



The Relationship of Customary Law to Society in a Bipolar Indonesia

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Abstract

Indonesia has the national motto "Bhinneka Tunggal Ika," which can be interpreted as "unity in diversity." This motto reflects the diversity of Indonesian society, including ethnicity, religion, race, inter-group relations (SARA), culture, and language. With the existence of diversity, the development of human life began continuously until it gave rise to certain habits. This research aims to gain a deeper understanding of the relationship between customary law and society in the diverse nation of Indonesia. This research is a normative legal study using a conceptual and historical approach. The result of this research is that there is a binding relationship between customary law and Indonesian society. Customary law, which is a product of human behavioral rules in social life. Customary law, as part of Indonesia's legal identity, is not only a set of rules but also contains various values and local wisdom that have become the soul and character of Indonesian society.

Keywords: Customary Law; Indonesian Law; Local Wisdom.

INTRODUCTION

Indonesia is essentially a pluralistic country with a background of cultural diversity. This diversity is characterized by many ethnicities, tribes, religions, races, intergroups (SARA), cultures, languages, and so on who are countrymen and homeland. Theoretically, Indonesia's cultural diversity is a configuration that reflects the nation's identity. Empirically, diversity is an element in forming the Unitary State of the Republic of Indonesia (NKRI). In addition, cultural diversity is also a capital and strength that can drive the dynamics of the life of the nation and state. However, seen from another point of view, cultural diversity also has the potential to cause a conflict that is very dangerous and threatens the integration of the nation. These conflicts include conflicts between ethnic cultures, conflicts between religious adherents, conflicts between races, and conflicts between groups that are sensitive, vulnerable and also vulnerable to situations and conditions that lead to the disintegration of the nation and state.¹

¹ I Nyoman Nurjaya, "Memahami Kedudukan Dan Kapasitas Hukum Adat Dalam Politik Pembangunan Hukum Nasional," *Perspektif* 16, no. 4 (2011): 237.

Observing the Indonesian state symbol, the Garuda Pancasila bird standing tall with its wings spread and carrying the Pancasila shield and perched on a ribbon that reads “Unity in Diversity” means that the Indonesian nation, although its people are different (different ethnicities, religions, races, intergroups, cultures and languages), still has one goal, namely to build and maintain the defense of the Unitary State of the Republic of Indonesia (NKRI) based on Pancasila. With this diversity, the development of human life is also diverse seen from each region in Indonesia. Each region has a habit that gradually the unity of the community participates in implementing the habit. If the habit is continuously practiced, it will give birth to “adat” in the community itself. As time progresses, the custom is considered a custom that must be applied to all the people in it, so it is said to give birth to “customary law”.²

If we ask when exactly did customary law begin to be implemented? The answer is in accordance with the legal adage “*Ubi Societas Ibi Ius*” which means that where there is society, there is law. Talking about customary law is the same as talking about laws that regulate and force people to obey the law, and if violated, it will cause or get strict sanctions from the law.³

It needs to be said that customary law in the tradition of this diverse Indonesian society is considered to have an important meaning in social life. With the existence of customary law, the pattern of behavior of the community can also be regulated. In addition, customary law also has a good influence on the activities carried out in daily life in this diverse Indonesian society. If there is one member of the community who does not obey the customary law or social norms that apply, it can be said that the underlying cultural values are denied. If members of the community continually deny the applicable customary laws, then over time the underlying culture will fade and even threaten to disappear and become extinct.

The use of customary law in a diverse country is an alternative way to direct social change that stretches towards a better legal ideal in the future. The real legal ideals as stated by Gustav Radbruch are to create justice, benefit, and legal certainty. While the purpose of the law is to create social order and maintain order, so that its legal function can be emphasized as an instrument of social supervision.

In society, culture is referred to as a wealth that has high value, because in addition to being the identity and icon of a region, culture is also a personal icon of a particular

² Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia* (Bandung: Bandung: CV. Mandar Maju, 2014).

³ Zainuddin Ali, *Sosiologi Hukum* (Jakarta: Remaja Rosdakarya: Jakarta: Remaja Rosdakarya, 2012).

region and also the icon of a nation. Because culture is a wealth, characteristic and identity, it requires the care, maintenance and preservation of the culture of each individual and each ethnic group.⁴ In addition, as a community, we must also maintain the applicable customary laws by maintaining and preserving these customary laws as the nation's culture. Because customary law can also be said to be a cultural product of the diverse Indonesian nation. The state symbol with the motto "Bhinneka Tunggal Ika" reflects that the personality of the nation is a reflection of the customary law community. Therefore, it is appropriate that the position of customary law in this diverse Indonesian state be maintained, maintained, and preserved.

Research that discusses customary law and Indonesian culture has actually been carried out by several previous researchers, such as Prasetyo's research (2021) which analyzes the position of customary law and its relation to the constitutional culture of Indonesian society.⁵ Research conducted by Hastuti (2023) which focuses on aspects of revitalization and efforts to maintain the existence of customary law in the midst of development and modernization.⁶ Another study was also conducted by Ariyani (2024) with a related analysis of legal development in Indonesia and its relevance to the existence of customary law.⁷

RESEARCH METHODS

The method that the author uses in writing this article is by using a method that has a normative juridical nature, namely research on the basis of legal principles, where judges draw important legal principles to interpret laws and regulations.⁸ Then, seen from the nature of the research, this writing uses typology which has a descriptive analytical nature, and has the aim of describing and also analyzing a problem discussed in this article. The types of legal materials used are in the form of literature studies, laws and regulations, literature books, scientific articles, and dissertations; and using primary data, namely legal dictionaries and Indonesian language dictionaries.

The author searches for library materials sourced from libraries and related documents sourced from the internet. The next step is that the author conducts a data analysis using a method called the qualitative analysis method. From this analysis, it is

⁴ Ahmad Tahali, "Hukum Adat Di Nusantara Indonesia," *Jurisprudentie* 5, no. 1 (2018): 33.

⁵ Dicky Eko Prasetyo, "Inventarisasi Putusan Peradilan Adat Sendi Sebagai Upaya Memperkuat Constitutional Culture Dalam Negara Hukum Pancasila," *Jurnal Hukum Lex Generalis* 2, no. 3 (2021): 249-273.

⁶ Maria Dominika Melani Hastuti, "Hukum Adat Bali Di Tengah Arus Budaya Global Dan Modernisasi Pembangunan," *Jurnal Hukum Lex Generalis* 4, no. 3 (2023): 251-259.

⁷ Aisyah Dwi Ariyani, "Implementasi Hukum Adat Sebagai Dasar Hukum Dalam Membangun Sistem Hukum Di Indonesia," *Madani: Jurnal Ilmiah Multidisiplin* 1, no. 12 (2024): 756-762.

⁸ I Gusti Ketut Ariawan, "Penelitian Hukum Normatif" 1, no. 1 (2019): 4.

then analyzed using an analysis method that is carried out qualitatively or by concluding and not based on statistical figures but concluding based on the relationship between the rules, principles, and also legal theories of phenomena that occur in society.⁹

ANALYSIS AND DISCUSSION

A. The Development of Indonesian Customary Law

The word law terminologically comes from Arabic which is said to be a singular form. The plural word is "Alkas", which is later translated into Indonesian as "Law". The notion of law contains a meaning that has a close link with coercion. While the term Recht itself is Latin, namely "Rectum" which means guidance, demands, or government. Related to the word rectum, then there is also the word "Rex" or people who have the job of giving orders or guidance. Also known as Latin basaha with the word "Ius" which means law. The word Ius itself is the Latin "Iubere" which means to rule or organize. The term Ius is closely related to "Iustitia" or also known as justice. Etymologically, the language of Ius can be interpreted as law which has a very close relationship with justice or also called Iustitia, which also has 3 important elements, including justice, authority, and also peaceful order. In other words, law is also defined as a series of rules that contain the contents of an order or prohibition and have a coercive nature, in order to create a condition that is highly desirable such as security, comfort, order, peace, tranquility, and welfare. In addition, the law also has strict sanctions against the lawbreaker.¹⁰

The word "law" itself has a very broad meaning covering all rules or regulations both written and unwritten. The law itself is also useful for regulating the entire life of the people in Indonesia and providing strict sanctions for violators of the law. In general, the law is defined as a set of living rules that have a compelling nature and contain an order, prohibition, and also permission to do something or not do something, with the aim of regulating public order, and if violated will get sanctions.

Materially, law is defined as all rules governing behavior, in the form of norms or rules, both written and unwritten. The purpose of the law itself is to regulate and realize public order. Because of this, the law must be implemented and must not be violated by the entire community based on the belief and power of the law. Formally, law is defined as a will created by humans in the form of norms or rules that contain

⁹ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2017).

¹⁰ Ubaidillah Kamal, *Dasar-Dasar Ilmu Hukum* (Semarang: Semarang: BPFH UNNES, 2020).

instructions to regulate human behavior, on what is allowed to do and what is not allowed to do, as well as what is recommended to do and what is prohibited to do.¹¹

In Prof. Mr. E. M. Meyers' book "*De algemene begrippen van het Burgerlijk Recht*" he expresses an opinion on the definition of law which is all the rules that contain a consideration of morality, and are useful for regulating the behavior of human life in society, and also become a useful guide for state authorities in carrying out their duties. Another legal opinion comes from Leon Duguit, who says the law is all the rules that are useful for regulating the behavior of society, rules whose use at a certain time is heeded by members of the community as a guarantee of common interests or the interests of all members of society and if violated it can create a bad reaction to the person who has committed the offense. In addition to the opinions of the experts above, Immanuel Kant also argues that law is said to be the overall conditions under which the free will of one person can adjust to the free will of another person, according to the legal rules of freedom.¹²

Aristotle argues regarding the definition of law "*Particular law is that which each community lays down and applies to its own members. Universal law is the law of nature*" which translates to specific law is the law that each community lays down and applies to its own members. Universal law is the law of nature. Law is also defined as something different from just regulating and expressing the form of the constitution and law has a function as regulating the behavior of judges and their decisions in court to impose punishment on violators of the law. Grotius also has an opinion about law with the words "*Law is a rule of moral action obliging to that which is right*" which means Law is a rule of moral action that obliges what is right. Max Weber expressed his opinion that "*Law as a body norms or rules that combine consensus and coercion. Laws are consensually valid in a group and are guaranteed through a coercive apparatus*" which means (Law as a body of norms or rules that combine consensus and coercion. Laws are consensually valid in a group and are guaranteed through a coercive apparatus).¹³

Based on the many understandings or definitions of law based on the opinions of experts, a definition of law can be constructed, namely that law is a set of rules, both written and unwritten, in the association of community life that has binding and compelling force and if there is a violation, it will cause action from the state in the form of sanctions. The term customary law comes from the Dutch language: *Adat Recht* which is translated into Indonesian. The term *Adat Recht* is contained in the book *De Atjehers*

¹¹ Ibid.

¹² C.S.T Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka: Jakarta: Balai Pustaka, 1986).

¹³ Achmad Ali and Wiwie Heryani, *Resep Hukum Sebuah Bungan Rampai* (Jakarta: Kencana Prenada Media: Jakarta: Kencana Prenada Media, 2012).

(1893) by Cristian Snouck Hugronje, which was only recognized as a juridical technical sense and as an object of positive legal science after being introduced by Cornelis Van Vollenhoven who researched the existence of law in the Dutch East Indies which was eventually present in his work: *Adatrecht*.

In Arabic, the term “*Customary Law*” is known by the Arabic word “*Huk'm*” which means command or regulation. Also known as the word “*Adah*” or adat which means habits regarding the behavior or behavior of the community that always occurs. So customary law is also called common law. In the Netherlands (Europe) customary law and customary law have the same meaning, which is called “*gewoonte recht*”, which is customary law that has a legal nature directly opposite to statutory law. Examples of such customs recognized in legislation include Article 1585 of the Civil Code (KUHPer) or *Burgerlijk Wetboek* (BW) which states: “The lease of furniture to furnish a whole house, a whole dwelling, a shop, or any other room, shall be deemed to have been made for as long a time, as houses dwellings, shops or rooms are always leased out according to local custom.”¹⁴

Van Vollenhoven was the first to make customary law a science, so that customary law was equal to other laws. He argues that customary law is the rules that govern behavior and apply to indigenous people and also foreign easterners, which on the one hand have strict sanctions and on the other hand are not codified. According to Ter Haar, a Professor at the College of Law (RHS-RechtsHoge School), he argues that customary law is the whole of the rules that incarnate from the decisions of legal functionaries and have authority, influence, and implementation that apply and must be obeyed wholeheartedly.¹⁵

Soepomo, an expert on customary law from Indonesia, or a Professor of customary law at the RHS-RechtsHoge School, expressed an opinion on the definition of customary law, namely unwritten legislative regulations, living in state law, decisions of judges, customary law, rural rules and also religious rules. In his book entitled “*Reviewing Indonesian Customary Law*”, Prof. Dr. Soekanto considers that customary law is not a law, but something that unwittingly stays away from the culture of the Indonesian nation.¹⁶ Customary law is also defined as a form of unwritten law, containing rules that govern the way of life but are not established by the authorities. This customary law is still required to be obeyed by the community based on the belief that these regulations have strong legal force. Habit, tradition, or custom is said to be the

¹⁴ R Subekti and R Tjitosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Balai Pustaka: Jakarta: Balai Pustaka, 2014).

¹⁵ Syukron Salam et al., *Bahan Ajar Hukum Adat* (Semarang: FH UNNES: Semarang: FH UNNES, 2021).

¹⁶ Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*.

oldest source of law, the source of origin from which is known or can be extracted part of the law outside the law, where we can find and explore the law.¹⁷ Unwritten law is also considered the oldest law in Indonesia. The law is intended to have long been practiced or applied to the various ethnic groups in Indonesia which is called "Customary Law". Unwritten law is often referred to as customary law. *Un-written law(un-statutory, un-written law, non-scripum)*, is a law that is still alive and applies in belief and reality in society, and is adhered to, obeyed, and respected by the entire community concerned.¹⁸

Based on the many understandings or definitions of customary law based on the opinions of experts, a definition of customary law can be constructed, namely the rules of human custom in social life. There is also an opinion that the form of customary law itself is mostly unwritten, but accepted and implemented by the community concerned. In a state of law, a principle applies, namely the principle of legality. This principle of legality is contained in Article 1 paragraph (1) of the Criminal Code (KUHP), which reads as follows: "No act can be punished except on the strength of criminal rules in existing legislation, before the act is committed".¹⁹ The principle of legality also means that there is no other law, other than what has been written in the law, to ensure legal certainty. However, if on the other hand the judge cannot find the law in the written law, then a judge must be able to find the law in the rules that live in the community. Recognized or not, customary law still has a very important role in the diverse state of Indonesia.

B. The Relationship between Customary Law and Indonesian Society

The development of law cannot be separated from the environmental factors that shape society in general. Law becomes one of the means used to achieve the hopes and ideals of society. The function of the law is to serve the interests of society from actions that can disrupt the balance of the life process of the community, by itself the law maintains social order to be maintained. The goal of society itself cannot be simplified by only looking at it from one perspective. There are various theories that explain and describe the purpose of society as a unit where individuals form social institutions in order to create a peaceful natural life. Law is one of the institutions formed by a society to pursue the ideals and expectations of a group of individuals in navigating life. To understand law more comprehensively, it is also necessary to understand the relationship between individuals and society.

¹⁷ Sudikno Mertokusumo, *Mengenal Hukum* (Yogyakarta : Liberty Yogyakarta: Yogyakarta : Liberty Yogyakarta, 2007).

¹⁸ Tahali, "Hukum Adat Di Nusantara Indonesia."

¹⁹ Moeljatno, *Kitab Undang-Undang Hukum Pidana* (Jakarta: Bumi Aksara: Jakarta: Bumi Aksara, 2016).

Soepomo, as one of Indonesia's leading customary law scholars, has explained the relationship between individuals and society in customary law. The manuscript is an *inaugural speech* (*inaugurele rede*) when he was appointed as a professor of customary law, which was spoken in Dutch. The development of European law is characterized by its individuality, one of the main characteristics of which is the self-consciousness of the individual. This individualistic attitude causes individual subjects to confront each other, always pitting them against each other in the struggle for power, but in Western law individuals no longer get priority. Western law does not prioritize individual satisfaction, but the most important function of the rule of law is to prevent asocial acts, create trust, guarantee security as an absolute requirement so that each individual can carry out daily activities and take the initiative to develop. According to Soepomo, the real purpose of the rule of law is to make its implementation unnecessary as much as possible.²⁰

However, individualism was not always the main concept in the development of European law. At the beginning of the 20th century, individualism began to shift, albeit slightly, as the main concept. Attention to society as the center also began to roll in amidst the saturation of the concept of individualism which began to show its weaknesses and shortcomings. In 1933, Hymans dared to stand against the mainstream view at that time which emphasized dogmatic-scholastic legal studies by bringing up the sociological school. The effect of this shift has more or less influenced the doctrine of legal science until now in the form of the doctrine of good faith and decency.

In contrast to the concept of the relationship between individuals and society in European law, customary law emphasizes humans not as isolated individuals, but as part of society. In customary law, the individual cannot be said to be the main one, but the community is the main one. The individual here is considered as part of the community to be an entity that has a duty to achieve community goals. Soepomo considers that the individual is primarily intended to perform service to the community, but this "service" is not considered a burden ordered by the ruler, nor is it a "sacrifice" that must be made for the common good. In the consciousness of society, it is obliged to society solely to carry out and carry out the natural functions of human life. Individuals as members of society are also endowed with rights that, according to the consciousness of the Indonesian nation and state, are societal rights.

Soepomo defines community rights as a right given to individuals in relation to their duties in society. Meanwhile, society itself is defined by Soepomo as the whole of all individual members, so that in the legal consciousness of society, individuals

²⁰ R Soepomo, *Hubungan Individu Dan Masyarakat Dalam Hukum Adat* (Jakarta: Pradnya Paramita: Jakarta: Pradnya Paramita, 1970).

exercise their legal power in accordance with social goals. The individual feels himself as part of the unity of society, in the individual merges with his community self. Society sees the individual as a special part of itself (society). On this basis, Soepomo came to a conclusion that distinguishes the relationship between individuals and society between European law and customary law.

CONCLUSION

In general, the law is defined as a set of living rules that have a compelling nature and contain an order, prohibition, and also permission to do something or not do something, with the aim of regulating public order, and if violated will get sanctions. Materially, law is defined as all rules governing behavior, in the form of norms or rules, both written and unwritten. The purpose of the law itself is to regulate and realize public order. Because of this, the law must be implemented and must not be violated by the entire community based on the belief and power of the law. Formally, law is defined as a will created by humans in the form of norms or rules that contain instructions to regulate human behavior, on what is allowed to do and what is not allowed to do, as well as what is recommended to do and what is prohibited to do. From the many understandings or definitions of law based on the opinions of experts, a definition of law can be constructed, namely that law is a set of rules, both written and unwritten, in the association of community life that has binding and compelling force and if there is a violation, it will cause action from the state in the form of sanctions.

The term customary law comes from the Dutch language: *Adat Recht* which is translated into Indonesian. In Arabic, the term "Customary Law" is known by the Arabic words "Huk'm" which means orders or provisions. Also known as the word "Adah" or *adat* which means customs regarding the behavior or conduct of society that always occurs. So customary law is also called customary law. In the Netherlands (Europe) customary law and customary law have the same meaning, which is called "*gewoonte recht*", namely customary law which has a legal nature that directly confronts statutory law. Customary law is also interpreted as a form of unwritten law, containing regulations that regulate life but are not stipulated by the authorities. This customary law still requires its people to obey it based on the belief that these regulations have strong legal force. Unwritten law is also considered the oldest law in force in Indonesia. From the many understandings or definitions of customary law based on the opinions of experts, a definition of customary law can be constructed, namely the rules of human customs in living in society. Legal developments cannot be separated from environmental factors that shape society in general. Soepomo, one of Indonesia's leading scholars of customary law, has explained the relationship between individuals and society in customary law. The beginning of the 20th century saw a

shift, albeit slight, towards individualism as the main concept. Attention to society as the center also began to grow amid a sense of fatigue with the concept of individualism, which was beginning to show its weaknesses and shortcomings. In customary law, the individual cannot be said to be the most important, but rather society is the most important. Here, individuals are considered part of society, entities that have a duty to achieve the goals of society. Soepomo defines community rights as rights given to individuals in relation to their duties within society.

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