

Customary Law in the Development of National Law

Abdul Rahman Maulana Siregar¹, Runtung Sitepu²

¹Doctoral Student, Faculty of Law, Universitas Sumatera Utara, Jl. Perpustakaan USU, Medan, Indonesia

²Doctoral Program in Law, Universitas Sumatera Utara, Medan, Indonesia

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Abstract: The laws of a nation is a reflection of social life of the nation, and the establishment of the law of a country must be free of influences and interests of other countries. Legal pluralism as a situation in which two or more legal systems work side by side in a field of social life. Legal pluralism gives an explanation against the fact of the existence of a social code of conduct that is not part of the regularity of the State law, including customary law, religious law, custom and agreement. Normative legal research is research using secondary data that is collecting data on the study of librarianship is sourced using a variety of scientific literature, books, magazines, documents, legislation, and the works of the law, as well as a source of another library. Strengthening customary law in the development of national law did not immediately solve the problems that arise in the community. However, legal pluralism gives new insight to the practitioner of law, State law and society-forming widely that besides State law there are other legal systems are more used to exist in society and the legal system interact with state law and compete with each other.

1 INTRODUCTION

Long before the entry of a foreign tradition, society believed to be Indonesia's already regulated by customary law values. The custom is understood as binding norms that are preserved by a community to organize the daily life of human beings, so the custom itself is legal. Based on such understanding it can be said that the people of Indonesia in reality never understand customs as separate entities from the law. The customary law is basically a reflection of what is believed to be a person as a way of life that conforms with a sense of Justice and propriety.

The laws of a nation is a reflection of the social life of the nation in question, and the establishment of the law of a country must be free of influences and interests of other countries. If later sound loud voiced, we need a democratic legal establishment, but the establishment of a democratic legal not legal means at once established will be effective. In this context for example, the Mission of a law is not how democratic establishment of laws that established, but lies in the extent to which what is sent from the formation of the legislation can be achieved. That is to say, the benefits of making more of a participatory law in an effort to boost the democratic

legitimacy of the legal character of the Act which was formed.

If the law of a nation is a reflection of the social life of the nation in question, then it becomes paradoxical with the globalization of the law. Although in some cases certain legal globalization meant will still take place in different legal systems. Despite the globalization of law something that hard to avoid, but nation States will not simply hand over their sovereignty, and function in a global system will not take place free of the control of nation States because globalization is not the way the toll without a mechanism. The mechanism of how the traffic of public relations of nation States, it is built upon a contract, agreement or Convention, so does it matter that had been limiting it is national law, then that restriction is an agreement between countries the nation.

The occurrence of different types of conflict law caused by the effects of globalization. Approach to customary law in the settlement of disputes out of court that generate win-win solution, so that the harmonization for the parties occurred. The resolution of the conflict with customary law approaches based on propriety, harmony, and alignment can prevent the occurrence of prolonged

conflict and materialize the harmonization of society. Harmonization of social life and the nation, means to embody the ideals of the struggle of the nation of Indonesia that is imbued by the sublime values of Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Bhineka Tunggal Ika.

In the form of customary law is characterized by its traditional model of delivery which is not written in the life of the community. The specificity of customary law lies in the *lisannya* tradition. Through oral tradition this is the custom character was preserved this tradition and through the relationship between past, present and future. Therefore, the information that is brought into the community is typically delivered orally then in law any rarely codified custom. Customary law is never attempted to systematically codified or enactment, because he is believed to be a direct manifestation of a sense of Justice and propriety that is embraced by all members of the community. Hence, neither the source nor the development of customary law is in the hands of the community and does not rely on the process of technical legislation.

Meanwhile, in the practice of criminal justice, the judge in examining, prosecute and disconnect a matter is bound by the principle of legality, which requires only a law or a written law can determine whether an act constitutes a Criminal deeds or not. Consequently, each of which may or may not be done it should be listed in the Act. Nevertheless, the introduction of the principle of legality was not absolute, that is, it is still possible for the excluded all does not reduce legal certainty. This occurs because of a problem of fairness into consideration and the presence of several regions in Indonesia that is still treating the criminal law. Moreover, some acts that according to the law society's consciousness is an ignoble deeds, thus the CRIMINAL CODE does not set it up. In some areas in Indonesia still apply customary law and the law of habit still adhered to by the people.

2 METHODOLOGY

Legal research is a scientific activity, based on a method, certain thoughts and systematics, aiming to learn one or more symptoms of a particular law, with its analysis. Against it, then also held in-depth examination against the facts of the law, and then lobbies for a solution of the above problems arising in the relevant symptoms.

Normative legal research that is collecting data on the study of librarianship is sourced using a variety of scientific literature, books, magazines, documents, legislation, and the works of the law, as well as a source of another library. The data in the normative legal research is data obtained directly from the subject of the research.

3 RESULT AND DISCUSSION

3.1 The Function of Customary Law in Society

The term "customary law" presented first by Prof. Dr. Cristian Snouck Hurgronje in his book entitled "De Acheers" (the people of Aceh), followed by Prof. Mr. Cornelis van Hoven Vollen in his book entitled "Het Recht van Custom Nederland Indie". The existence of the term, then the Netherlands colonial Government at the end of the year 1929 began using officially in the Netherlands legislation.

The term customary law is actually not known in the community, and the community only know the word "custom" or habit. Custom Recht translated into customary law can be transferred into the law of habit. Nevertheless, van Dijk objected to customary law compared with the law of habit. According to him, the Customs and the habits it is an essence that is different when seen from the source. Customary law it is sourced on the existence of a power tool in the form of a fixture of society as a base, whereas the law of habit that does not.

To get an overview what is a customary law, argued as follows:

TER Haar Bzn, customary law was the overall regulation of the incarnate in the decisions of the heads of customs and apply spontaneously within the community. TER Haar famous theory of "decision" means that to see if it's something that is already a customs law, it needs to be viewed from the attitude of the rulers of the Community law against violators of regulations customs. When rulers dropped the sentence against the ruling of the offenders then customs it is customary law.

Cornelis van Vollen Hoven, Customary law is the overall behaviour of the Community rules in force and to have codified and not yet sanctions. Customary law is complex customs that are generally not written, codified and not coercion, sanctions have so have legal consequences.

Soepomo, customary law is unwritten law in the unwritten rules, including the rules of life that

although not defined by the authorities but adhered to and supported by the people based on the belief that the regulations have the force of law.

Soerjono Soekanto, Customary law is in fact the law of habit, that is to say customs which had legal consequences (*sein sollen*). In contrast to mere habit, customary law are acts repeated in the same form on *rechts vardigeoordenen der samen-leven*.

Of the limitations expressed above, then look at the elements of customary law are: the existence of a continuous behaviour carried out by the community; such conduct regular and systematic; such behaviour has to be sacred; the existence of a decision of the head of the customs; the existence of the legal consequences of sanctions; not written; and adhered to in the community.

Legal pluralism, in substantive legal pluralism, defined as a situation in which two or more legal systems work side by side in a field of social life are the same, or to explain the existence of two or more social control systems in one area of social life or describe a situation in which two or more legal systems interact in a social life or a condition in which more than one system of law or institution working side by side in activities and relationships within a community group.

(Ehrlich, 1913) emphasised that the State law has never been the only source of law, but it has neglected important facts or to be precise, over time: [there has never been a time when the law was published by State being the only law, even in the courts and other authorities, and so there is always an undercurrent that seeks to uphold the position of the matching for non-State law.

Anthropologists and sociologists is a group that stands out among parties that have highlighted the different meanings of the word 'culture', and many writers and historians have law outlines in detail the uniqueness of the various the legal system and the relationship between law and culture or cultures. A frequently expressed view was that the law, culture and society will certainly be intertwined, but this view has been challenged, for example, by Alan Watson, a renowned Scottish compare at once a specialist in Roman law and civil law. Watson (1974) argues that the legal regulations is not merely exist, but able to survive easily, even in a neighborhood far from the antecedents. So, he argues that 'the rules of law as are the places it comes from wherever he was, therefore, regardless of origin, private law can survive 'without having to have a close relationship with the community, the period of time specific or particular place'.

As a country that embraced a tradition of Civil Law System, it is in the legal system of Indonesia's positive reading must depart from the hierarchy of legislation which strongest is Constitution that embodied in the 1945 Constitution. So, in combining the settings regarding the existence of indigenous and customary law in the legal system of Indonesia's positive, the easiest thing is to first examine its settings in the 1945 Constitution.

In the Constitution (constitution, enacted back according to the Decree of the President dated July 5, 1959) is not a single Article that contains a basic introduction of customary law. According to Transitional Rules article 11 of the Constitution, all State agency rules and regulations that there is still directly applicable for yet a new held according to the basic law ". Before the re-enactment of this Constitution, then apply the Constitution as the year 1950. In the Constitution while Article 104, States that "Any court decision must contain the reasons and sentencing in the case refer to the rules of the Statute and the rules of customary law, which provided the basis of punishment . "But this provision, that if we interpret" customary law "widely, contains a *grondwettelijke grondslag* enactment of law, until now haven't given its legal basis.

3.2 The Position of Customary Law in National Law

Customary law is the manifestation of the value consciousness and community characteristics of Indonesia that differentiate it from other legal systems, thus functioning as an embodiment of the original law and a reflection of the soul of the nation and the people's sense of Justice Indonesia. With the position of customary law as the legal embodiment of the original and the reflection of the soul of the nation and the people's sense of Justice from Indonesia, then customary law should have a central role in the development of the law of Indonesia.

If you see further Explanation on the "General" part III 1945 Constitution, it will be noted that the position of 1945 was the Preamble as expository thoughts trees embody the ideals of the law governing the country's basic law. Explanation of the position of the 1945 Constitution Preamble 45 it certainly reaffirms that the Preamble 1945 here's what is in the hierarchy of legal Grammar Grundnorm Indonesia, so it serves as a source of law of the national law. *Rechtsidee* was unification of values that play a role in the life of the community with the philosophy of life influenced by believed by

the community, so if the Preamble 1945 contains trees embody rechtsidee thoughts national, then the fine points of mind in 1945 Preamble is the embodiment of the values of the original society of Indonesia. In other words, 1945 as a Preamble in the hierarchy of legal Grammar grundnorm Indonesia is the elaboration of the values of the indigenous nations of Indonesia.

This will be increasingly strengthened trees thoughts conceived in 1945 the Preamble clearly describe and reflect the characteristics and pattern of Indonesia society and also the style and characteristics of the customary law Indonesia society. Countries based on the divinity of the one true God is a reflection of the nature of the religion-magistik Indonesia society, who believe in the existence of the metaphysical power of transcendental-beyond her enclosing as well as mastering all aspects of his life. Principal's mind about the country's unity, the goal of realizing social justice, as well as a State system based on popular sovereignty and representative consultative is a reflection of the character of the existing family and komunalistik in the community Indonesian. Even in the explanation of the "public" part II grain 3 confirmed that principal's mind about the State system based on popular sovereignty and representative consultative system is in accordance with the nature of Indonesia society.

The above discussion clearly reaffirm the central position of getting legally customary law in national law, that customary law was the basis of national law. That customary law is the law of Indonesia in the grundnorm. Adat – law as spelled out in the Preamble 1945-which serves as a source of law or of any rule of law welbron positively that there is so much that customary law was the raw material substance positive law Indonesia. Every positive law must rule the form with his rechtsidee, so customary law serves as the substantive validity of the testers of the stone all positive law Indonesia rules.

Thus, the position of customary law is one important source to obtain materials for the construction of a national law that led to the unification of laws and which mainly will be done through the creation of laws and regulations with do not ignore the growing and ever-growing laws and courts in the construction law.

Legal pluralism did not resolve the problems that arise in the community. However, legal pluralism was present to give a new understanding to legal practitioners, legal State-forming (the legislators) as well as the community widely that besides State law there are legal systems there used to be more in

society and the legal system interacts with state law and even compete with each other. In addition, legal pluralism gives an explanation against the fact of the existence of a social code of conduct that is not part of the legal order of the State. The implementation view argues that the only institution which acts create order is social State through the law that established and defined by the State. In such, there are many other 'power' that comes not from the State. Among them, customary law, religious law, customs, cross-trade agreements and so on. The forces equally has the ability govern the actions of communities that are bound up in it, even sometimes members or the community within the community prefer to obey the rules set up by the group than the rule of law State.

4 CONCLUSIONS

Strengthening customary law in the development of national law did not immediately solve the problems that arise in the community. However, legal pluralism was present to give a new understanding to legal practitioners, legal State-forming (the legislators) as well as the community widely that besides State law there are legal systems there used to be more in society and the legal system interacts with state law and even compete with each other. The position of customary law in the development of national law can be realized through the judiciary as a stronghold of legal discovery when within an award have been adopting the values of customary law, then it is morally will strengthen the confidence of the community on the existence of customary law even though customary law in variety that no longer is not written.

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