International Journal of Multicultural and Multireligious Understanding

http://ijmmu.com
editor@ijmmu.com
ISSN 2364-5369
Volume 9, Issue 1
January, 2022
Pages: 127-131

Positive Law and a Sense of Justice in the Eyes of Indigenous Peoples

Bernadus Okoka; Moh. Saleh

Master of Law, Universitas Narotama Surabaya, Indonesia

http://dx.doi.org/10.18415/ijmmu.v9i1.3371

Abstract

The type of research used in this research is normative legal research. The state of law, Pancasila is a form of all legal systems, namely the merging of all good elements from all existing legal systems. Therefore, customary law actually has to get a proper place in the legal system within the Indonesian legal state, because customary law makes a rule good or bad and is also an original law of Indonesian people although it is not universally applicable and is the work of the Indonesian nation itself. Furthermore, customary law is more in line with the character, personality, and culture of Indonesia compared to other laws, both rechstaat and the rule of law.

Keywords: *Positive Law; Justice; Culture*

Introduction

The purpose of establishing the State of Indonesia as a state of law in the fourth paragraph of the Preamble to the 1945 Constitution is to protect the entire nation and the entire homeland of Indonesia, promote public welfare, educate the nation's life and participate in carrying out world order based on independence, eternal peace and social justice. Another thing is the Preamble of the 1945 Constitution in the fourth paragraph containing 4 (four) main points, which are the elaboration of the values of Pancasila which are just, reflecting the characteristics and characteristics of the indigenous people and the customary law of the Indonesian people.(Michael et al., 2021)

As an archipelagic country with various ethnic groups and cultures, Indonesia has a wealth of customs. This of course also has an impact on customary law that grows and develops in each region. The existence of Indonesian customary law which in Dutch is called *Adatrecht* was first discovered by Snouck Hurgronje, which was later used by Mr. C. VanVollenhoven in 1928. He stated that Indonesian law and public morality were customary law.(Djamali, 2011) Mochtar Kusumaatmadja stated that the function of legal development as a means of community renewal is not only a tool to maintain order in society but in a developing society, the law must be able to assist the process of community change. The problem lies in how far the formation of new laws and regulations, the anticipated impact on society as a whole.(Kusumaatmadja, 1976)

The legal regulations that apply in a social group are not separated and not spread freely but in a single unit, each of which applies independently. Law as a legal system (Murphy & Burton, 2020) has its

own systematic form which is based on thought and everyday life. One of the existing legal systems in Indonesia and identified in the eyes of the world is the customary law system. This system is based on unwritten legal regulations that grow and develop and are maintained with public legal awareness. A legal system is a set of specific rules and procedures that are relatively consistently applied by formal authorities. Behind that in terms of legal figures, every legal system has criteria, namely: *first*, from a technical point of view: the legal system has a vocabulary (legal language) to express its legal concepts, hierarchical rules of law and legal sources, juridical techniques to form and interpret or interpret the legal concepts, the rule of law and interpret or interpret the law, and *secondly*, from a cultural perspective: have philosophy, political and economic principles to achieve the idealized society. The two criteria are complementary and even comprehensive.(Anisimov & Truntsevskiy, 2021)

Indonesia's development policy paradigm in the reform era introduced and adopted the importance of recognizing and protecting national law for indigenous peoples and their local wisdom.(Kusumaatmadja, 2002) In this case, Indonesia's development is based on the interests, knowledge and ways of local communities based on local knowledge and wisdom in managing the environment and society.

Based on the description above, there are interesting legal issues to study how positive national law in the constitution can regulate, protect, accommodate and recognize the existence of customary law itself. And also what kind of interaction and position is between positive national law and customary law, so that between the two can run harmoniously in accordance with the social context, legal needs and a real sense of justice for the culture of indigenous peoples.

Research Methods

The type of research used in this research is normative legal research.(Refina Mirza Devianti, 2021)

Discussion

Indonesian law as a whole still uses the law originating from its colonial state, namely the Netherlands. Almost all laws that run in the Netherlands are also applied in Indonesia. In other words, Indonesian law is a law that still refers to the law made by the Dutch. The Continental European legal system is the legal system applied in the Netherlands. Because Indonesia is a former Dutch colony, the Continental European system has also been implemented in Indonesia. The Continental European Legal System places greater emphasis on written law, and legislation plays an important role in this legal system in Indonesia itself, the legal basis is the constitution.(Rokilah, 2020)

Although historically Indonesia was a former Dutch colony, the Dutch legal system *(rechtstaat)* (Likadja, 2015) automatically influenced Indonesian law, so the explanation of the 1945 Constitution before the amendment attached the word *rechstaat*. This word disappeared after the amendment to the 1945 Constitution and the statement of the rule of law is no longer in the explanation, but has been formulated as a norm. According to Mahfud MD (MD, 2010) this omission contains a *prismatic* principle about the rule of law, namely the incorporation of good elements from various different concepts into one unified concept whose implementation is adjusted to the demands of development. This concept prioritizes justice, written provisions that hinder justice can be abandoned. So, Indonesia is a legal state that accepts the principle of legal certainty for *rechstaat* as well as the principle of justice in the *rule of law* and the principles of customary law.

It cannot be denied that the actual role of customary law is quite significant in solving problems in society. Due to its communal and *religious-magical* nature, (Sudiyat, 2000) customary law prioritizes balance in society, both the balance between rights and obligations between individuals and the balance

between humans and nature. Because of these characteristics, customary law will easily resolve disputes in the community, because people's obedience to something religious will be stronger than obedience to other things.

After amendments to the constitution, customary law is recognized as stated in the 1945 Constitution Article 18B paragraph (2) which states: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and principles. the unitary state of the Republic of Indonesia, which is regulated by law". Then a number of laws, especially those related to natural resources, contain recognition of the existence of indigenous peoples' rights. As if a regulation is incomplete if it doesn't contain an acknowledgment of the existence and rights of indigenous peoples.(Binsneyder & Rosando, 2020) This is greatly influenced by the advocacy carried out by indigenous peoples and their supporters who since their emergence have indeed wanted to reorganize the relationship between indigenous peoples and the positive law of the state.

Starting from the social structure that forms the social order as such, then the problem arises of how to place the implementation of positive law on the one hand, with the urge to maintain and protect the existence of indigenous peoples who have lived and become community habits, where the Indonesian customary law system is different from the legal system. Continental Europe which has historical and philosophical roots in common with the concept of the rule of law and at the same time as a legal system that is formally applied by the state.

Law as a system must be understood integrally. (Romashev, 2021) That is, the system has regular elements or components that are interrelated with one or several principles that support the formation of the law, so that functionally it provides a unified understanding. Customary law is thus a system, because it has a basic conception, the existence of elements, coherent, functional parts that are interrelated and consistent are completeness of the whole that is strung together so as to provide an understanding. The functional systematic arrangement of customary law always moves in relation to the existing reality. Customary law will experience changes and shifts if the object of customary law changes. Likewise, if the object is fixed, then customary law will not experience changes and shifts. Customary law is flexible and dynamic in facing various changes.

Constitutional Court Decision No. 35/PUU-X/2012 (MK Decision 35) and as also being discussed in the National Legislation Body, namely the 2020 Indigenous Law Community Bill, emphasizes the position of indigenous peoples as subjects of rights. The Constitutional Court's decision 35 formulates two things in the context of the position of indigenous peoples as subjects of rights, namely; *First*, the Constitutional Court mentions indigenous peoples as legal subjects with rights and obligations that have the same legal status as other legal subjects; such as individuals and legal entities. *Second*, indigenous peoples develop *evolutionarily*. The Constitutional Court seems to refer to the opinion of classical sociologists; Emile Durkheim about the evolution of the development of society, namely the development of society from a mechanical society to an organization.(Badu, n.d.)

One of the peculiarities of customary law (Manullang, 2021) it is unwritten nature, this is because customary law exists and lives in the community of its users, not codified law like the law on *rechstaat* codified by the authorities, *rule of law* set by judges and customary law living in the community in society. This peculiarity makes customary law difficult to apply in the life of the nation and state, especially in terms of governance. However, customary law is still considered as a legal system, because the definition of law itself is very broad, not only limited to written law, but also unwritten law such as customary law as well as the definition of law itself. And also with the state's acknowledgment that decision-making and also in making regulations without neglecting the two elements that apply and live in society, namely customary law, considering the heterogeneous Indonesian society.(Widia & Budiartha, 2021).

Conclusion

The state of law, Pancasila is a form of all legal systems, namely the merging of all good elements from all existing legal systems. Therefore, customary law actually has to get a proper place in the legal system within the Indonesian legal state, because customary law makes a rule good or bad and is also an original law of Indonesian people although it is not universally applicable and is the work of the Indonesian nation itself. Furthermore, customary law is more in line with the character, personality, and culture of Indonesia compared to other laws, both *rechstaat* and the *rule of law*.

If there is a question about the existence of customary law because of its unwritten nature, because some argue that the law is written and one of the characteristics of the rule of law is the rule of law, Indonesia should look at the essence of the purpose of the law itself, namely the law aims to create justice and public order. Customary law which focuses on harmony, harmony, balance, and community harmony cannot be denied that that is justice and order itself, because there will be no harmony and balance in the community, if justice and order are not achieved. Even further, the balance and harmony desired by customary law also includes human relations and their surroundings, not limited to harmony among human beings as applied to the laws that underlie them in *individualistic philosophies*.

References

Anisimov, V. F., & Truntsevskiy, Y. V. (2021). Intrusion of international law into the national legal system. *Law Enforcement Review*, *5*(1). https://doi.org/10.52468/2542-1514.2021.5(1).40-57

Badu, L. W. (n.d.). Perlindungan Hak-Hak Konstitusional Masyarakat Adat dan dalam Penerapan Sanksi Adat. *Jurnal Konstitusi*, *18*(1).

Binsneyder, M., & Rosando, A. F. (2020). AKIBAT HUKUM PENGALIHAN HAK TANGGUNGAN TANPA SEPENGETAHUAN KREDITUR DALAM TINJAUAN ASAS KESEIMBANGAN DAN ITIKAD BAIK DALAM PUTUSAN PENGADILAN. *Jurnal Hukum Bisnis Bonum Commune*. https://doi.org/10.30996/jhbbc.v3i1.3052

Djamali, R. A. (2011). *Pengantar Hukum Indonesia Edisi Revisi*. PT. Raja Grafindo Persada.

Kusumaatmadja, M. (1976). *Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional*. Lembaga Penelitian Hukum dan Kriminologi Fakultas Hukum Universitas Padjadjaran.

Kusumaatmadja, M. (2002). Konsep-Konsep Hukum Dalam Pembangunan - Fungsi dan Perkembangan Hukum Dalam Pembangunan Nasional. *Teori Hukum Pembangunan*.

Likadja, J. A. C. (2015). Memaknai "Hukum Negara (Law Through State)" dalam Bingkai "Negara Hukum (Rechtstaat)." *Hasanuddin Law Review*.

Manullang, S. O. (2021). Understanding the sociology of customary law in the reformation era: Complexity and diversity of society in Indonesia. *Linguistics and Culture Review*, *5*. https://doi.org/10.37028/lingcure.v5nS3.1352

MD, M. M. (2010). *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi*. Raja Grafindo Persada.

Michael, T., Siregar, E., Siregar, R. G., Yasa, I. W. L., & Kusuma, I. M. W. (2021). The Principle of Synderesis in Interpreting Legislation. *International Journal of Multicultural and Multireligious Understanding*, *8*(7), 37–40. https://doi.org/10.18415/IJMMU.V8I7.2877

Murphy, R., & Burton, F. (2020). Introduction to 'Law' and the 'Legal System.' In *English Legal System*. https://doi.org/10.4324/9781315768526-1

Refina Mirza Devianti, T. M. (2021). Accountability of mosque administrators against violation of Covid-19 health protocols in the mosque environment. *International Journal of Research in Business and Social Science (2147-4478)*, *10*(2), 284–289.

Rokilah, R. (2020). Dinamika Negara Hukum Indonesia: Antara Rechtsstaat dan Rule Of Law. *Nurani Hukum*, *2*(1). https://doi.org/10.51825/nhk.v2i1.8167

Romashev, Y. (2021). General Principles of Law in the System of International Law. *Law. Journal of the Higher School of Economics*, *3*. https://doi.org/10.17323/2072-8166.2021.3.148.174

Sudiyat, I. (2000). *Asas-asas Hukum Adat: Bekal Pengantar*. Liberty.

Widia, I. K., & Budiartha, I. N. P. (2021). Reducing State Expenses To Retain Convicts In Prison Based On Customary Law. *Journal of Legal, Ethical and Regulatory Issues*, *24*(Special Issue 1).

Copyrights