

Revitalizing Customary Law as a Source of Law in Building the Indonesian Legal System

Wahida Ariyanti Nasution¹ Muhammad Luthfi Daulay²

¹Medan Area University

²State Islamic University of North Sumatra

E-mail: wahidahariyantinasution@gmail.com daulayluthfi11@gmail.com

Info Articles	Abstract
Article History Received : 2021-09-04 Revised: 2021-09-13 Published: 2021-09-30	The neglect of customary law as a source of law in Indonesia is partly due to the assumption that customary law is very traditional and cannot accommodate modern developments (globalization and technology). This study examines which areas of customary law are still relevant in addressing the problems faced by the Indonesian nation in the era of globalization, and how urgent customary law is as a basis for national legal development policies. This study uses a descriptive analytical research method with a normative juridical approach, where data and information will be collected both in terms of its assessment and management are carried out interdisciplinary and multidisciplinary and cross-sectoral. The data and information are then analyzed in depth through normative juridical to obtain a picture of customary law. The results of the study indicate that some customary legal institutions, including inheritance law, customary rights, mortgages, rent, and profit sharing, are still relevant and can be a source of inspiration for the formation of national law and become a source of law in the process of legal discovery. In addition, the existence of these institutions can be used as a reference in the formation of national law and play an important role as a source in the process of legal discovery in Indonesia.
Keywords: <i>Revitalization, Customary Law, Sources Of Law.</i>	

I. INTRODUCTION

The existence of customary law as the living law of the Indonesian nation is increasingly marginalized. Customary law, once a living law capable of providing solutions to various social problems in Indonesian society, is increasingly fading. Currently, in empirical reality, various problems sometimes arise for indigenous Indonesian communities when customary law clashes with positive law. For example, when traditional community rights clash with investor interests through state legal means. The Development of the Indonesian Legal System

The tendency to prefer civil law and common law systems, and Indonesian legal politics that lead to the codification and unification of law, has accelerated the disappearance of customary legal institutions. It is undeniable that currently, in relation to economic activities, positive law is transforming towards the Islamic legal system (sharia). It can be said that in business activities such as corporate law, financing law in banking, capital markets and insurance, as well as contract law, a dualistic legal system applies, namely conventional and sharia. Regarding the existence of sharia principles in economic activities, the

author argues that customary legal institutions relating to economic activities share many views with sharia principles, including prioritizing the principle of balance, prohibiting unlimited exploitation, and sustainable development. Thus, currently, in addition to customary law, sharia principles have also become a source for the formation of national law. The increasingly marginalization of customary law as a source of law in Indonesia is partly due to the assumption that customary law is very traditional and cannot accommodate modern developments (globalization and technology). The implications of this Indonesian legal policy are also felt in resolving societal issues that ignore customary law, which is actually more relevant. For example, the rise in horizontal conflicts between indigenous communities in one region should be resolved through the role of customary community resolution institutions. A crucial issue that arises in everyday life is the differing perceptions between land ownership by communities based on customary rights and the public interest, which is a burden and obligation of the state. Another example is the idea that the basis for criminalizing an act should be expanded

to include customary law values.

The historical journey of the application of law in Indonesia records that many legal experts have studied customary law as the law that lives in Indonesian society. Van Vollenhoven, for example, stated that if "one wishes to gain knowledge and information about the laws that exist on this earth, precisely because of the diversity of their forms in the past and present, then the entirety of the laws of the Indies (read: in Indonesia) is a never-ending source for study." This statement acknowledges that legal pluralism in the customary environment is unique, interesting, and a characteristic of Indonesian society. Kusni Sulang (a member of the Dayak Cultural Institute of Palangka Raya) even emphasized that the diversity of customary law is a blessing. Legal pluralism can be a unifying force, a solution, and even create peace in social interactions. To this day, customary legal pluralism in Indonesia, which has grown dynamically following the development of its society while remaining grounded in the characteristics of indigenous communities and the participatory cosmopolitan mindset, has attracted the interest of experts from around the world as an object of research. As a reminder, currently, in relation to the resolution of disputes, both civil and criminal, a method or approach known as the restorative approach is developing, which is similar to the participatory cosmopolitan mindset adopted by indigenous communities. The implementation of restoring balance based on the participatory cosmopolitan mindset is embodied in several ceremonies, taboos, or rites of passage. This fact demonstrates that indigenous concepts and mindsets are not only still relevant but also serve as inspiration for other countries to develop laws to fulfill the community's sense of justice.

Indigenous communities share a common pattern for resolving conflicts within their communities: controlling community life and imposing sanctions if violated, making redress highly effective. Another example is Utrecht University's efforts to promote the use of consensus-based deliberation, modeled after the Malay indigenous community, to resolve problems. In indigenous communities, dispute

resolution through deliberation is a living law recognized in nearly every legal circle (*rechtskring*). This dispute resolution through deliberation always involves the community leader (customary leader), both in preventing legal violations (*preventieve rechtszorg*) and restoring the law (*rechtsherstel*). Conversely, Indonesia enacted Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution as an out-of-court settlement option, clearly inspired by the development of dispute resolution in countries with common law systems. Furthermore, it can be seen that in the context of codification and unification of law in Indonesia, various laws and regulations refer to the common law, civil law and sharia legal systems.

The full acceptance of other legal systems in the formation of legislation in Indonesia, in its implementation, sometimes creates conflicts with the sense of justice of the Indonesian people. For example, the field of economic law, particularly the capital market, has developed many types of anonymous agreements such as collective investment contracts, trustee agreements, brokerage agreements, and derivative transactions. Specifically, in the practice of derivative transactions, the courts still classify derivative transactions in the capital market as profit-making agreements based on Article 1774 of the Civil Code. This erroneous view of derivative transactions is evident in derivative cases that occurred in the banking world between Bank Niaga and Dharmala Agrifood, Bank Niaga and Suryamas Duta Makmur, Mayora Indah and Bankers Trust, Bank Credit Lyonnais Indonesia and PT Nugrasentana. The courts considered that derivative transactions were considered not to fulfill the lawful cause as one of the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code. These cases demonstrate that the acceptance of certain legal systems is sometimes difficult to implement in certain societies.

Some of the ideas contained in the theory of living law include the statement that the process of formulating legislation must absolutely consider the legal values and norms that exist and apply within society. If the enactment of a

law conflicts with these values and legal norms, it will certainly be rejected. In the Indonesian context, the living law of Indonesian society is customary law.

Customary law can also be used as a source of law by judges if the law so requires. Customary law is uncodified law among Indonesians and foreign Easterners (including Chinese and Arabs).

II. RESEARCH METHODS

To facilitate this research, a research method, data collection techniques, and relevant approaches are required. In this case, a descriptive analytical research method with a normative legal approach is used. The data and information collected, both in terms of assessment and management, are conducted in an interdisciplinary, multidisciplinary, and cross-sectoral manner. Secondary data, in the form of primary, secondary, and tertiary legal materials, are then analyzed qualitatively and in depth to obtain a picture of customary law. The data collection technique used is a literature study.

The results of the literature study were then analyzed using qualitative data analysis methods, meaning that conclusions were not based on statistical figures but were concluded based on the relationship between legal principles, legal rules and legal theories with phenomena that occur in society (through legal interpretation).

III. RESULTS AND DISCUSSION

Customary law, besides being classified based on diversity as found in legal environments (*rechtskring*), can also be seen from another perspective, namely from the field of study, namely customary law regarding the structure of citizens (constitutional law), customary law regarding relations between citizens (civil law), and customary law regarding crimes (criminal law).²⁴ Based on this and to study customary law that is still relevant, used as a source for the formation of national law, researchers first determine the following guidelines. *First*, The study was conducted by first examining neutral and non-neutral (sensitive) legal areas. Neutral legal areas are those that are not directly related to the spiritual aspects of humankind, such as property law, contract law, and economic law.

Non-neutral legal areas are those that are closely related to the spiritual aspects of humankind, such as marriage law, inheritance law, and land law.

Second, based on customary law that does not hinder the development of a just society. Third, customary law, which is still considered relevant, is expected to become a source for the formation of unification and codification in certain legal fields. Based on the guidelines above, the researcher conducted a study of constitutional law and customary civil law.

A. Structure of Indigenous Communities (Government)

Customary law concerning the structure of citizens covers all matters concerning the structure and order within customary communities. Customary communities are united by their respective legal associations, which have their own structure, apparatus, and duties. Legal associations have members who feel bound to one another, who are united, and full of solidarity. Legal associations are formed based on genealogical and territorial factors. Genealogical factors bind people according to lineage. Based on lineage, there are legal arrangements arranged based on paternal lineage (patrilineal), maternal lineage (matrilineal), and based on lineage of both (parental). Meanwhile, territorial factors bind members of legal associations based on a shared relationship to the same area. Legal associations based on territorial factors include villages, regions, and village associations. A village association is when a shared residence binds a community of people over its own area. A regional association is when there are several places of residence together in a certain area and always with a certain degree of freedom and each is headed by an official, where these places of residence are parts of an association that has its own boundaries and government, as well as its own territorial rights. A village association is when each village association is complete with its own government and region and is located close together and makes an agreement to maintain common interests by making an agreement to maintain common interests by establishing a government that is cooperative between the governments, where the heads of the villages that are united are not given their own territory.

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The demands of nationalism for the Unitary State of the Republic of Indonesia have forced legal associations based on genealogical factors to be unable to emerge. Another reason is that genealogically orderly social structures are scattered across regions because they lack their own territory. However, this is not the case with social structures based on territorial factors such as Nagari in Minangkabau and Subak in Bali. Their existence remains in line with government developments, and even in the era of regional autonomy, the concept of Nagari governance has inspired the revitalization of village autonomy. The existence of customary legal associations as a system of government in the regions has a strong legal and formal foundation..

The existence of indigenous communities in Indonesia is recognized constitutionally as regulated in the 1945 Constitution, 4th Amendment Article 18B paragraph (2): "The state recognizes and respects indigenous community units 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 as regulated in law." On a practical level, for example, the 1945 Constitution which introduced the Right to Control the State, was based on Ulayat Rights, the Rights of Lordships which are traditionally recognized in customary law. Apart from being protected by the constitution, the existence of indigenous communities is also protected in Law no. 39 of 1999 concerning Human Rights as regulated in Article 6 paragraph (1) and paragraph (2) which determines:

In the context of upholding Human Rights, differences and needs in customary law communities must be taken into account and protected by law, society, and the government... The cultural identity of customary law communities, including rights to customary land, is protected, in line with developments in the times.

Nagari in West Sumatra Province is an administrative division after the sub-district replaced the term village. Nagari is a legal community unit with territorial boundaries that is authorized to regulate and manage the interests of

the local community, based on the origins and customs recognized and respected in the government system of the Unitary State of the Republic of Indonesia. Nagari is led by a Wali Nagari assisted by several Wali Jorong (Nagari Secretaries). The Wali Nagari is elected democratically by the Anak Nagari (Nagari residents). Administratively, Nagari is currently under the sub-district, which is part of the Regency Regional apparatus, while in the City Government structure, Nagari is no longer recognized. Nagari (village) have autonomy, making them analogous to village autonomy. Within a Nagari, a Nagari Customary Council (KAN) is formed, an institution whose members include religious scholars, intellectuals, and traditional elders (ninik mamak). Important decisions are always discussed between the Village Head and the Nagari Customary Council. For legislation, there is a Nagari Consultative Body (BMN). Nagari also have their own assets, such as customary rights. In Solok Regency, Nagari currently have 111 authorities, including Building Permits and Business Permits (SITU). In Indonesia, there are approximately 600,000 Nagari-type legal associations, inhabited by approximately 70 million people, living in remote and forested areas. Their existence is very difficult for local governments to reach. Therefore, for the effectiveness of government services and in efforts to improve the welfare of people living in remote areas, revitalization of Nagari government and similar areas is important and must be realized immediately, because it is very much in line with the concept of regional autonomy.

B. Marriage and Inheritance under Customary Law

Marriage and customary inheritance are non-neutral (sensitive) legal areas. Therefore, in the legal policy of marriage and inheritance, customary law serves as the foundation for the formation of national law. Based on this, researchers will focus on certain areas of customary civil law, namely laws related to family law, including kinship law and marriage. Furthermore, inheritance law, which is closely related to the legal field, cannot be separated from the kinship and marriage systems. The enactment of Law Number 1 of 1974 concerning Marriage,

ended the pluralism of customary marriage law. Thus, it can be said that in the field of marriage law, there has been a unification and codification of marriage law. However, Hazairin stated that the unification of marriage law is a unique unification, because it actually still recognizes the validity of various religious legal systems. The influence of religion on customary law has been recognized since Snouck Hurgronje conducted research on Indonesian customary law.²⁸ This can be seen, among other things, in Article 2 paragraph (1), which stipulates that a marriage is valid if it is carried out according to the laws of each religion. It can be said that the sources for the formation of the Marriage Law are customary law and Islamic law.²⁹ If examined further, the recognition of the principles of customary law is very visible in Law Number 1 of 1974. The relationship between a child and a sibling from the mother's side is equal to that of a sibling from the father's side in the parental or two-sided, or bilateral, relationship structure. The same regulations regarding marriage, the obligation to provide support, respect, and inheritance apply to the child. In the parental structure, a child only receives a Marriage occurs through marriage. In a patrilineal kinship system, a child finds siblings only through the father's line. The mother's family is not considered a child's relatives. The rules that apply to a child regarding marriage taboos, inheritance laws, and the obligation to provide for siblings on the father's side differ from those on the mother's side. Generally, siblings on the father's side are more important to the child than siblings on the mother's side. In a matrilineal kinship system, the child's only sibling is the mother, and those who are also siblings through the same mother are counted along the mother's line.

For indigenous communities, marriage is a matter that concerns the entire community. Marriage is a family matter in areas where parental order exists, and marriage is a matter of family, descent, and clan, especially in indigenous communities that adhere to matrilineal and patrilineal lineages. The structure of parental, matrilineal, and patrilineal relationships forms the basis of rules in marriage, such as prohibitions on marriage with certain individuals. In the kinship order, the prohibition on marriage with

close relatives has a special nature. Related to marriage, indigenous communities recognize elopement, honest marriage, and marriage with other payments. Elopement or *merat* marriage is a marriage carried out because of parental disapproval, or because the groom cannot afford the expensive wedding costs. In the patrilineal order, honest marriage is known, namely marriage with honest payment, or dowry from the groom to release the prospective bride from her family and to be included in the groom's family group. In honest marriages, there is also a type of marriage with service payments, where the dowry payment is postponed, and the groom works for his in-laws, thus paying off his honest debt. Due to the family system in patrilineal societies, daughters currently tend to have the same status and inheritance rights as sons.³⁰

Marriage involves the removal of the man from his family and inclusion in the woman's family. A filial marriage occurs when a wife dies and is replaced by her sister without a dowry, or conversely, when a man marries the widow of his deceased brother. Marriages involving other payments occur in communities with matrilineal or parental kinship systems. These payments differ in nature from dowries. In a purely matrilineal system, the wife remains within her family, and the man also remains within his family, even though he lives in his wife's home, and his children are included in her family. In addition, patrilocal and matrilocal marriages are also recognized in traditional communities. Patrilocal marriage means that the husband and wife live with the man's family, either temporarily or permanently. Matrilocal marriage means that the husband and wife live with the woman's family. Marriage has consequences in the form of marital property, which consists of inheritance, assets obtained from each party's business, and joint property. Inheritance is property that remains the property of the person who received it. Inheritance does not become joint property. In most areas, property acquired during a marriage becomes joint property. However, this does not apply in areas where there are consanguineous families.

Customary inheritance law contains all the legal regulations governing the transfer of ownership of goods and property upon death. In

the parental inheritance system, all property belonging to both parents is inherited equally among all children. Inheritance under this system consists of the deceased's personal property plus half of the joint marital property. The surviving spouse does not receive any inheritance from the deceased. If the deceased has no children, the joint property goes to the surviving siblings, and if there are no siblings, the joint property becomes the inheritance of both families. In a patrilineal system, only sons inherit from their father and mother and are entitled to all property. If the deceased has no sons, their inheritance goes to the paternal grandfather, and the same applies to inheritances. If the grandfather dies, the children of the grandfather (the male siblings) become the heirs. In a matrilineal system, all children are heirs, but usually only the mother's children. If the deceased is a man, the heirs are his sisters and their children. National legal policy regarding inheritance is to submit to the customary law of each family, and to Islamic law in Muslim communities. Based on this, the existence of customary inheritance law is still necessary as the legal basis for the inheritance process. The state recognizes the mechanism for distributing inheritance by communities based on customary inheritance law, and if a dispute arises, the judge will decide the case based on the respective customary laws. So far, the state has not intended to unify inheritance law, because inheritance issues are a sensitive area of law. Efforts to unify inheritance law into a single national inheritance law will result in national disintegration. Therefore, national inheritance law consists of customary inheritance law and Islamic inheritance law, where customary inheritance law consists of the inheritance laws of each customary community.

C. Land Law

Public custom recognizes land rights which include partnership rights which van Vollenhoven calls *beschikkingsrecht*, position profit rights, profit rights, use rights, lien rights and rental rights. Partnership rights to land are customary rights which allow the partnership and its members to profit from the land and everything that grows and lives on that land (cultivating, building buildings, herding livestock, gathering food, hunting and fishing).

The right to withdraw profits from partnership land is only used to meet the family's personal needs (not to be commercialized). If the partnership's rights are cultivated or worked on, a permanent relationship arises between the members of the partnership who work on the land.

The right to profit from office is the right of a village official to the land of office where he has the right to withdraw the proceeds from that land as long as he holds office. The right holder is not permitted to sell or mortgage this land. When the term of office ends, the land returns to partnership land.

The right to draw produce is a right obtained with the approval of the leaders of the association for members who cultivate or work the land for one or more harvests. Meanwhile, what is meant by the right to use is the right to cultivate the land and collect the produce obtained from agricultural land owned by others.

In relation to land transactions, customary law distinguishes between land transactions and transactions related to land. In land transactions, only one type of legal act is recognized: sale, which is the transfer of ownership rights to land, either permanently or loose sale, the transfer of land with a payment of a sum of money paid in cash and the person who transfers the land rights can reclaim the land if he repays the amount of money he received or sells the pawn. The pawn holder has the right to draw all benefits from the land, but may not rent and sell loose and annual sale, which is a form of transfer of land and the owner for a certain period of time by paying a sum of cash to another person and after a certain period of time the land will return to the owner. Customary law, in addition to recognizing land transactions whose object is land, also recognizes transactions related to land. In these transactions, land is not the object of the agreement, but it cannot be separated from the agreement. In customary communities, for example, there are *maro* or split pinang and *mertelu* agreements. Split pinang agreements are agreements in which the land owner allows another person to work, plant, and harvest the land with the aim of dividing the results according to a previously agreed ratio. Split-betel nut agreements usually originate from the landowner, who lacks

sufficient manpower to cultivate the land themselves. In split-betel nut agreements, most parties share the land in half, with each party receiving half of the harvest. If the land is fertile and easy to cultivate, the landowner provides tools and seeds. The landowner receives two-thirds, while the cultivator receives one-third. For less fertile and difficult-to-cultivate land, the landowner receives one-third and the cultivator two-thirds.

Another type of agreement relating to land is a lease agreement, which essentially requires the landowner to allow another person to cultivate, plant, and harvest the land in exchange for a specific payment. Furthermore, customary law also recognizes land security agreements, which provide security in the event of a debt, whereby if the debt is not paid, the garden or agricultural produce is handed over to the lender as repayment. It can be concluded that land law, specifically land transactions and land-related transactions applicable to indigenous communities, is relevant in the formation of national law because it is considered to fulfill the nation's sense of justice and philosophy. This is in line with Article 5 of the UUPA, which states that the agrarian law applicable to land, water, and airspace is customary law. The customary law in question must meet the following requirements: First, it must not conflict with national and state interests, which are based on national unity. Second, it must not conflict with the regulations contained in the UUPA. Third, it must not conflict with other laws and regulations.

Based on Article 5 of the UUPA, customary law occupies a crucial position within the National Agrarian Legal System. The customary law that serves as the basis for the enactment of National Agrarian Law is customary law that has been purged of foreign, individualistic-liberal, and feudal elements inconsistent with Pancasila. This customary law then becomes the primary source in the development of national land law, while also serving as a complementary source for national land law. In line with this thinking, it is stated that the UUPA is more of a discussion of land law based on a foundation of land legal regulations aligned with Pancasila and the structure and objectives of the Unitary State of Indonesia. According to Soepomo, customary

law will continue to serve as a reference for the development of Indonesian law, both to provide material for the formation of legal codification and to be directly applied in areas not yet possible to codify. Even in legal areas that can be codified, customary law, as unwritten customary law, will remain a new source of law for matters not or not yet stipulated in law. This emphasizes the position of customary law as the basis of the National Legal System.

IV. CONCLUSION AND SUGGESTIONS

A. Conclusion

Several conclusions can be drawn from the issues discussed in this article. First, customary legal institutions currently constitute alternative legal institutions, essential for serving as a basis or source for the formation of national law. Second, areas of customary law that remain relevant in addressing current issues include both neutral legal areas such as family and inheritance law, land rights, the right to profit from office, the right to withdraw usufruct from use rights, and land-related transactions such as lease rights, split-pinang (maro) agreements, rent, and guarantees in the transfer of land-related rights, as well as non-neutral legal areas such as the Nagari institution.

B. Suggestion

There are two possible solutions to the problems discussed in this article. First, the government should enforce customary law on a par with national law. Second, the government should make customary law a source of law in the formation of national law.

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