SEAN INSTITUTE
Sharing Knowledge

https://ejournal.seaninstitute.or.id/index.php/Justi
Fox Justi : Jurnal Ilmu Hukum, Volume 13, No 02 2023
ISSN: 2087-1635 (print) ISSN: 2808-4314 (online)

Fox Justi : Jurnal Ilmu Hukum

THE ROLE OF CUSTOMARY LAW IN THE DEVELOPMENT OF NATIONAL LAW

Mohammad Miftah

Fakultas Hukum, Universitas Pasundan, Bandung, Indonesia

Keywords

Customary law, development, national law

Abstract. Customary law is part of the law that is not written, lives and grows in the soul of the people and applies from generation to generation from ancient ancestors to the present day. The source of customary law is the people's belief in belief, which is expressed, the form of customs, decisions of the heads of the among other things, in people. This study aims to determine the extent of the role of customary law in the association of national law and how the function of customary law in the current era of globalization, the results of the study explain that, the existence of customary law and its position in the national legal system cannot be denied even though customary law is not written and based on the principle of legality is an illegitimate law. Customary law will always exist and live in society. Customary law is a law that really lives in the awareness of the conscience of the community which is reflected in the patterns of their actions in accordance with their customs and sociocultural patterns which are not contrary to national interests. In the development of national law, the role of customary law is very important, this is because the national law to be formed is based on applicable customary law, but in its course customary law is unwritten and dynamic in nature which can always adapt to the development of human civilization itself.

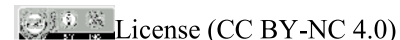
Email : moch.miftah@unpas.ac.id
Copyright 2023 Fox Justi : Jurnal Ilmu Hukum

1. INTRODUCTION

It can be said that a system is inseparable from the principles that support it, so the presence of law here can be used as a set of orderly arrangements or arrangements of the rules of life, which are related to one another and consist of parts or elements that are interconnected and related. closely to achieve a specific goal and plan (Aditya, 2019). The division of law itself can be classified into several types, namely, differentiated based on its form, such as written law, namely law that we can find in written form and included in various state regulations, and has a rigid, firm nature and guarantees more legal certainty, for example such as the Constitution and regional regulations. Then there are also unwritten laws, namely laws that are still alive and growing in the beliefs of certain people or commonly referred to as customary law (Dewi, 2005).

According to Indriati & Hastuti (2021) customary law itself is a law that applies to indigenous Indonesian people and makes it an object of positive legal science and serves as a separate subject. Meanwhile, according to Isdiyanto (2018) the formation of customary law begins with the personal behavior of community members and the existence of actions and reactions that are polarized in reciprocal relationships between one individual and another individual, so that it will form a social interaction that is carried out repeatedly and influences the behavior for others, so that in the process a social system occurs, which is binding and gradually becomes a custom which must then be obeyed and implemented by the community concerned. Habits or customs are a reflection of the personality of a nation and the embodiment of the soul of the nation. Therefore, every nation has its own customs and habits that are different from one another, in which these differences are an important element in the identity of a nation (Maladi, 2010).

The term customary law was first introduced scientifically by Prof. Dr. C Snouck Hurgronje, Then in 1893, Prof. Dr. C. Snouck Hurgronje in his book entitled "De Atjehers" mentions the term customary law as "adat recht" (Dutch), namely to give a name to a system of social control (social control) that lives in Indonesian society, and this term was later developed scientific study by Cornelis van Vollenhoven who is known as an expert on Customary Law in the Dutch East Indies (before

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International
License (CC BY-NC 4.0)

becoming Indonesia). As for the ability of customary law to adapt, precisely because customary law has the nature of unwritten and non-codified law, the community can quickly break away from previous ties and traditions and eventually develop into a very modern group (Manarisip, 2013). In the journal Mayasari (2017) it is stated that, customary law as an element of culture is also the cultural heritage of the ancestors which should be respected and preserved. As a cultural heritage, the community has the right to defend it. In fact, further and in principle as a human right, humans/society must respect or maintain that culture.

However, according to Prof. Mr. Cornelis van Vollenhoven, in Siregar (2018) explains that, customary law is all the rules of positive behavior which on the one hand have sanctions (law) and on the other hand are not codified (custom). Positive behavior has a legal meaning that is stated to apply here and now. While the sanction in question is a reaction (consequence) from another party for a violation of norms (law). The sources of customary law are unwritten legal regulations that grow and develop and are maintained with the legal awareness of the people, and have the ability to adapt to current developments. Customary law community groups are people who are bound by their customary legal order as joint citizens because they have the same place of residence or certain hereditary foundations. The customary law system is divided into three groups, namely customary law regarding state administration, customary law concerning citizens (law of kinship, land law, debt law), and customary law concerning offenses (criminal law).

In the development of national law, the role of customary law is very important, this is because the national law to be formed is based on applicable customary law, but in its course customary law is unwritten and dynamic in nature which can always adapt to the development of human civilization itself. If the customary law that regulates a field of life is deemed no longer suitable for the needs of the community, then the community itself will change the customary law so that it can provide benefits to regulate their life, but on orders from traditional elders who do have authority and power (Nurrohmah et al. al., 2021).

Meanwhile, the results of Officialni's research (2020) stated that customary law as an element of culture is also the cultural heritage of the ancestors which should be respected and preserved. As a cultural heritage, the community has the right to defend it. In fact, further and in principle as a human right, humans/society must respect or maintain that culture. Universally, human rights experience a development that is commonly referred to as "generation". In this case indigenous peoples have the right to defend their customs and culture and the environment because it is also guaranteed by the 1945 Constitution of the Republic of Indonesia, namely in article 18B paragraph (2) confirms that the state recognizes and respects customary law community units and their rights -their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia (Safriani, 2018).

Furthermore, Article 32 paragraph (1) of the 1945 Constitution of the Republic of Indonesia mandates the state, in this case the government and all components of the nation, to guarantee the freedom of the people to maintain and develop their cultural values. Thus it is very clear that the existence of legal community units (customary communities) along with their traditional rights, customs, culture, government systems and so on which are scattered throughout the territory of Indonesia has a very strong foundation. In the MPRS Decree No.II/MPRS/1960 in Appendix A Paragraph 402, customary law has been established as the principles of fostering national law which consists of several main points including, (1) The principles of fostering national law so that it conforms to the direction of the state and based on customary law that does not impede the development of the wider community. (2) In the effort towards homogeneity, every law must pay attention to the facts that live and are respected by all Indonesian people, including customary law itself (3) In perfecting the law on marriage law and state inheritance law, there must be attention to the existence of religious factors , custom and so on.

Based on the provisions of the MPRS Decree above, the position and role of customary law in the development of national law is very clear and firm, as long as it does not hinder the development of society and is based on the values of welfare and justice. In addition, customary law is also an original Indonesian cultural heritage because it arises from the overall behavior and decency of the people who

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)

live and develop in the lineage of national values and are able to be obeyed, adhered to and maintained until now (Ulil, 2019). Thus customary law that can be used as principles or the basis for fostering national law is not pure customary law, but customary law that is clean and fulfills the conditions determined by the state. So based on the description and description of the background above, the researcher is interested in further examining the Role of Customary Law in the Development of National Law.

2. METHOD

The research method used is through a normative juridical approach, namely by taking inventory, reviewing and analyzing and understanding law as a set of positive norms in the system of laws governing employment issues with the specification of analytical descriptive research which is research to describe the flow of scientific communication and analyze Existing problems will be presented descriptively. The type of data used is secondary data, including library materials related to research, secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials. Then data collection was carried out through literature study through a review of library materials related to the problems studied, then the data were analyzed normativelyqualitatively.

3. RESULTS AND DISCUSSION

In the Seminar on Customary Law and Development of National Law, it was formulated that Customary Law is one of the most important sources for obtaining materials for the Development of National Law, especially those that lead to legal unification and will be carried out through the making of laws and regulations, without neglecting the growth of customary law in Fostering Law, then in this process it is very clear that the position of customary law is indeed placed at a very strategic level, especially in the context of developing national law.

However, in order to know the role of customary law in the formation/development of national law, it is necessary to know the social and cultural values that form the background of these customary laws, as well as their role in daily life activities, while the indicators include values that support development. (law), and must always be maintained and maintained, then values that support development (law), and must be adjusted or harmonized with the development process (Sinaga, 2019). And so on the values that hinder development (law), but will gradually change if there are other factors that also influence it. However, in the process, values that definitively impede development (law) must be removed on purpose so as not to hinder the future.

Thus the functioning of customary law in the process of development/formulation of national law is highly dependent on the interpretation of the values that form the background of the customary law itself. As for the literature, it is stated that there are three groups of opinions which highlight the position of customary law at the present time, namely a) Groups who are against Customary Law, who view Customary Law as an outdated law that must be immediately abandoned and replaced with new legal regulations. more modern. This school argues that customary law cannot meet legal needs in the present and in the future.

Furthermore, namely the group that fully supports customary law, in which this group expresses an opinion that greatly glorifies Customary Law, because customary law is born from the habits of the Indonesian people, customary law is most suitable to be applied and maintained, especially in the process of developing national law. And finally, the moderate group takes a middle ground between the two opinions of the previous group where this group says that only part of customary law can be used within the National Legal System, while the rest will be taken from elements of Indonesian positive law (Sudaryatmi, 2012). The elements of customary law that may still be maintained up to the present are laws relating to family matters and laws related to matters of inheritance, while other legal fields can be taken from legal elements originating from the West.

As for some other legal experts, customary law is often termed as a synonym for unwritten law, for example in legislative regulations, laws that live as conventions in state bodies (parliament, provincial councils, and so on), laws that live as customary rules that are maintained in association live, both in cities and in villages, but in the process they are still obeyed in society because they have a

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)

certain sanction if they are violated just like that. rule of law, a principle applies, namely the principle of legality, where this principle states that there is no law other than what is written in the law books, the statement reads solely to guarantee every legal certainty that will be faced by the general public. But on the one hand, if a judge cannot find his law in written law, a judge must be able to find his law in the rules that live in society, whether recognized or not, but the role of customary law still has a very ideal position, especially in the national legal system in Indonesia.

The statutory basis that still recognizes the application of customary law in Indonesia, even during the Dutch colonial era and remains in force in the present era, is contained in Article 131 paragraph 2 sub b IS, where according to these provisions, it is stated that, for Indonesian legal groups native and eastern (foreign) legal groups also apply customary law to them. This is due to the fact that customary law grows out of the ideals and thoughts of the Indonesian people, so that customary law can be traced chronologically even since the Indonesian state consisted of kingdoms spread throughout the archipelago.

However, when referring to the notion of customary law as stated by Soepomo, then customary law is a law that can be formed through the Legislative Body (Court). Because basically the law is a unit of norms that originate from the values that exist in society. As for customary law, it has a different character, the first is neutral and the second is not neutral, this is because customary law is very closely related to religious values, so this distinction needs to be examined carefully in order to understand the formation or change of law that will apply in society.

In the Elucidation of the Law it is stated that customary law which is refined and adapted to the interests of modern society and its relations with the international world is perfected in accordance with the provisions of the MPRS II/MPRS/1960 Appendix A Paragraph 402, stating that the customary law in question is not the original customary law which is still adhere to the message of their ancestors and apply to indigenous peoples, but instead is customary law that has been reconstructed, customary law that has been perfected, designed in a modern way, which according to Moch. Koesnoe considers that customary law in the BAL has materially disappeared, because it was influenced by institutions and the characteristics of western law or have been modified by Indonesian socialism so that all that remains is the formulation (the dress) alone (Susylawati, 2009).

Understanding the formulation of Article Tap MPRS II/MPRS/1960 above, the constitution guarantees the unity of indigenous peoples and their traditional rights, then instead of that the guarantee of the constitution as long as customary law is still alive in accordance with the development of modern society and in accordance with the principles of the Unitary State of the Republic of Indonesia as stipulated in the laws and Pancasila, thus this constitution guarantees the recognition and respect for customary law if it fulfills the requirements, including that customary law is still alive and in accordance with the development of society, then the requirements for ideality, namely in accordance with the principles of the unitary state of the Republic of Indonesia, and the enforceability is regulated in the law -Law Article 28 I paragraph (3) of the 1945 Constitution confirms that the cultural identity and rights of traditional communities are legally respected and their freedom guaranteed by the state.

In the conclusion of the Seminar on Customary Law and Development of National Law in Yogyakarta in 1975, it has been explained in detail where in fact the position of customary law in the national legal system in Indonesia does have a very significant role both in the national legal system in Indonesia, in legislation, and in decisions judge. The existence of the application of customary law apart from being recognized in national legal instruments is also regulated in international instruments, where in the provisions of Article 15 paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR) states that, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

Then the recommendation from the United Nations (UN) Congress on "The Prevention of Crime and the Treatment of Offenders" stated that the criminal law system that had existed in several countries (especially those originating/imported from foreign law during the colonial era), in generally "obsolete and unjust" (obsolete and unfair) and "outmoded and unreal" (outdated and not in accordance with reality). The reason is because the legal system in several countries is not rooted in cultural values and

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)

there is even a discrepancy with people's aspirations, and is not responsive to today's social needs. Such conditions were stated by the UN congress as a contributing factor to the occurrence of crimes. So it is very clear that the scope and dimensions of customary law do have a very broad context and have even been recognized by the international community.

Considering that customary law is a law that reflects the personality and soul of the nation, it is believed that some institutions of customary law are of course still relevant as reference material, especially in the formation and study of national law. However, customary law that can no longer be maintained will become extinct over time, in accordance with the flexible and dynamic nature of customary law. According to Von Savigny, as quoted by Soepomo, emphasized that Customary Law is a living law, because it is an embodiment of real legal feelings from the people. In accordance with its own nature, customary law will continue to be in a state of growth and development like human life in general. Agreeing with Savigny, van Vollenhoven said that customary law in the past did have different characteristics because of course it underwent various developments and changes (wijdan, 2021).

Furthermore, Vollenhoven in Siregar (2018) emphasized that customary law will be able to develop and adapt to the times, this is because some decisions of indigenous peoples will cause new changes, especially in customary law rules. However, if the enactment of a law contradicts the values and legal norms that live and apply in the community, of course the existence of customary law will be rejected not only from the general public but from any party, even if it is from the government. As for the Indonesian context, the living law of Indonesian society is a multicultural society and respects every existing custom, so customary law can also be used as a source of law by judges if the law orders so, mainly for the sake of forming a just and prosperous legal protection. .

On the other hand, customary law has previously existed to regulate the order of life of the Indonesian indigenous people and of course within the boundaries of the jurisdiction of the customary law community where the customary law grows and develops. Customary law develops as legal dualism in the life of the Indonesian people. The influence of Dutch colonial civil law penetrated deep into the foundations of people's lives, however, after the Indonesian nation became independent, the government moved quickly to restore legal governance in Indonesia and recognize and guarantee the existence of existing laws, including customary law itself. With the existence of various laws that regulate life in state society, the scenario of legal development and how to form legal harmonization is clearly a complex problem and greatly influences the effectiveness of law, but the presence of customary law as a form of legal pluralism provides a number of important notes in life. law in Indonesia, clearly needs to be acknowledged and respected for the harmony of all Indonesian citizens.

The existence of customary law in addition to other laws will appear very important if law is understood in a broader sense, namely as a process of social control based on the principles of reciprocity and publicity which empirically takes place in the life of a peaceful and prosperous society. Law as a social rule cannot be separated from the values that apply in a society, it can even be said that law is a reflection of the values that live in society. Good law is law that is in accordance with the living law in society, of course, is a reflection of the values that live in society. The values that live in society (behavior) may at first be a habit which then arises as a feeling in a society that adheres to that habit as something proper (Wiranata, 2005).

As explained above, law and customary law have the same meaning, namely as a series of norms that regulate behavior and actions in social life with the aim of creating an order in society. What distinguishes it is that customary law applies to Indonesians, it is unwritten and not made by the legislature. In the application of customary law as positive law, it is necessary to put forward two concepts of thought about law that are very sharp in contrasting the position of customary law in the legal system, namely the concept of legism (including positivism) and the school of history. The flow of legism requires that law-making can simply be done with laws, while the flow of history opposes equating law with laws because it is impossible to make laws but must grow from the legal awareness of society.

The contradictions above do not need to be defended anymore but must be reconciled in a balance between law as a tool and law as a reflection of society's culture. Also between law as a tool to uphold order which is conservative (maintaining) and law as a tool to build (direct) society to be more

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)

advanced. So in broad outline the position of customary law in the national legal system does have an equally important position, but what distinguishes it is that customary law only applies to Indonesians and is unwritten in nature, even as the 1945 Constitution recognizes the existence of customary law in addition to other written laws. This is because customary law has a long historical history and is rooted in the cultural values of the Indonesian people.

4. CONCLUSION

Customary law is an unwritten rule that lives within the indigenous peoples of an area and will continue to exist as long as the community still fulfills the customary law that has been passed down to them from their ancestors before them. Therefore, the existence of customary law and its position in the national legal system cannot be denied even though customary law is unwritten and based on the principle of legality is an illegitimate law. Customary law will always exist and live in society. Furthermore, customary law is a law that really lives in the awareness of the conscience of the community members which is reflected in their patterns of action in accordance with their customs and socio-cultural patterns which are not contrary to national interests. The current era can indeed be called the era of the revival of indigenous peoples which is marked by the birth of various policies and decisions. However, what is equally important is the need for further study and development with its implications for drafting national laws and efforts to enforce applicable laws in Indonesia.

5. REFERENCES

Aditya, Z. F. (2019). Romantisme Sistem Hukum Di Indonesia: Kajian Atas Konstribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum Di Indonesia. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, *8*(1), 37-54.

Dewi, R. W. L. (2005). Peranan Hukum Adat Dalam Pembangunan Dan Pembentukan Kitab Undangundang Hukum Pidana Nasional. *Perspektif: Kajian Masalah Hukum dan Pembangunan*, *10*(3), 265-273.

Indriati, E. D., & Hastuti, I. (2021). hukum adat dalam pembaharuan dan pembangunan hukum nasional. *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat*, *19*(1), 125-142.

Isdiyanto, I. Y. (2018). Menakar "Gen" Hukum Indonesia Sebagai Dasar Pembangunan Hukum Nasional. *Jurnal Hukum & Pembangunan*, *48*(3), 589-611.

Maladi, Y. (2010). Eksistensi hukum adat dalam konstitusi negara pasca amandemen. *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, *22*(3), 450-464.

Manarisip, M. (2013). Eksistensi Pidana Adat dalam Hukum Nasional. *Lex Crimen*, *1*(4).

Mayasari, R. E. (2017). Tantangan Hukum Adat Dalam Era Globalisasi Sebagai Living Law Dalam Sistem Hukum Nasional. *Journal Equitable*, *2*(1), 94-114.

Nurrohmah, P. R., Aryanti, T. L., & Nainggolan, O. M. (2021). peranan hukum pidana adat dalam pembangunan hukum nasional di era globalisasi milenial. *De Juncto Delicti: Journal of Law*, *1*(1), 61-75.

Resmini, w. (2020) peran hukum adat dalam pembentukan hukum nasional.

Safriani, A. (2018). Hakikat Hukum Dalam Perspektif Perbandingan Hukum. *Jurnal Jurisprudentie*, *5*(2).

Sinaga, E. (2019). Politik legislasi hukum tidak tertulis dalam pembangunan hukum nasional. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, *8*(1), 1-17.

Siregar, F. A. (2018). Ciri Hukum Adat Dan Karaktristiknya. *Jurnal Al-Maqasid: Jurnal Ilmu Kesyariahan Dan Keperdataan*, *4*(2), 1-14.

Sudaryatmi, S. (2012). Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi. *Masalah-Masalah Hukum*, *41*(4), 572-578.

Susylawati, E. (2009). Eksistensi hukum adat dalam sistem hukum di Indonesia. *Al-Ihkam: Jurnal Hukum & Pranata Sosial*, *4*(1), 124-140.

Ulil, A. U. (2019). Penyelesaian tindak pidana ringan melalui kearifan lokal dalam pembangunan sistem hukum nasional. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, *8*(1), 113126.

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)

wijdan, a. f. (2021). Eksistensi Hukum Adat Sebagai Budaya Bangsa Dalam Membangun Sistem Hukum Nasional Di Indonesia. *PESAT*, *7*(1), 91-102.

Wiranata, I. G. A., & SH, M. (2005). *Hukum Adat Indonesia Perkembangan dari masa ke masa*. Citra Aditya Bakti.

Fox Justi is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0)