

Customary Law as Part of the Reform Legal System in Indonesia

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Abstract

Customary law is a law that was born even before Indonesia proclaimed its independence in 1945. Customary law is part of original law and has grown and developed in Indonesia so that it also influences the implementation of the Indonesian legal system. The development and renewal of Indonesian law should not forget the important parts of the building blocks of the Indonesian legal system, including Customary Law. In short, this writing using a qualitative descriptive method provides an overview of the important role of customary law which should always be part of the renewal of the legal system in Indonesia. Historically, the formation of the Indonesian legal system also departs from the concept of customary law that lives in Indonesian society which was ultimately influenced by the Dutch legal system when the Dutch colonized Indonesia. The concordance process of the Dutch legal system colored the formation of the Indonesian legal system which in fact could not be denied that it still left a residue in several parts of the Indonesian legal system such as the old version of the Criminal Code and the civil code. The development and renewal of the National Legal System according to the author should not leave material legal sources as the basis for the formation of a legal system that reflects the spirit of Indonesia. Material legal sources that are reflected in Pancasila, the ideals of Indonesian society, values, norms, kinship, deliberation, mutual cooperation, tolerance, and so on that characterize Indonesian society must be a priority scale in structuring the Indonesian legal system in the future, including part of cultural heritage in the context of customary law.

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1. Introduction

If you look at history, especially for the development of customary law in Indonesia, customary law has a juridical technical understanding after Cornelis Van Vollenhoven issued his book entitled *Adat recht* (Wulansari, 2016). Cornelis Van Vollenhoven stated that customary law is a law that applies to the native Indonesian people and makes it an object of positive legal science and is used as a separate course even during the Dutch colonial period, customary law is used as a law that must be applied by gubernemen judges (Syahbandir, 2010).

C. Van Vollenhoven also stated that the so-called customary law (*adatrecht*) is *dat samenstel van voor inlanders en vreemde oosterlingen geldende gedrageregels, die eenerzijds sanctie hebben* which means that customary law is the entire rules of behavior that apply to indigenous Indonesians who have forced and uncodified efforts. Then if you quote Soepomo's opinion that "customary law is a synonym of "unwritten law "Unwritten law means a law that is not formed by a legislative body (Soepomo, 1952, p. 45).

In Indonesia, customary law has long been known as customary rules, for example in Aceh Indonesia in 1607-1636 during the reign of Sultan Iskandar Muda. This term is found in the law book called "Makuta Alam" and in the book "Safinatul Hukkam Fi Takhlisil Khassam" written by Jalaludin bin Syeh Muhammad Kamaludin, son of Kadhi Baginda Khatib Negeri Trussan on the orders of Sultan Alaidin Johan Syah (1781-1895). In the preamble or opening part of the book, it is stated that in examining cases, judges are obliged to pay attention to the provisions of Sharia Law, Customary Law as well as customs and Resam. This term was later noted by Christian Snouck Hurgronje in his research in Aceh and then translated into Dutch as "Adat-Recht. (Wulansari, 2016, p. 176).

In the context of the State of Indonesian Law, the existence of customary law is also regulated and protected, especially in the amendment to the 1945 Constitution for the first time in 1999. Article 18b Paragraph (2) of the Amendment to the 1945 Constitution states "The State recognizes and respects the unity of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law". According to this Article, customary law that is recognized is customary law that is still clearly alive, clear material and scope of indigenous peoples.

Even in the General Explanation of the 1945 Constitution which explains that". The Basic Law is a written basic law, while in addition to the Basic Law, there is also an unwritten basic law, which is the basic rules that arise and are maintained in the practice of implementing the state even though it is not written". In the sense that customary law, which is generally not written, has the same position as other laws that apply in Indonesia, considering that the recognition of unwritten law is in addition to the Constitution itself. In this case, according to Soepomo in his book Dominikus Rato which gives the following view: (Manarisip, 2012)

1. That in the field of family life, customary law will still dominate Indonesian society.
2. That the criminal law of a country must be in accordance with the features and characteristics of its nation or society itself. Therefore, the customary criminal law will provide very valuable materials in the formation of a new Criminal Code for our country.
3. That customary law as an unwritten customary law will remain the source of new law in matters that have not been /are not stipulated by the law (Rato, 2016, p. 12).

This shows that customary law has fundamentally given importance to society from the past until now in Indonesia. Therefore, it is important to make customary law part of the legal system and legal reform in Indonesia because customary law is the original law that has taken root and become the soul of the Indonesian nation.

2. Analysis and Discussion

Speaking of the System, the system is most often used to designate the understanding of methods or ways and a set of elements or components that are interconnected with each other into a unified whole. Actually the use is more than that, but less known. As a set, the system is also defined variously (Amirin, 2003). The *legal system* according to language is a legal unit composed of three elements, namely: (1) Structure; (2) Substance; (3) Legal Culture (Lawrence M. Friedman) (Imaniaty, 2016).

Likewise with the Indonesian Legal System which also consists of various factors, one of which is customary law as part of the Indonesian legal system. So in this case it can be

understood that the position of customary law in the legal system in Indonesia. Customary law has certain features and meanings as a source of recognition of customary law, for example traditional, religious, togetherness, concrete, visual, open, simple, can change, adjust, not codified, deliberation and consensus (Hadikusuma, 1992).

In Indonesia, one of the laws that is a reflection of the nation's personality is customary law, which is the embodiment of the nation's soul from century to century (Susylawati, 2009). Customary law in Indonesia has the same constitutional position as the legal position in general in the life of the state in Indonesia, but what should be underlined is that there is also a difference between customary law and generally applicable law, namely from the aspect of its enforceability and form.

In this case, the applicability of customary law only applies to Indonesians and from the aspect of the form of customary law is generally not written. Therefore, of course, as the condition of recognition is a shared obligation to always preserve customary law and the customary law community itself, so that the noble values of the nation can survive various implications of degradation due to globalization. If you look at various problems, it can be said that the laws that apply in our country today are no longer able to answer the challenges of the times so that revolutionary changes are needed in the sense that there needs to be a fundamental change of the existing laws and legal systems (Mansyur, 2006).

The development of Indonesian national law which is currently strongly influenced by external elements but of course as far as possible must maintain material legal sources of Indonesian laws (Adhyanto, 2014). Because essentially the legal mind is formed in the mind and heart of humans as a product of a unified view of life, religious beliefs and societal realities. In line with that, Indonesian law and legal science should rely on and refer to the ideals of the law (Sidharta, 2010).

In the context of fostering national law that is in the midst of the vortex of other world legal systems, of course, the development of national law must remain independent and consistent in running in accordance with the spirit of Pancasila and the singular diversity of Indonesia. As quoted by Mahfud MD that in the field of law, Pancasila, which has been placed as the source of all legal sources, is only a jargon, not quite as good as *senafas*. This occurs due to

the absence of an implementation framework for the monsept (Mahfudz, 2009).

The inclusion of other values that intentionally or unintentionally become influencing factors should be considered thoroughly whether or not they can provide excesses for the development of national law. As it is understood that Indonesia has not been separated from the multidimensional crisis, one of which is in law enforcement. Various problems that show that can be considered as distancing the community from Justice (Imaniyati, 2003). Based on the aforementioned facts, it is natural for a country to replace the conservative legal thinking inherited from the government and the colonial education system with a legal thinking that is more concerned with the needs of the developing community.

As if quoting Roscoe Pound's opinion that "*as tool as social engineering*", then in fact the development of national law should be able to provide direction and path for law, society and the state to be interrelated with each other (Adhayanto, 2015). Of course, this can be realized if the spirit in the development of national law is based on the spirit and values espoused in society by not neglecting other developed values that are in accordance with the culture of Indonesian society.

The State of Indonesia as a developing country is certainly in need of fostering and developing the National Legal System in order to encourage and support development in all fields in order to support various advances that occur in other parts of the world. For example in the banking sector where there are various reforms and innovations such as the birth of Baitul Mal wat Tamwil (BMT). Although the form of BMT legal entity does not yet exist because until now there has been no regulation that specifically regulates the BMT, there is no law that requires BMT to have or must be in the form of a certain legal entity (Imaniyati, 2011).

Then it relates to the issue of Intellectual Property Rights (IPR) which is also constantly developing along with the development of science and technology. The more developed science and technology, the more the need for protection of intellectual property rights is felt, thus encouraging the state to compile and renew IPR regulations (Imaniaty, n.d.) or even in the Criminal field, also emerging regarding customary criminality which is a new breakthrough in the concept of criminality in Indonesia (Kurniawan, 2016). Of course, there are many more cultural heritages that are part of customary law that should be an important part of the substance of legal reform in Indonesia.

3. Conclusion

Historically, the formation of the Indonesian legal system also departs from the concept of customary law that lives in Indonesian society which was ultimately influenced by the Dutch legal system when the Dutch colonized Indonesia. The concordance process of the Dutch legal system colored the formation of the Indonesian legal system which in *fact* could not be denied that it still left a residue in several parts of the Indonesian legal system such as the old version of the Criminal Code and the civil code.

The development and renewal of the National Legal System according to the author should not leave material legal sources as the basis for the formation of a legal system that reflects the spirit of Indonesia. Material legal sources that are reflected in Pancasila, the ideals of Indonesian society, values, norms, kinship, deliberation, mutual cooperation, tolerance, and so on that characterize Indonesian society must be a priority scale in structuring the Indonesian legal system in the future, including part of cultural heritage in the context of customary law.

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