CUSTOMARY LAW AND INDIGENOUS PEOPLES IN THE NATIONAL LEGAL SYSTEM

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Abstract
Customary law, as a dynamic legal system within society, is highly flexible because it is not constrained by formal procedures and can adapt to societal changes and needs. However, its weakness lies in the aspect of legal certainty due to its unwritten nature and the uncertainty regarding its commencement and cessation. In contrast, statutory regulations and agreements are formalized by authorized bodies, making the hierarchical position of customary law within statutory regulations unclear. Despite this, many countries, including Indonesia and India, recognize and respect customary law through constitutional or statutory acknowledgements, including the rights of Indigenous communities. This study focuses on the status and role of customary law and indigenous peoples within the national legal systems of Indonesia and India, as well as its function in managing societal life. The objectives are to describe and analyze the existence of customary law and indigenous peoples in both countries' legal frameworks and to examine the role of customary law in addressing societal and legal issues. The study employs a normative legal approach, utilizing statutory and conceptual analyses. The anticipated contribution of this study is twofold: theoretically, it aims to advance legal science, particularly in the development of Customary law concerning national legal systems; and practically, it seeks to provide insights for legal practitioners, judges, government officials, and communities in resolving legal matters, both within and outside the court system. Additionally, the study aims to offer valuable legal source materials for law and regulation formation based on living law. The study is expected to serve as a reference, especially for research on the position and role of Customary law in national law contexts.

Abstrak
Hukum adat, sebagai sistem hukum yang dinamis dalam masyarakat, sangat fleksibel karena tidak terikat oleh prosedur formal dan dapat beradaptasi dengan perubahan dan kebutuhan sosial. Namun, kelemahannya terletak pada aspek kepastian hukum akibat sifatnya yang tidak tertulis serta ketidakpastian mengenai kapan ia mulai dan berhenti berlaku. Sebaliknya, peraturan perundang-undangan dan kesepakatan formal diakui oleh badan-badan yang berwenang, sehingga posisi hierarkis hukum adat dalam peraturan perundang-undangan menjadi tidak jelas. Meskipun demikian, banyak negara, termasuk Indonesia dan India, mengakui dan menghormati hukum adat melalui pengakuan

konstitusional atau statutori, termasuk hak-hak komunitas adat. Studi ini berfokus pada status dan peran hukum adat serta masyarakat adat dalam sistem hukum nasional Indonesia dan India, serta fungsinya dalam mengelola kehidupan sosial. Tujuannya adalah untuk menggambarkan dan menganalisis keberadaan hukum adat dan masyarakat adat dalam kerangka hukum kedua negara, serta mengkaji peran hukum adat dalam mengatasi masalah sosial dan hukum. Penelitian ini menggunakan pendekatan hukum normatif, dengan analisis statutori dan konseptual. Kontribusi yang diharapkan dari studi ini bersifat ganda: secara teoretis, bertujuan untuk mengembangkan ilmu hukum, khususnya dalam pengembangan hukum adat terkait sistem hukum nasional; dan secara praktis, memberikan wawasan bagi praktisi hukum, hakim, pejabat pemerintah, dan masyarakat dalam menyelesaikan masalah hukum, baik di dalam maupun di luar sistem pengadilan. Selain itu, studi ini bertujuan untuk menyediakan bahan sumber hukum yang berharga untuk pembentukan hukum dan regulasi berdasarkan hukum yang hidup. Penelitian ini diharapkan dapat menjadi referensi, khususnya untuk penelitian mengenai posisi dan peran hukum adat dalam konteks hukum nasional.

1. Introduction

In most countries, other than using statutory regulations as a legal basis in running state government and regulating people's lives (Bekbaev, 2023), also maintain and provide space for the application of unwritten law (customary law), especially to organize and solve problems that arise in a social relationship in the community (Qerimi et al., 2022).

In Indonesia, the basis of living in society as an Indonesian citizen is clearly stated through the Preamble of the 1945 Constitution of the Republic of Indonesia, specifically in paragraph IV, which is regulated or compiled in a State Constitution. In addition, Article 1 paragraph (3) mentioned that "Indonesia is a state based on law", of course, this provision emphasizes that anyone carrying out an action or deed in Indonesia must be based on legal provisions. The basic foundation of these written laws is strengthened by the enactment of Law of Republic Indonesia Number 12 of 2011 About the Formation of Laws and Regulations, as amended several times and most recently amended by Law Number 13 of 2022, Article 7 stipulates that the type and hierarchy of statutory regulations sequentially consisting of 1945 Constitution of Republic of Indonesia, Decrees of the People's Consultative Assembly, Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, Provincial Regulations, and Regency/ City Regional Regulations.

Indonesia also recognizes, respects, and guarantees the existence of customary law community units, of course, with the customary law they produce, along with the traditional rights attached to them, as long as they are still alive and following the development of society and the principles of the State of the Republic of Indonesia, as stated in Article 18B paragraph (2) of the 1945 Constitution. The averment of the recognition of customary law community units and customary law being applied in the society shows that the state does not ignore and does not underestimate the existence of customary law, even the law produced by society, and this recognition is directly given through the state constitution.

Besides Indonesia, administrating their state government and regulating the lives of their people, India is also recognizes and respects the existence of customary law (Sharma & Kumar, 2022) as an unwritten law that born and enforced amid Indian society, apart from being based on the Indian Constitution as a written basic law. This is stated in Article 13 paragraph (3), Article 244, Article 244-A, and the Fifth and Sixth Schedules (The Law Library of Congress, 2013).

There is indeed a stigma regarding the distinction between statutory regulations as a form of written legal product with its principle of legal certainty (Irawan, 2024) but not flexible, compared with customary law as a form of unwritten law with its principle of flexibility but does not guarantee legal certainty (Diala, 2017). Meanwhile, the fact is that two forms of law: statutory regulation and customary law resemble one another. This is proved by the positive law which is embodied through statutory regulations that originated from customary law (Osman, 2023) (one of the aspects originating the formation of statutory regulation is indeed customary law) so that the application of positive law can achieve its effectiveness, while the customary law itself is accepted as part of national law that is recognized and respected its existences (Wiguna & Yuspin, 2022).

Indeed, between statutory regulations and customary laws, there are different binding powers (Rautenbach, 2019), because the process of their formation is different, and the method of enforcement is also different. Meanwhile, in reality, laws and regulations that are not rooted in social life will experience ineffectiveness (Trofimov, 2024) and will further result in the incompetence of the law and the law enforcers themselves (Yulianto Syahyu and Diana Fitriana, 2021).

However, while realizing the importance of customary law existence to the national legal system, we cannot deny the fact that indigenous peoples still have not received optimal protection and guarantees (Turner et al., 2022), especially in matters relating to the implementation of management rights over land, natural resources obtained from generation to generation through customary law mechanisms of its local government (Inter-American Commission on Human Rights, 2010), although normatively, as mentioned above, customary law gains recognition and respect through the constitution.

Customary law is a law that originates from the habits that develop in society, and then the process is accepted as rules and norms agreed upon by the community so that the level of effectiveness can be guaranteed (Agus Lanini Et.al, 2021) because these rules and norms are consciously and without coercion accepted by the public. However, in some cases, the formation of positive law, which is authoritatively carried out by authorized institutions, sometimes does not pay attention to legal realities that develop in society. Based on the description above, this normative study is directed in answering the following issues: How is customary law positioned in the formation of the national legal system and What is the contribution and essence of customary law and customary law community or indigenous peoples in the development of national law in the future.

2. Methods

This research method employs a normative legal research approach, focusing on the analysis of legal norms found in legislation, official documents, and literature related to customary law

and indigenous peoples in Indonesia and India. By utilizing written legal sources, this study aims to explore the legal principles that govern the relationship between customary law and national law, as well as to assess the extent to which the recognition and protection of indigenous peoples' rights are reflected in the existing legal system. This approach enables the researcher to understand the legal foundations underlying the implementation of customary law and to provide recommendations for improving and strengthening the legal position of indigenous communities within a broader legal context.

3. Discussion

3.1 The existence and position of customary law in the formation of the national legal system

It is understood that written law in the form of statutory regulations, which are expected to be able to regulate all problems in the life of the state and society, is experiencing limitations. This is understandable because there is an imbalance between the development of society and all of its activities, with the provisions formulated in the form of laws and regulations.

As is known, written law has a "formal" and "rigid" nature. The "formal" nature of written law is shown through the authority that may form and determine regulations (C. Ford, 2017). It is known that not all state institutions or government agencies in Indonesia have the authority to form laws and regulations. Only certain state institutions or government agencies have the authority to make regulations. Law Number 12 of 2011 concerning the Formation of Legislation, as amended several times and lastly amended by Law Number 13 of 2022, stipulates that institutions or officials who have authority in forming statutory regulations include the People's Consultative Assembly, People's Representative Council, President, Provincial Regional People's Representative Council, Governor, Regency/City Regional People's Representative Council, and Regent/Mayor. Apart from these institutions or officials, they do not have the authority to form statutory regulations unless an attribution or delegation of authority is given by an institution or official who has the authority to form statutory regulations. Meanwhile, the "rigid" nature of written law is shown through the procedures that must be followed by the guidelines for making regulations that have been determined. By doing so, the formation of these regulations will fulfil formal requirements, not to mention that the material requirements must already considered.

The usual procedure for forming statutory regulations includes the stages of planning, drafting, discussing, stipulating, and enacting. Of course, with such a long stage, the formation of legislation requires a long time. The nature of this kind of written law formation is sometimes not agile enough to keep up with the developments and the needs of society. This is different from the nature of customary law, which is based on unwritten law and is known for its high flexibility and informality because it does not require formal institutions as in the formation of statutory regulations. Everything related to these unwritten laws is born, grows, and develops in society. Therefore, the existence of written law (legislation) and unwritten law (customary law) complement each other.

A figure in the sociological jurisprudence school, Eugen Ehrlich, stated that written law that applies in society will apply effectively if it is in line with the law that lives in society (Eugene,

Ehrlich, 2001). Furthermore, it is said that good positive law is the law that is in accordance with "living law" as an "inner order" from within society which reflects the values that grow, live, and develop in the life of the society itself. Living law can be a good source of law in the formation of positive law because public compliance with the law is parallel with the awareness of the community itself. A community or society that has legal awareness is one of the objectives of enacting the law in society because there is non-coercive compliance from authorized institutions to enforce the law. Therefore, it is important for institutions or officials who have the authority to form regulations to pay attention to the values and habits that live in society.

3.2 Customary Law in the National Legal System

Indonesia and India recognize the customary law system in their social life. At least this is recognized in the constitution of each country. In Indonesia, even though one national legal system has been implemented, the legal sources to form that legal system can come from various legal systems other than the one that has been implemented.

The following are the other sources of information on the legal system in Indonesia. First, provisions originating from Western law inherited from the Dutch colonial government, which focused more on the civil law system or adherents of the Continental European legal system by making written law in the form of statutory regulations as the main source in administering state government, regulating people's lives, especially those related to public law, and international relations, even matters concerning relations between individuals.

Second, legal norms originating from rules that are born, developed, and applied in society, known as living laws, namely provisions that apply in society, although not written, are followed and obeyed by members of society. In legal studies, provisions of this kind are categorized as adhering to the Anglo-Saxon legal system or emphasizing the common law system in solving problems or dealing with problems in society. Apart from that, Indonesia also absorbs legal sources originating from religious law or provisions that originate from religious values that are being taught, especially the Islamic legal system and the canonical legal system, so relatively many laws and regulations in Indonesia are sourced from this religious law, especially legal products produced after entering the 21st century, including regulations regarding Islamic banking (*shari'ah* banking), Islamic state securities (*shari'ah* state securities), regarding zakat and others.

Particularly regarding customary law in Indonesia, its existence is not only applied in everyday life, but even in the Judicial Powers Act, judges at every level of court in all judicial bodies are obliged to explore, follow, and understand the values of law that lived in society as a living law.

An expert on Indonesian customary law said that customary law must be a basic source for the formation of national law because it contains values and culture that are lived and embraced by the people so that the laws and regulations that are produced later will be in accordance with the soul and the reality of the life of the society (Moh. Koesnoe, 2020).

Customary law in the Indonesian national legal system has the following position:

a. Its existence is recognized in the state constitution, it is explicitly and clearly stated in Article 18B paragraph (2);

b. In the field of justice, judges are required to explore, follow, and understand the law and justice that live in society;
c. In the field of constitutional administration, there are also unwritten basic laws that fall into the category of constitutional conventions that also apply;
d. Even though it is not written down, the principles and substance of customary laws are accommodated, and in fact, some laws in Indonesia state customary law as a source of law, as in the application of the Basic Agrarian Law, Water Resources Law, Forestry Law, and others.

The position of indigenous peoples and customary law -which is guaranteed normatively- in real life is indeed not sociologically aligned in society (J. D. Ford et al., 2020). This is due to the tendency of modern society to put more emphasis on aspects of legal certainty by using statutory regulations as written legal products. This also cannot be separated from the development of the economy and the industrial world, which is its legal character is more inclined towards the Continental European legal system. The Continental European legal system itself applies the civil law system in their written legal products. In addition, the condition of customary law in Indonesia also does not benefit from the assumption or the stigma that customary law is "traditional" (not modern) or old-fashioned and thick of agrarian characteristics, which are completely different from the industrial world characteristics that connote the era of globalization and technological advances. Such an assumption can lead to the neglect of customary law in solving problems in Indonesian society. Whereas social problems that are horizontal should be resolved by the community itself through local wisdom (Abas et al., 2022) by utilizing the laws that live in the community (Mhd Ade Putra Ritonga, et.al, 2022).

In the Indian Constitution, the recognition and protection of indigenous peoples and customary law in India is somewhat similar to the recognition of the existence and protection of indigenous peoples and customary law in Indonesia, but the scope of it is relatively broader. This is reflected in the provisions of Article 13 paragraph (3), Article 244, Article 244-A, and Article 371-A, which show that customs applied in society are valued and respected as much as the law established by an authorized institution. Likewise, the recognition and protection of tribes registered (Wahi & Bhatia, 2021) in the state are also regulated in the Indian Constitution. This is somewhat similar to what happens in Indonesia, where certain communities or regions are given special autonomy in the form of special rights. Likewise, in India, certain tribal communities that are registered and mentioned in the Indian Constitution are also given special autonomy to make arrangements in their households as long as it is in accordance with the authority granted by the Constitution (The Law Library of Congress, 2013).

3.3 The Obstacles of Customary Law

There will be some weaknesses if customary criminal law is included in the national legal system that adheres to the civil law system, which includes:

a. It may not be in line with the principle of legality, where the main principle in criminal procedure law is that all actions will be categorized as criminal acts if the action previously

has been written and strictly regulated in statutory regulations. Meanwhile, in customary law, the characteristic is precisely the unwritten law that grows and develops in society.

b. In customary criminal law, there are no criminal elements (*bestandelen*) or they do not have any criminal elements. This is different from the national criminal law, which always emphasizes the existence of criminal elements to determine whether an act is categorized as a criminal act or not.
c. The next weakness is that there is room for the possibility of regulations that are discriminatory and not in favour of vulnerable groups in society. This can happen, because the birth, development, and termination of customary criminal law cannot be predicted, planned, and debated beforehand.
d. One of the characteristics attached to unwritten customary law is indeed rather difficult to measure by the principle of legal certainty, meanwhile, criminal law requires legal certainty through the principle of legality. Being so, it is feared that if customary criminal law is applied, someone who does not commit a crime will be criminalized.
e. In addition, according to its essence, customary law is a law that is born, grows, and develops amid society. It has high elasticity because it's not bound by formal procedures in the formation of statutory regulations, so if customary law is forced to become part of the European continental legal system or civil law system, then it will actually reduce or even eliminate the essence of customary law itself.

Based on that reasoning, the customary law live and grow with its legal system, side by side with written law, which is the essence of the civil law system, or a legal system based on statutory regulations established by the state government.

3.4 Contribution and Essence of Customary Law and Indigenous Peoples in the Development of National Law in the Future

In the Indonesian constitution, customary law community units and their traditional rights are recognized and guaranteed in the constitution as long as they are still alive and align with the development of society and the principles of the State of the Republic Indonesia, as stipulated in Article 18B of the 1945 Constitution of the Republic of Indonesia Amendment Second Year 2000. Guarantees for the protection and respect for the rights of customary law communities (indigenous peoples) in Indonesia are also regulated in Law Number 39 of 1999 about Human Rights, in Article 6 paragraph (1), which states that in the context of upholding human rights, differences and needs within the legal community Customs must be considered and protected by law, society and the government. In paragraph (2) it is stated that the cultural identity of customary law communities (indigenous peoples), including rights to customary land, is protected, in line with current developments. Thus, it is clear that the existence of customary law communities (indigenous peoples) in Indonesia is guaranteed and protected by the state.

Indigenous peoples are defined as a unit between a group of people with a certain geographic area united by hereditary culture, nature (which is the source of their livelihood), and government organizational rules that are based on local community customs and framed by customary law that was born, grew and developed from the community itself.

Meanwhile, in Article 1 number 33 of Law Number 27 of 2007 concerning Management of Coastal Zone and Small Islands, as amended several times and most recently amended by Law Number 6 of 2023 concerning Stipulation of Government Regulations in lieu of Law Number 2 of 2022 concerning Job Creation Act (Omnibus Law) to become a Law, in particular Chapter III, Part Three, Paragraph 2, Article 18 formulated the notion of "Customary law Community", namely a group of people who have been living in certain geographic areas for generations in the Unitary State of the Republic of Indonesia because of ties on ancestral origins; a strong relationship with land, territory, natural resources; having customary governance institutions; and having the customary law order in their customary territories that accordance with statutory provisions.

Based on Law Number 48 of 2009 on Judicial Power in Article 5 Paragraph (1), it is determined that "judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society". These provisions show that in Indonesia, apart from adhering to a civil law system based on statutory regulations in the administration of state government, it also gives a place for the common law system to take part in the field of justice.

Another accentuation of unwritten law, especially in the field of justice, is also emphasized in Article 50, paragraph (1) of the Judicial Powers Act. It says, "A court decision must include reasons and grounds for the decision, but also contains certain articles of the relevant laws and regulations or source of unwritten law which is used as the basis for adjudicating."

The Indian Constitution's recognition of customary law is also highly accentuated, as stated in Article 13 paragraph (3), which states that "In this article, unless the context otherwise requires law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas", means even Custom is recognized as the main source in the Indian Legal System (The Law Library of Congress, 2013).

The fact that not all custom is used as a guide, especially for courts in India, except for those that meet three criteria, namely that it is categorized as ancient, or the origins are eternal; it continues to be used and still live in society; and it has definite properties that do not change (The Law Library of Congress, 2013).

In addition, the Indian Constitution also provides protection for indigenous peoples and their customs, which are guaranteed through Articles 244, Articles 244-A, and Articles 371-A. Customs in India play an important role, especially in Hindu law, and are accepted as part of the Indian legal system, especially matters relating to personal status and inheritance, which are regulated in the marriage law.

Based on the constitutions arrangements of the two countries above (Indonesia and India), it can be illustrated that these two countries provide almost the same protection and recognition for the customary law communities and their customs, as well as their contributions to the formation of their respective national laws.

3.5 The Role of Law in National Development, from a Sociological Jurisprudence Perspective

The theory of Sociological Jurisprudence in India plays an important role in carrying out economic and social engineering, especially after 1947. Law is used as a tool to embody social, economic, and political justice. Based on this, law formation planning is intended to advance the general welfare by protecting and securing the social order. This is realized by mandating all government institutions to pay attention to justice, as well as social, economic, and political issues. Therefore, the repressive legal approach will be abandoned and replaced with a new sociological approach that prioritizes common interests to bring about peaceful social change through the law (Manmeet Singh, 2023).

Not much different from India, in Indonesia, the main task of the government in the Preamble to the 1945 Constitution of the Republic of Indonesia is protecting all citizens of the nation, improving people's welfare, and educating the life of the nation for the common interest of the entire nation, which is all of that set forth and guaranteed in the state constitution. This is reflected in the Body or articles of the Constitution, such as Article 28D paragraph (1), which states that "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". This provision is also in line with Article 27 paragraph (1), which stipulates that "All citizens have equal before the law and government without exception".

It also mentioned in the provisions of Article 33 paragraph (2) and paragraph (3) concerning law are aligned with the welfare of the people which stipulates that "branches of production that are important to the state and the public are controlled by the state, and the land and water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people".

Regarding the efforts to educate the nation's life, the provisions in Article 31 of the Indonesian Constitution oblige the state to allocate a budget of at least twenty per cent from the state revenue and expenditure budget as well as from the regional income and expenditure budget. From this general description, it appears that the role of law is important in realizing the goals of the state and society. This role of law parallels the Sociological Jurisprudence theory, which tries to synchronize aspects of legal certainty -through positive law- and aspects of benefit and justice -through living law. It is indeed through this living law that the development of society is expressed. If you trace the history of Indonesian law, customary law is a living law.

Roscoe Pound distinguishes between Sociological Jurisprudence, which emphasizes the implementation of law in society, and Sociology of Law, which focuses more on theoretical legal issues (Roscoe Pound, 1943). Moreover, Roscoe Pound introduces the Pragmatic Legal Realism theory, which emphasizes that law does not only carry out statutory orders but also functions as a tool to make changes in society, this is called law as a social engineering tool (Roscoe Pound, 1940).

According to Roscoe Pound, the law contains certain interests, and these interests must be protected by law. Indeed, not all interests must be regulated and protected by law, but some interests need and are already regulated and protected through religious, moral, and ethical norms, and other forms of protection (Hari Chand, 2005). Typically, the law protects public interests,

social interests, and private interests. The protection of these three interests must be carried out in a balanced manner. The balance of these three interests is the essence of justice (Galligan, Denis, 2006). These individual interests are usually regulated through private law, and it talks about matters related to the will and desires concerning personal interests and lives, including personal interests, such as the development of interests, reputation, and so on; protection of personal rights (privacy), such as belief, opinion; and also domestic relations, such as marriage. In addition, individual interests also concern asset ownership, the right to associate, as well as job continuity (Marett Leiboff & Mark Thomas, 2004).

Meanwhile, public interests are regulated through public law, which regulates issues relating to the interests of the state. Whereas social interests are regulated by law which can accommodate the demands, requests, wishes, and aspirations of the people that are embodied in people's lives, such as a sense of peace, a sense of orderliness, security guarantees, health insurance, security guarantees, and so on (Marett Leiboff & Mark Thomas, 2004).

With the concept of law as a social engineering tool, Roscoe Pound formulates these various interests so that they become balanced and in harmony like what an engineer does, who can utilize the available resources through good planning to produce a planned building so that even legal experts are expected to be able to produce law and make law according to the needs and interests of society (Suri Ratnapala, 2009).

In addition, with the concept of social engineering, it is also expected that the law can be implemented flexibly and avoid the application of rigid laws so that not only it can accommodate changes that occur in society but also minimize the occurrence of social friction. This is possible if various interests can be managed properly between claims, needs, desires, and expectations in the application of law in society (Roscoe Pound, 1940).

4. Conclusion

There are several conclusions on the issues discussed in this article. First, laws and regulations that are enforced in society will work effectively if they are in line with the living law in society (living law). It is because the living law acts as an inner order from within the society itself and reflects values that live, grow, and develop in that society itself. Second, customary law institutions that are still relevant to the development and the needs of society, as well as the rights of customary law communities (indigenous peoples), have to strengthen their formation of laws and regulations. Third, the sector of customary law is usually neutral -it can be accepted by all elements of society- so it has the opportunity to be considered as a source for the formation of national law.

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