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History of Customary Law

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ABSTRACT

Background. This article discusses the history of customary law, emphasizing its role in shaping community behavior. Human beings, from birth, have an instinct to understand the phenomena in social life, which form customs and manners.

Purpose. Customs, including customary law, reflect the deposits of morality in society.

Method. This study includes historical analysis and highlights the influence of Hinduism in the Hindu Age as well as the influence of Malaio Polynesia in other areas.

Results. Customary law, with specificities such as its religio magical/religious aspects, is recognized as the result of acculturation between the customary rules of the Pre-Hindu era and Hindu, Islamic and Christian cultures. This article provides a brief understanding of the role of customary law in the historical context and discusses its influence on community life. The social and cultural implications of the continuation of adat law are also discussed in the context of contemporary society.

Conclusion. This study provides a concise view of the historical dynamics of customary law, enhancing our understanding of the relationship between custom, historicity and social development.

KEYWORDS

Customary Law, Dynamics, Malaio-Polynesia

INTRODUCTION

In essence, humans have been endowed with an instinct to be able to know how symptoms arise in social life. Since birth, humans have been destined to live with other people, as a result of which dynamic social interactions arise (Asmah & Salam, 2022). This interaction is based on a pattern called action, which is then carried out repeatedly so that it becomes a habit. If the habit is not considered a way of behaving, then it can be said that the habit has become a system of behavior (Klerkx dkk., 2019). The behavioral system is a reflection of the nature of the life of the human group. A behavioral system that is permanent and strongly integrated with the behavioral patterns of the community can increase its binding force so that it becomes a custom (Mindra dkk., 2022). Within a custom there are various oral regulations, including customary law (Bedner & Arizona, 2019). Custom is a sediment of morality in society, namely that the rules of custom are in the form of rules of morality whose truth has received general

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recognition in society, so customary law is a law that is rooted in morality.

In addition, there is also the term adat, which also has similarities and differences with custom. In Minang society the terms adat istiadat and adat nan diadatkan are known. The term customary law comes from the translation Adatrecht, which was first proposed by Snouck Hurgronje, then used by Van Vollenhoven (Muja'hidah dkk., 2023). The term used previously in legislation was Religious Regulations (Godsdienstige Wetten) due to the influence of the Receptio in Complex teachings of Van Den Berg and Salmon Keyze (Martin-Palacio dkk., 2021). According to Soepomo, the term customary law is used as a synonym for unwritten law in legislative regulations (non-statutory law), laws that live as conventions in state legal bodies (Parliament, Provincial Councils and so on), laws that arise because of judge decisions (judge made law) (Bakker, 2023), laws that live as customary rules that are maintained in the association of life, both in cities and in villages (customary law).

Customary law has specificities that characterize and distinguish it from other laws, namely: a) Religio Magis/Religion (Fowler, 2022). The Indonesian nation is a religious nation, and it animates the law it creates, namely customary law (Wamukaya & Mbathi, 2019). b) Togetherness. Unlike western law which is centered on the individual, customary law is centered on the community (Ali dkk., 2023). Customary law, according to Koesnoe, as the law of the people who make the people themselves, regulates their lives which are constantly changing and developing through decisions or settlements issued by the community as a meeting of taste and meeting of mind through deliberation. Old things that are not used are changed or abandoned inconspicuously (Umar dkk., 2019). The characteristics of togetherness, traditional, dynamic, plastic, non-codified, deliberation and consensus are interrelated and support each other.

Our customary laws were already in existence in ancient, pre-Hindu times (Alkhan & Hassan, 2021). According to customary law scholars, the customs of the pre-Hindu society were Polynesian Malay customs (Egan, 2020). Then came Hindu culture, Islamic culture and Christian culture, each of which influenced the original culture which has long controlled the life of the Indonesian people as a customary law (Sachs, 2019). So that the customary law that now lives in the people is the result of acculturation between the rules of customs of the Pre-Hindu era with the rules of life brought by Hindu culture, Islamic culture and Christian culture.

RESEARCH METHODOLOGY

Research methods that could be used in a study on the "History of Customary Law" could include historical and anthropological approaches (Cowling dkk., 2020) . The historical approach would involve analyzing historical documents, such as traditional legal texts, colonial records, and historical literature to trace the evolution and development of customary law from the past to the present (Wane dkk., 2022). Meanwhile (Hanic & Smolo, 2023), the anthropological approach will focus on direct observations and interviews with communities that still practice customary law, as well as analyzing the traditional practices, social structures and cultural values that underpin customary law (Janssens & Wouters, 2022). The combination of these two approaches will provide a more comprehensive understanding of the role, function and transformation of customary law in the context of history and community life.

RESULT AND DISCUSSION

History of Customary Law

In his book "Het Adatrecht van Nederland Indie", Van Vallenhoven gives an explanation of customary law, namely customary law is a whole set of positive rules of behavior, which on the one

hand has sanctions and on the other hand has not been codified (Khalilieh, 2019). The history of customary law in the Hindu era (Michalscheck dkk., 2020), Hinduism influenced the islands of Java, Sumatra and Bali (Assaad & Abdul-Malak, 2020). While other areas were influenced by the Malaio Polynesia era, namely an era where our ancestors still held original customs influenced by nature which was all powerful. As for some kingdoms that stood in the Hindu era, as follows: a) Srivijaya Kingdom - King Syailendra (7th to 9th centuries) used Malaio Polynesia customary law, b) Medang (Mataram) Kingdom during the time of King Dharmawangsa, in order to memorialize important events in the field of justice, several inscriptions were made, among others: Bulai inscription (860 AD), Kurunan inscription (885 AD), Guntur 7 inscription (907 AD), c) Singosari Kingdom founded by Ken Arok, the effort made towards customary law was to establish the inscription "Sarwadharma" which describes the existence of "Tanah Punpunan" (Huang dkk., 2020), which is in the form of land provided to finance sacred buildings whose status is released from Thanibala power or civil power (community) with compensation, d) Majapahit Kingdom founded by Jayakatwang, during the reign of Hayam Wuruk, customary law received attention thanks to the efforts of Mahapatih Gajah Mada. The efforts are dividing the various fields of government and state security, the existence of a court decision called Jayasong / Jayapatra, Gajah Mada issued the Gajah Mada Law Book.

The history of customary law in the Islamic era occurred during the heyday of the Islamic kingdoms in Indonesia in various regions (Huang dkk., 2020). a) Aceh - Pasai and Perlak Kingdoms, namely the strong influence of Islamic law on customary law, seen from every place of settlement led by a religious scholar who acts as an imam and has the title "Teuku / Tengku", b) Minangkabau and Batak, namely customary law basically survives in everyday life, while Islamic law plays a role in religious life, in this case seen in the field of marriage. The traditional saying is that customary law is based on flow and proper, and religious law is based on the Book of Allah. In Batak which consists of various tribes, namely Toba, Karo, Dairi, Simalungun, and Angkola, c) South Sumatra (Palembang/Kukang) during the time of "Ratu Senuhun Seding", customary law was recorded in Arabic Malay - UU Simbur Cahaya. It contains terms derived from Islamic law, such as: Khatib Bilal, d) Lampung, the influence on the kinship structure adopted is the male lineage (patrilineal). Where the eldest male (called "pun" - who is respected) - Majority Inheritance (Chu dkk., 2020). He has the right and obligation to continue his parents, e) Java, the kingdom of Demak (Raden Patah) made the mosque the center of struggle and government, the Kingdom of Padjajaran (Ratu Purana) the existence of a seaport, Banten and Sunda Kelapa with the fleet leader Fatahillah.

The history of customary law during the VOC era, namely customary law (adatrecht), was used for the first time scientifically in 1893 to name the law that applied to the planting of foreign powers in a regular and systematic manner, starting with the establishment of the East Indies Trading Company or Verenigde Oost Indische Compangnie (VOC) in 1602 by Dutch trading companies at the suggestion of John van Oldenbarneveld, in order to be able to face competition with other trading companies (Boamah & Amoako, 2020). On 20 March 1602, the VOC was granted charter rights, which included the power to build forts, enter into treaties with the kings of Indonesia, appoint judicial officers and so on.ku for indigenous groups (native Indonesian citizens) who did not originate from the legislation of the Dutch East Indies Government (Marshall, 2020) . Therefore, the VOC had two functions, first as a trader and second as a government institution that had the authority to manage its own household (Chang & Shi, 2020). The laws that applied during the VOC era were as follows: 1) Batavia as the center of government and one type of law applies, namely Company Law (Dutch Law) for all groups, both in the field, constitutional, civil and criminal law. As for outside the central government area, the original law was allowed to apply,

namely customary law. likewise, in the complaints of the native groups, customary law was still used.

Publishing efforts during the VOC era resulted in four codifications and legal records for indigenous Indonesians, namely (Mardian dkk., 2021): a) In 1750, a compendium of Javanese laws, the Mogharraer Code, was produced for the Landraad of Semarang, which contained mostly Islamic criminal law; b) In 1759, the VOC issued a Compendium van Clootwijck on the laws of the Bumiputera within the Kraton of Bone and Ga; c) In 1760, the VOC issued a Set of Islamic Law Regulations on marriage, divorce and inheritance for use by the VOC Court; d) Mr. P. Cornelis Hasselaer (Resident of Cirebon from 1757 to 1765) established a Book of Customary Law for Cirebon judges. P. Cornelis Hasselaer (Resident of Cirebon in 1757 - 1765) established a Book of Customary Law for Cirebon judges. This book of customary law is known as "Pepakem Cirebon". During the Daendels administration (1808-1811 AD), customary law was still in effect for the Indonesian people, provided that it did not conflict with the government. In the Raffles government (1811-1816 AD) Raffles' attitude towards customary law is clearly seen in his edict dated February 11, 1814 which contains "Reguiations for more effectual administration of justice in the Provincial Court of Java" which consists of 173 articles. Like Daendels (Inayatillah dkk., 2022), Raffles also considered that customary law was nothing but Islamic law and its position was not equal but lower than European law.

The years 1816 - 1848 were an important period in customary law, because it was the restoration of the Dutch colonial government in Indonesia, which was the beginning of the legal policy of the Dutch Government which was consciously aimed at the Indonesian people. The Reglement of 1819 stipulated that customary criminal law would apply to the Bumiputera. This meant that if in a dispute between a Bumiputera and a European the defendant was a Bumiputera, the Landraad would adjudicate and apply customary law. The year 1848 can be considered as the beginning of the Dutch Government's policy towards customary law.

The Existence of Customary Law in Indonesia

Talking about the frame of the Unitary State of the Republic of Indonesia, of course we cannot let go of the existence of values, norms, methods, and guidelines for behavior that live in the community. These things are a form of Indonesian wealth that has long lived and developed in the lives of people in the archipelago. So it can be said that these values, norms, methods and behavioral guidelines can be said to be accommodated in a generally unwritten law which is widely known as customary law.

In the literature, Snouck Hurgronje introduced the term Adatrecht (customary law) as the law that applies to bumi putra (native Indonesians) and foreign easterners during the Dutch East Indies. Van Vollenhoven, who defined customary law as the law that applies to the indigenous Indonesian people, also gave the same definition (Tjoanda, 2020). So that at least it can be understood that customary law is a law that lives in the midst of Indonesian society, and applies to the Indonesian people, in which case each place of customary law has different arrangements but basically has the same root concept.

Speaking of Indonesia as a State of law, the existence of customary law is also regulated, protected, and accommodated by the constitution. Referring to the provisions of Article 18B paragraph (2) of the 1945 Constitution, "The State recognizes and respects the unity of customary law communities and 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, which are regulated by law" (Isakhan, 2020). Referring to these provisions, there are several important things that can be understood in relation to the position of customary law in the Indonesian legal

system (Jones dkk., 2023) . The State recognizes the existence of customary law communities in Indonesia constitutionally. And of course in this case it also includes the law that lives in it, namely customary law itself. Recognition of these rights can be interpreted as recognition of rights for indigenous peoples regarding their existence. In the sense that indigenous peoples are protected by the constitution of the existence of the community and everything that lives in the life of the community itself, including in this case is the customary law itself which is part of the indigenous community.

The State's recognition of indigenous peoples and their own customary laws is a conditional recognition (although in the concept of the rule of law, these conditions are a form of control of the rule of law). If examined further, as stipulated in Article 4 of the Minister of Home Affairs Regulation No. 52/2014 concerning the recognition and protection of indigenous peoples, which in this case regulates the stages and conditions that must be met by Indigenous Peoples to obtain legal certainty over their traditional rights (Jayus, 2020). In its provisions, indigenous peoples must go through stages that are carried out in stages to obtain legal recognition of the indigenous peoples themselves, which in this case include the stages of identification of indigenous peoples, verification and validation of indigenous peoples and then after the 3 (three) stages have been passed, in this case the determination of indigenous peoples is carried out as the output of these stages.

In the focus of the position of customary law in the Indonesian legal system, the constitution returns where recognition of unwritten law was previously only explained or included in the General Elucidation of the 1945 Constitution which in this case regulates "... the Constitution is a written basic law, while in addition to the Constitution it also applies unwritten basic laws, which are basic rules that arise and are maintained in the practice of state administration even though they are not written" (Liu dkk., 2020). In the sense that customary law, which is generally unwritten, has the same position as other laws that apply in Indonesia given the recognition of unwritten law in addition to the Constitution itself . So in this case it can be understood that the position of customary law in the legal system in Indonesia has the same constitutional position as the position of the law in general in the life of the state in Indonesia, but what should be underlined is that there are also differences between customary law and applicable law in general, namely from the aspect of validity and form. In this case, the applicability of customary law only applies to Indonesians and from the aspect of its form, customary law is generally unwritten.

Regulation of Customary Law in Indonesia

Protection of the rights of Indigenous Peoples (MHA) at the conceptual level has been guaranteed by the constitution. The existence of Articles 18 B (2) and 28I (3) of the 1945 Constitution as well as sectoral laws (Law No. 5 of 1960 on Agrarian Principles; Law No. 4 of 2009 on Mining, Minerals and Coal; Law No. 7 of 2004 on Water Resources; and other related laws) have attempted to provide recognition and respect for the Unity of Indigenous Peoples. In das sollen, the central government has juridically guaranteed the welfare of the government system by striving to achieve the fulfillment of constitutional rights and traditional rights. Constitutional rights are the basic rights and basic freedoms of every citizen, related to education, employment, equality before the law, socio-economic rights, freedom of opinion, the right to live and reside guaranteed by the Constitution. Meanwhile, traditional rights are special or special rights inherent and owned by a community of people due to the similarity of origin (geneological), similarity of territory, and other customary objects, rights to customary land, rivers, forests and practiced in the community.

In practice, constitutional juridical obligations related to recognition and respect for MHA carried out by the central and local governments still encounter various obstacles. State policies

related to public services increasingly show evidence of their existence as a minority group being treated in a discriminatory manner. The lame reality between das sollen and das sein related to the recognition and respect of MHA and traditional rights is quite evident. Article 18B paragraph (2) states that MHA and their traditional rights are recognized and respected by the state as long as they still exist, are in accordance with modern life and do not conflict with the Republic of Indonesia and are regulated by law. But of course, articles born after the amendment cannot be formulated without certain political interests.

There are still many cases in court that reject the legal standing of MHA. Of the five cases of MHA lawsuits, almost none were granted. Except for a case in Papua that was granted, but that was more due to the replacement of legal standing from MHA to individuals. Then when looking at the constitutional guarantees, Article 18B paragraph (2) of the 1945 Constitution, and sectoral laws, related to the recognition and respect of MHA appear to reinforce each other. However, in fact, Article 18B paragraph (2) and Article 28I paragraph (3) are very heavy legal norm constructions (rigid) and the recognition and respect in the Sectoral Law partially negates, especially related to traditional rights both material and immaterial. However, the status of MHA and their traditional rights has not changed. One of the reasons for legal uncertainty is that the construction of imperative norms does not have strong coercive power. The nature of the norms constructed in Articles 18B paragraph (2) and 28I paragraph (3) are facultative rather than imperative norms. Facultative norms are complementary norms whose enactment depends on the existence of other conditions. In contrast to imperative norms, which are norms of orders and prohibitions that can force other than their implementation. In fact, the concept and meaning of MHA including their traditional rights are clearly protected in various legal regulations, but the implementation is not easy to apply. The understanding of policy makers in formulating the MHA protection model has not been comprehensive enough to answer the realities on the ground.

Development of Customary Law in Indonesia

The legal system that has colored our national law in Indonesia so far is basically formed or influenced by three pillars of legal subsystems, namely the Western legal system, customary law and the Islamic legal system, each of which is a legal sub-system in the Indonesian legal system. The Western legal system is a legacy of the Dutch colonial colonizers who for 350 years colonized Indonesia and greatly influenced the Indonesian national legal system. While the Customary Legal System is based on the natural foundations of the Indonesian mind, and to be aware of the customary legal system one must explore the natural foundations of the mind that live in Indonesian society. the Western legal system is a legacy of the Dutch colonial colonizers who for 350 years colonized Indonesia and greatly influenced the Indonesian national legal system. While the Customary Legal System is based on the natural foundations of the Indonesian nation's mind, and to be aware of the customary legal system one must explore the natural foundations of the mind that live in Indonesian society.

Indigenous peoples face formidable challenges to survive in the traditions passed down by their ancestors to the communities that still exist in today's life. They are forced to modernize from the perspective of the general public by having to abandon ancestral traditions that actually have a wealth of cultural and living values. They (indigenous peoples) along with the influx of external influences and urgent needs from within the community itself (internal) make them dynamically undergo continuous changes. These changes are not evenly experienced by all customary law communities in the archipelago. Some are rapidly changing (such as the coastal communities of Java Island and the east coast of Sumatra) and some are very slow to change, even some of them do not change at all, such as the Badui community in the interior of Banten. The reason for this is

partly due to the nature and characteristics of the customary law community itself, which is open and dynamic so that it is very easy to experience changes and shifts in traditional values.

Many external influences can affect changes in indigenous communities. External influences that greatly affect these changes include: 1) government policies and bullying that do not appreciate customary law communities, 2) our education curriculum that does not appreciate the traditional culture of the Indonesian people, 3) the flow of information and technological developments that are relatively fast, and 4) intermarriage between regions which causes the fusion or disappearance of the distinctive cultural values of each region.

The shift in customary law can also be seen in terms of the enforceability of customary law. When there is a problem between the indigenous community and the government, national law is applied to resolve the problem, because often the government as the determinant of State policy considers itself the most correct by hiding behind formal rules and regulations, considering that the State has the power and juridical basis to control the property of citizens who have no man or land that does not have official documents / land certificates. Meanwhile, indigenous peoples adhere to customary law, which actually historically, has existed long before the government regulation. Since Indonesia was established as a sovereign state, customary law has occupied its own role and in its development, customary law has actually received a special place in the development of national law. In recent years in the formation of state law, local wisdom that lives in the community has become one of the important considerations in the formation of state law, both in the formation of laws and in the formation of regional regulations. The concept of legal pluralism no longer develops in the realm of dichotomy between the state law system on the one hand and the folk law system and religious law on the other. To show the development of the concept of legal pluralism, the relationship between law and other aspects of culture can be understood by introducing Friedman's view below: 1) Law as a system basically has 3 elements, namely (a) the structure of the legal system, which consists of legislative institutions, court institutions and their structures, prosecutorial institutions, state police agencies, b) the substance of the legal system in the form of norms, legal regulations, patterns of community behavior that are behind the legal system, c) the legal culture of the community in the form of values, ideas, expectations and beliefs that are manifested in patterns of community behavior in perceiving the law. 2) Every society has its own legal structure and substance. Which determines whether the substance and structure of the law is obeyed or vice versa.

The Importance of the Existence of Customary Law in Indonesia

The existence of Customary Law is based on a strong theoretical and juridical basis. Before Modern Law entered Indonesia, Customary Law had regulated the lives of tribal communities throughout the country. Its theoretical foundation comes from the thoughts of Carl Von Savigny, who considered Law as "the spirit of a nation" and was born from Customary Law. Customary law is a manifestation of positive law, (Muhammad Erwin, 2011: 268). Savigny stated that Law is an expression of the soul of a nation about what is considered right and just. Savigny also emphasized the role of the nation's soul as a determining factor for community compliance with the Law, with the values embraced by the community metamorphosing into written norms. Based on Savigny's principles, Article 18B recognizes and respects special or special regional government units, and recognizes customary law communities and their traditional rights, as long as they are in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law.

Recognition of the rights of customary law communities is in line with legal history theory in the context of Indonesian positive law. The legitimacy of the theory also comes from the concept of

Gene Law, which states that customary law as the gene of Indonesian law has infinite value. According to Isdiyanto (2018: 591-592) customary law becomes the holder of various elements and values in society, creating harmony between all elements. The logical consequence of this recognition is the legitimacy to apply the provisions of customary law in customary law communities, provided that it is in accordance with the development of society and does not violate the principles of the rule of law. The enactment and operation of customary law is supported by the elements within it, especially social institutions. Harmony in the life of Indigenous peoples occurs because of social institutions that function to provide guidelines to community members on how to behave to meet life's needs.

According to Soekanto (2012:171), social institutions grow because humans need an orderly life, and norms in society are formulated as a guide to behavior. The function of social institutions is to provide guidance to community members in an effort to fulfill their life needs, with available social rules and regulations (Santosa, 2009: 5). In community life, social institutions are used as social control. Some of the social institutions that play a role in this are the "Police" who maintain security and order, the "Court" as an institution that determines right and wrong for violations, "Adat" which includes rules, institutions, institutions and values in traditional societies, and "Community Leaders" who have influence and are respected in community life (Purwaningsih, 2019: 10-11).

The existence of social institutions has a main purpose, which according to Sumner (in Soekanto, 2012: 173) is to fulfill the needs of society by achieving order and integration. The function of social institutions involves several aspects, including providing guidelines to community members on how they should behave, maintaining the integrity of society, and acting as guidelines in the social control system. The empowerment of social institutions is an effort to improve their roles and functions, with the implication that the functioning of social institutions in accordance with their roles can create more proportionally organized social conditions. The conceptual and juridical basis for the implementation of Customary Law is a supporting factor for its existence, while the existence of social institutions, consisting of several elements such as the police, courts, adat, and community leaders, supports the implementation of Customary Law.

In addition to external factors, the author highlights a more essential internal factor, namely the community's belief in the values contained in Customary Law. This belief influences the community's adherence to customary values, which in turn shapes the legal culture. According to Friedman (1984), legal effectiveness depends on legal culture, while Rahardjo (2008:15) states that legal culture is a force in society rooted in tradition and value systems, which influences the acceptance and implementation of law.

Indigenous people's belief in customary values is based on an important factor, namely the existence of metaphysical consequences if customary rules are violated. These consequences have a magical or spiritual element. The existence and enforceability of customary law in indigenous communities is not only seen from a conceptual and juridical perspective, but is also supported by the community's belief in customary values and belief in the metaphysical consequences of violating customary rules.

CONCLUSION

Humans have an instinct to understand the symptoms of social life and want to know the daily behavioural arrangements. The processes of imitation and education shape behavioural patterns. Social interaction arises from living with others. Customs, including customary law, reflect

the morals and norms recognised in society. Customary law has specificity, including religio magical/religious aspects.

The history of customary law during the Hindu era shows the influence of Hinduism on the islands of Java, Sumatra and Bali. In other areas, influence came from the "Malaio Polynesia" era with customs influenced by natural magic. In the Hindu period, kingdoms grew that were influenced by Hindu and Buddhist laws brought by traders, especially from China.

AUTHORS' CONTRIBUTION

Author 1: Conceptualization; Project administration.
Author 1: Validation; Writing - review and editing.

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