

Correlation Between Traditional Law and Positivism in Indonesia and Malaysia

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Abstract

This article aims to analyze the correlation between customary law and positivism law in Indonesia and Malaysia. This research uses a normative juridical approach with a statute approach and a conceptual approach. Based on the research results, customary law is unwritten with positivism law which is written. And positive law in Indonesia or the law that is expected to be present in the future in Indonesia, must be seen from the aspect of culture or customary law that grows and develops in the environment of indigenous peoples. Given the purpose of the form of a regulation or law is to meet human needs in social life. So the people who enjoy the law are the people. Whereas in Malaysia customary law is still recognized as long as it grows and develops in the community and does not conflict with the religion of Islam and has been promulgated, it can be said that there is the same thing as the distribution of assets gono gini or joint assets with Spencerian assets in Malaysia.

I. Pendahuluan

In the 1945 Constitution, it appears that the Republic of Indonesia, which was established on August 17, 1945, is a state based on law in the sense of an administrative state (Verzorgingsstaat). This is written in the Preamble to the 4th paragraph of the 1945 Constitution which reads as follows:

"... to form an Indonesian state government that protects the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace, and social justice..." [Indonesia, 1945 Constitution, Preamble.]¹

With the task of the state in administering the general welfare, it becomes important to establish our state regulations, because the state intervenes in managing the welfare of the people in the legal, social, political, economic, cultural, environmental, as well as defense and security fields. with the formation of state regulations it is no longer possible to avoid this. [Maria Farida Indrati Soeprapto, Legislation Science, Kanisius, Yogyakarta: 1998, p. 1] Bearing in mind this is also the ideals of the Indonesian nation and State which are embodied in the constitution.

Customary Law and Law has various functions, the main function is to regulate life. The absence of law and customary law makes human life difficult and irregular because mutual understanding cannot be built. The existence of customary law and law is to help people live in harmony because they both give birth to rules that will regulate human behavior. The usual example in Malay society is the customs related to marriage. Beginning with seeing/assessing the prospective bride and groom then followed by applying to marriage, there are rules that must be obeyed. The goal is not just to unite two individuals but the bond is built based on agreement, affection, mutual trust and building relationships between the families of both parties. Marriages that do not follow customary law can lead to estrangement of relations or create hostility. Customary law makes marriage a family matter and not a personal matter because the union of two souls represents the formation of a new relationship. Marriage can also unite two countries or become a tool to reconcile in hostilities. From a legal point of view, marriage also builds bonds and creates a sense of responsibility which, if violated, can break ties. The law does not see marriage as a tool to unite the families of both parties but only involves the parties concerned. However, marriage law is usually supported by customary law. Over time it caused a change in lifestyle and customary law was likely ruled out. In certain circumstances customary law is changed to law in the hope of strengthening supervision over life and so punishment is imposed if there is a violation of the law.

The function of the formation of laws and regulations is increasingly felt to be necessary because in a country based on modern law (verzorgingsstaat), the main purpose of the formation of laws is no longer to create codification of norms and values

¹ Indonesia, *Undang-Undang Dasar* 1945, Pembukaan.

of life that have settled in society, but rather to create modifications or changes in society.² This will certainly help the development of existing laws in Indonesian society, seeing as so far we have only imitated the rules that have been inherited by the colonizers, regardless of whether the regulations are in accordance with the customs that grow and develop in the indigenous peoples of Indonesia. Indonesia.

By prioritizing the formation of laws through modification, it is hoped that a law is no longer behind and sometimes feels left out, but can be in front, and remains valid in accordance with the development of society. I.C Van Der Vlies argues that a modified law is a law that aims to change the prevailing legal opinion, and laws and regulations that change social relations.³

Law is the law that applies in a country, this kind of law is called positive law. The origin of this law is the determination by the legitimate leadership in the State.⁴ Law as a moral category is similar to justice. The word justice is also used in the legal sense, in terms of compatibility with positive law, especially compatibility with the law.⁵ Because the law binds everyone, legal justice must be understood in terms of equality.⁶ Positive law does not seek to be clearly separated from justice, and the better the legislators try to make them fair after all, the more support there is for the ideological bias that is characteristic of classical, conservative natural law theory.⁷

Currently, Indonesian national law is still in the process of being formed. Some national laws (in the sense of national laws that were formed after Indonesia) do exist, but whether these laws are in accordance with the ideals of the National Law, we need to examine them carefully.⁸ Seeing how many regulations are made, but not implemented in accordance with the objectives and functions of these regulations, they also overlap with mere political interests which are detrimental to certain groups.

Because in its development we cannot always rely on the formation of state regulations with codification, which takes a long time, so in meeting our needs to form National Laws we cannot do other things except by forming written laws, the formation of which is relatively faster. If so, the development of the Science of Legislation is increasingly necessary to form a National Law, because the aspired National Law will consist of written and unwritten laws. In addition, the formation of written law is felt to be very necessary for the development of society and the state at this time.⁹

Written law, in addition to being a vehicle for new laws that were formed after Indonesia's independence in order to meet the needs of state, national and social life which is constantly evolving, also needs to "bridge" between the various spheres of practice of various customs and other unwritten laws, or to overcome the need for certainty. unwritten law in the event that the parties want it.¹⁰ Indonesia is also a country

² T. Koopmans, "*De rol van de wetgever*", dalam *Honderd Jaar rechtsleven*, Zwolle, Tjeenk Willink, 1972, Hal. 223, dalam Maria Farida Indrati Soeprapto, *Ibid*.

³ I.C Van Der Vlies, *Handbook Wetgeving*, Zwolle, Tjeenk Willink, 1987, Hal. 9, dalam Maria Farida Indrati Soeprapto, *Ibid*.

⁴ Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah*, Kanisius, Yogyakarta: 1982, Hal. 273

⁵ Hans Kelsen, *Pengantar Teori Hukum*, Nusamedia, Bandung: 2009, Hal. 48

⁶ Satjipto Rahardjo, *Teori Hukum*, Genta Publishing, Yogyakarta: 2010, Hal.45

⁷ Hans Kelsen, *op. cit.*, Hal. 51

⁸ A. Hamid S. Attamimi. *Fungsi Ilmu Perundang-Undangan dalam Pembentukan Hukum Nasional*, makalah disampaikan pada ceramah ilmiah di fakultas Hukum Universitas Islam Assyafiah, Jakarta 17 Maret 1989, Hal. 5

⁹ Maria Farida Indrati Soeprapto, *op. cit.*, Hal. 4

¹⁰ A. Hamid S. Attamimi, *op., cit*, Hal. 6

that tends to follow the flow of Positivism, which is a school that identifies law with the Law. There is no law outside the Law, the only source of law is the Law. In Germany this view is widely held and defended by Paul Laband, Jellinek, Rudolf von Jhering, Hans Nawiasky, Hans Kelsen and others..¹¹

In Indonesia itself, the influence of the thought of legism is very clear, it can be read in Article 15 of Algemene Bepalingen van Wetgeving which among other things reads (in Indonesian):

Except for deviations that are determined for Indonesian people and those who are equated with Indonesian people, then custom is not law unless the law determines it. When examined, these sentences clearly reflect the legal thinking on which they are based, namely, that the law must be in written form..¹²

With the establishment of the Republic of Indonesia, we recognize the existence of various laws, both written law which is the regulations inherited from the Dutch East Indies era, as well as unwritten law which is a variety of customary law. It's just that the problems that arise today, when we see that Indonesia's tendency to follow the flow of Positivism will affect customary law, which is an unwritten law that is recognized and developed in the environment of Indonesian indigenous peoples.

For Malaysia and Indonesia, independence marked the end of the colonial era, but the country was faced with a new problem, namely colonial law which replaced customary law. In addition, the question arises whether customary law that has been marginalized is able to restore the real nature of law among the community? R. Soerojo stated, customary law is essentially a reflection or embodiment of Pancasila. However, for Malaysia there are no scholars who say so, customary law in the view of the majority of Malaysian scholars is one of the sources of law recognized by the constitution. Therefore, in Indonesia, enabling customary law is better than in Malaysia, because as a source of law it is likely that it will not be used as a reference, but the legislative body is sensitive to customary law.

2. Research methods

The writing of this article uses normative research methods ¹³ with the main problem in this study is the problem of the correlation of customary law with the flow of positivism in Indonesia and Malaysia. This research is a descriptive study that is able to provide data that is as accurate as possible about the correlation between customary law and positivism law in Indonesia and Malaysia..¹⁴ The data were analyzed in a normative-qualitative manner by interpreting and constructing the statements contained in the document as a policy that refers to the laws and regulations. Normative because this research is based on existing regulations as positive legal norms, while qualitative means data analysis that is

¹¹ Lili Rasjidi dan Ira Thania Rasjidi, *Dasar-Dasar Filsafat dan Teori Hukum*, Citra Aditya Bakti, Bandung: 2007, Hal. 56

¹² Lili Rasjidi dan Ira Thania Rasjidi, *Ibid*, Hal. 57

¹³ Amirudin dan Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, Jakarta: Rajawali Press, p. 68

¹⁴ Soerjono Soekanto dan Sri Mamuji, 2004, *Penelitian Hukum Normatif "Suatu Tinjauan Singkat"*, Jakarta: PT Raja Grafindo Persada, p.14

based on documents as case findings and documents from field investigations at the research site. The approach used in this research is a statutory approach and a conceptual approach.¹⁵

3. Results and Discussion

3.1. Customary law in Indonesia

In people's lives, there are always various kinds of norms that directly or indirectly affect the way we behave or act. In our country, the norms that are still very much felt are customary norms, religious norms, moral norms, and state legal norms. Because our country consists of various islands and ethnic groups, and there is freedom for each resident to embrace their own religion and to worship according to their religion and beliefs, moral norms, customary norms and norms Religions that exist and apply also vary from one another.

Norm is a measure that must be obeyed by a person in relation to others or with the environment. A norm only exists if there is more than one person, because the norm basically regulates the procedures for a person's behavior towards other people, or towards their environment. Legal norms can be formed in writing or unwritten by the institutions authorized to form them, while moral, customary, religious and other norms occur unwritten, grow and develop from habits that exist in society.¹⁶

For the emergence of customary law, certain conditions are needed, namely there must be an act or action of the same kind under the same circumstances and must always be followed by the general public and there must be legal belief from the group of people who are interested.¹⁷

In its development, the term customary law does not only mean traditional customary law, which is also called customary law (in a narrow sense) but also includes modern customary law.¹⁸ In general, customary law (in a broad sense) is not written in the form of legislation and is not codified, so it is not structured systematically and is not compiled in the form of a law book. The form of customary law is irregular, the decisions do not use preamble, the articles of the rules are not systematic and have no explanation, and most of them are not written or recorded.

There is a close relationship between law on the one hand and socio-cultural values on the other. This has been proven thanks to the investigations of several legal anthropologists, both pioneering such as Sir Henry Maine, A.M Post and Yosef Kohler and Malinowski[See his books: *Crime and Custom in the Savage Society*, 1926] and R.H. Lowie[See his articles: *Anthropology and Law in The Social Sciences*, 1927 and *Incorporated and Law in The Social-Sciences*, 1927 and *Incorporated Property in Primitive Society in the Yale Law Journal*, 1928.] The close link between law and socio-cultural values In the community it turns out that good law is nothing but law that reflects the values that live in society.¹⁹

¹⁵ M. Syamsudin, 2007, *Operasionalisasi Penelitian Hukum*, Jakarta: PT Rajawali Press, p. 57

¹⁶ Maria Farida Indrati Soeprapto, *op., cit*, Hal. 6

¹⁷ Hartono Hadisoeparto, *Pengantar Tata Hukum Indonesia*, Liberty, Yogyakarta: 1981, Hal. 20-21

¹⁸ Hilman Hadikusuma, *Bahasa Hukum Indonesia*, Alumni, Bandung: 1992, Hal 31

¹⁹ Mochtar Kusumaatmadja: *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, Binacipta, Hal. 8. Lihat juga Soejono Soekanto: *Pengantar Sosiologi Hukum*, Bhratara Karya Aksara, 1977, Hal. 20. Perhatikan: Cairns. *Hukum dan Ilmu-Ilmu Sosial Budaya* (keduanya terjemahan) pada bagian lain buku ini Hal. 113. Dalam Lili Rasjidi dan Ira Thania Rasjidi, *op.,cit*, Hal. 80

Indonesia today is in a period of transition, which is changing values in society from traditional values to modern values.²⁰ However, it is still a matter of which values to leave and which new values to replace. Of course, in the process of change, there will be many obstacles that will sometimes cause unrest and turmoil in society.

Customary law is the rule of human behavior in social life. Behavior that is continuously carried out by individuals gives rise to "personal habits". If that personal habit is imitated by others, then it will also become that person's habit. Then if all members of the community carry out the habitual behavior, then gradually the habit becomes the "custom" of the community. So, custom is a habit of the community, and community groups gradually make it a custom that should apply to all members of the community, so that it becomes "customary law". And customary law is a custom that is accepted and must be implemented in the community concerned.²¹ Because these habits have become a culture in society.

In essence, culture has three manifestations, namely the first form of culture as a complex of ideas, ideas, values, norms, regulations and so on. Second, culture can manifest itself as a complex of patterned behavior activities of humans in society. And third, culture can be manifested as objects made by humans. By starting from this understanding of culture, it can be concluded that customary law is one of the manifestations of culture.²² So it can be concluded that habit becomes culture, then culture becomes customary law.

Considering that Indonesia consists of various ethnic groups and has a variety of cultures, of course the habits that exist in every legal action carried out within the customary community will differ from one another, and the use of the term adat in the sense of habit within the community is very prominent from other terms.²³ It is this customary law that continues to grow and develop in the environment of indigenous peoples and is obeyed and passed on to the successors of children and grandchildren scattered throughout the territory of the Indonesian state.

Positive Law

Positivism is an understanding that demands that every methodology that is thought of to find the truth should treat reality as something that exists, as an object, which must be separated from any kind of subjective metaphysical preconceptions.²⁴ That is a school of philosophy that has a scientific orientation in the 30s and 40s. Its aim is to displace much of philosophy and religion as meaningless by establishing verification criteria, and to reaffirm and resolve remaining issues using strict formal

²⁰ Soerjono Soekanto, *Pengantar Sosiologi Hukum*, Bhratara Karya Aksara, Jakarta, 1977, Hal. 19

²¹ Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*, Mandar Maju, Bandung: 2003, Hal. 1

²² I Gusti Ketut Sutha, *Bunga Rampai Beberapa Aspekta Hukum Adat*, Liberty, Yogyakarta: 1987, Hal. 28

²³ Zulherman Idris, *Hukum Adat dan Lembaga-Lembaganya Keberadaan dan Perubahannya*, UIR-Press, Pekanbaru: 2005, Hal. 2

²⁴ Lihat: Gordon Scott, dalam *The History and Philosophy of Social Science*, Routledge, London, 1991, Hal. 301, yang diikuti oleh Soetandyo dalam bukunya *Hukum; Paradigma, Metode dan Pilihan Masalah*, Dalam Otje Salman dan Anthon F. Susanto, *Teori Hukum*, Refika Aditama, Bandung: 2009, Hal. 79-80

language. So "God exists" and "God does not exist" are both meaningless because they cannot be verified.²⁵

Legal positivism is an inseparable part of the influence of the development of positivism (science). In its most traditional definition of the nature of law, it is interpreted as positive norms in the legal system.²⁶

Kelsen said, if the law has determined a certain pattern of behavior, then everyone should behave according to that specified pattern. In short, "people must conform to what has been determined". Herein lies the normative nature of law. The obligation and obligation to obey the law, simply because it has been determined so (juridically-formally), not because of the value contained in the legal material itself. From here we know the term "juridical-normative".²⁷The source of all that is from Grundnorm (basic norms). Grundnorm resembles a supposition about the "order" to be realized in living together (in this case, the state). Kelsen himself did not mention the contents of the grundnorm. He only said that the grundnorm was a transcendental-logical condition for the enactment of the entire legal system. All positive legal systems must be hierarchically guided by the grundnorm. Thus, indirectly, Kelsen also actually made a theory about Juridical order.²⁸

The basic norm of law cannot be equated with a natural law, namely a law that is attached to things. Kelsen totally rejects a legal obligation that stems from the state of things themselves. According to Kelsen the only law is positive law; other laws do not exist. People who live together form laws to regulate that common life. In this case Kelsen is consistent. For him the whole law is contained in the formulation, which combines two certain realities according to the principle of dependence. From the private side there are actions that are against the law, from the power side, countermeasures follow. So the law has nothing to do with a subject who has a right. Rights and obligations in the legal field only exist if positive law is determined. Based on this view Kelsen can say, that animals and flowers have the same strong rights as humans, namely do not have any rights, but both animals and flowers can be protected by positive law, and other laws do not exist. This also means that the norms that are no longer adhered to are no longer valid. If a legal norm is formulated, it is assumed that there has been a violation. Otherwise, the legal norm coincides with the actual situation and there is no need to form a norm. But if there are so many violations that it can be said that the effectiveness of the norm has disappeared, then the norm has lost its validity. [Theo Huijbers, op, cit., p. 158-159] That's the theory of Hans Kelsen which states that law is normative because of Grundnorm.

²⁵ Anthon F. Susanto, *Ilmu Hukum Non Sistematis Fondasi Filsafat Pengembangan Ilmu Hukum Indonesia*, Genta Publishing, Yogyakarta, 2010, Hal. xiii

²⁶ Darji Darmodihardjo dan Sidharta berpendapat, positivisme hukum (aliran hukum positif) memandang perlu memisahkan secara tegas antara hukum dan moral (antara hukum yang berlaku dan hukum yang seharusnya, antara das sein dan das sollen), Lihat Darji Darmodihardjo dan Sidharta, *Pokok-Pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia*, Gramedia, Jakarta, 2004, Hal. 113. Pengertian lain misalnya dapat dijelaskan sebagai berikut: positivisme hukum adalah aliran pemikiran yang dalam yurisprudensi yang membahas konsep hukum secara eksklusif. Kata eksklusif diturunkan dalam bahasa Latin *exclusivus* yang artinya tidak menampung atau memuat hal lain. Jika hukum dan moralitas memiliki otonomi yang eksklusif berarti masing-masing memiliki ruang lingkupnya sendiri-sendiri, dan masing-masing tidak berhubungan satu sama lain. Lihat E. Sumaryono, *Etika Hukum, Relevansi Teori Hukum Kodrat Thomas Aquinas*, Kanisius, Yogyakarta, 2002, Hal. 183. Dalam Anthon F. Susanto, *Ibid*, Hal. 70

²⁷ Satjipto Rahardjo, *op., cit*, Hal: 127

²⁸ *Ibid*.

Customary Law in Positivism Theory

According to the seminar on customary law and national law development on January 15-17, 1975 in Yogyakarta, customary law is defined as original Indonesian law that is not written in the form of legislation of the Republic of Indonesia which here and there contains elements of religion. About the original Indonesian term according to Prof. Iman Sudiyat SH at the upgrading of customary law in Aceh in 1981, it was said that the truth was not the original Indonesian law but the original Indonesian law. So what is meant by the term customary law is unwritten law in the form of state legislation, including customary law.²⁹

The law, if distinguished according to its source is: ³⁰

- a. statutory law, namely the law contained in the legislation;
- b. Customary (customary) law, namely the law that lies in the customary (customary) regulations;
- c. Treaty law, namely the law stipulated by countries in an agreement between countries (treaty);
- d. Jurisprudence law, namely the law formed by the judge's decision.

Although in all of Indonesia there is one customary law, customary law itself is not a single entity. Each ethnic group has its own customary law.³¹ According to its contents, customary law has 4 kinds of elements, namely:

1. Unwritten law (original custom);
2. Written law (formed by the original law maker);
3. Laws derived from religion;
4. Law comes from outside

In customary law there is no principal separation between civil law and public law. This is because the composition of Indonesian society contains religious and mystical traits. The implementation and maintenance of customary law is carried out in a legal community, especially those in villages and remote areas which are still thick with the customs and culture of their ancestors.

As far as the author believes, from the point of view of Hans Kelsen's theory, the Positivism School cannot be applied in the State of Indonesia, because the State of Indonesia itself consists of thousands of islands and various ethnic groups, races, and religions which are rich in cultural diversity and customs that still exist. grow and develop in the community. This is because the ancestors or ancestors will continue to inherit the applicable customary law to their children and grandchildren. Which, customary law is not summarized, written or codified like positive law. But the spirit of customary law will continue to be attached and will not become extinct in indigenous peoples.

It is impossible to make customary law written down, because the customs that are spread throughout the Unitary State of the Republic of Indonesia are different in each region and are very numerous in number. We have not been able to determine which

²⁹ Hilman Hadikusuma, *op, cit*, Hal. 31

³⁰ Cansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia*, Balai Pustaka, Jakarta: 1983, Hal. 71

³¹ Wiratmo, *Pengantar Tata Hukum Indonesia*, Perpustakaan Fakultas Universitas Islam Indonesia, Yogyakarta: 1988, Hal. 85

customary law can serve as a guide for customary laws in Indonesia, because if we choose one of these customary laws, there will be an overlap between one customary law and another. For example, regarding inheritance law in Minangkabau which uses the Matriliakat system (mother's lineage system) it will be different from inheritance law in Malay custom which uses the Patriliakat system (father's lineage system).

While Hans Kelsen's Positivism theory states that law is positive law, namely written law, if we use this theory in Indonesia, the unwritten customary law cannot be enforced even in indigenous peoples, with the meaning that all communities in the territory The Unitary Republic of Indonesia only has to obey written laws, so unwritten laws are not laws that must be obeyed.

This will have a bad influence on the beliefs of indigenous peoples who have long believed in and obeyed customary law inherited by their ancestors. Of course, there will be a conflict between indigenous peoples and government officials. Judging from the conflict of theories regarding the position of customary law which is not recognized because it is not written. So, Indonesia should not tend to follow the flow of positivism from Hans Kelsen.

However, the existing regulations (positive law) with regulations that are expected to exist, should be viewed from the sociological aspect that occurs in the midst of indigenous peoples. In a sense, law is inseparable from culture. Because law as a manifestation of culture is also a process, if the law is to be said to be alive. [Sunarjati Hartono, *From Inter-Class Law to Inter-Customary Law*, Alumni, Bandung: 1986, p. 9] As a manifestation of that culture, the law is also a social institution, because law is a way to meet human needs in social life.

The Role of the Law

On this day the law is considered a solution to various problems and so leads to the unity of society. However, is this true? One of the main roles played by law is to protect, especially regarding human rights, which include the right to life. In addition, the law also corrects the position, for example if there is an injury due to negligence, a lawsuit can be filed to obtain compensation, or in the event of death, the cause of death may be punished as compensation for the act. Another role that is no less important is to strengthen the situation, such as strengthening family ties as a form of responsibility for the financing of family members.

Protection, correcting the situation and strengthening the situation, is born from the main characteristics possessed by law, namely being coercive, having sanctions and punishments that can be imposed by the government. Thus, law is seen as having advantages over customs. Another advantage possessed by law is that it is easy to identify because it is written, codified and disseminated. Each individual can easily find out about actions or behaviors that are allowed or prohibited. At the same time, the law also has its shortcomings, the law is sometimes separated from the spirit of preserving relationships. This situation causes dependence on the law even on events that are too personal, for example a maid who is prosecuted through legal channels due to carelessness in caring for her employer's children. Because the law is written and codified, it is rigid and not flexible to be adapted to the atmosphere and needs.

3.2 TRADITIONAL LAW IN MALAYSIA

Because adat is born and formed from people's habits, adat should describe the way of life of the group in which it is enforced. Communities around the world today are not only experiencing sudden political changes, but also experiencing changes in technology and the surrounding environment. Once upon a time in longhouse society, social position was determined by success in bringing home a human head, but today social position is measured by money and materials such as vehicles and other possessions.

The arrival of Islamic clerics and Christian missionaries caused a change in people's responses, especially to adat. Customs are gradually marginalized if they are contrary to religious teachings. Judging from the influence of Islam, some customs are marginalized, as in Sabah and Sarawak, customs that are contrary to Christian teachings are likely to be abandoned. However, for people who adhere to the perpatih customary pattern such as in Negeri Sembilan, customs and religion are carried out in harmony, therefore there is the expression 'Adat is based on law, law is based on the Book of Allah'. However, this situation only applies if the custom is not contrary to religious teachings.

Customary law in Malaysia or Indonesia views society as a unit, individual citizens of the community, seeing themselves as part of the community and not separate. Their lives are communal or group, where people live together and seek harmonious relationships between individuals and all members of society. This is different from the philosophical thought of western legislation, which prioritizes individual interests. Therefore the spirit of solidarity and the spirit of togetherness (communal) in law is getting less and less.

Customary Laws That Have Been Converted To Law

It is rather difficult to find customary law that has been updated as law, that is, as a rule that comes from the government. Referring to the experience of Malaysia, between customs that have been codified and turned into law is a treasure of search.

Shared assets are assets obtained by joint efforts between husband and wife in a marriage bond. In the Perpatih custom this is known as the property of the man of the wife. The notion that sepencarian property is customary law has changed after independence because research shows that there are similarities between Islamic principles regarding property ownership and the practice of sequestering property. Therefore, most provinces in Malaysia have made a written distribution in the application of the Islamic Family Law in the provisions regarding the distribution of assets. The acceptance of search property as a family provision is made because Islam does not reject custom, the position of search property is recognized by Islamic law based on the principle of muhakamah custom.

The civil law also uses the adat of sepencarian assets, the civil court in the case of Roberts alias Kamaruzzaman v Umi Kalthom [1966], recognizing the customary practice of the Malay community. Today cases involving Malays are no longer heard in the Civil Court, the Act to Amend the Law (Marriage and Divorce), recognizing the principles born of Malay customary practice that are in harmony with British common law and the principles of justice. Assets acquired during marriage are known as 'marital assets',

'family assets' and 'marital assets', are objects or goods or donations given or individual or joint efforts for the welfare of the family. extensively.

Custom Eradication

There are also customs that are not recognized by law and cause these customs to disappear. Among the rejected customs is the custom of taking adopted children. The practice of taking adopted children is a custom that has been going on since time immemorial and applies in all societies, including Asia, Europe and the Middle East. In Malaysia, this custom applies as a whole and there are times when it is inter-ethnic. However, this custom is seen as a threat to the welfare of children because there is abuse that occurs which involves elements of selling children and child abuse. The Deed of Adoption 1952 (Deed 257) has been established to control the custom of adopting children and today adoption of children through customary law is not allowed, and must be done through law.

The two examples given earlier are of a local nature, i.e. somewhat specific to Malaysia and perhaps also to parts of Indonesia. However, there are common elements in most customary law that has a place in law, namely those relating to the judiciary or also called dispute resolution. The element of togetherness can be obtained by looking at the principle of principle which is the basis for a custom. In courts based on customary law, there are two important principles, namely communal and consensus. These two principles are also used by different cultures.

Customary Position

For Malaysia and Indonesia, independence marked the end of the colonial era, but the country was faced with a new problem, namely colonial law which replaced customary law. In addition, the question arises whether customary law that has been marginalized is able to restore the real nature of law among the community? R. Soerojo stated, customary law is essentially a reflection or embodiment of Pancasila. However, for Malaysia there are no scholars who say so, customary law in the view of the majority of Malaysian scholars is one of the sources of law recognized by the constitution. Therefore, in Indonesia, enabling customary law is better than in Malaysia, because as a source of law it is likely that it will not be used as a reference, but the legislative body is sensitive to customary law.

Customary Law is currently the pillar of the law. To get attention and be used as a reference, customs need to be recognized as law. This recognition is obtained by codifying adat and making it into law. This situation changes the status of customary law because adat is no longer seen as coming from the community, but comes from the government. The benefit of this change is that adat is recognized by the government, can be enforced and if there is a violation, punishment can be imposed. However, if the custom is made in written form, the spirit implied in the custom can be lost. This was expressed by Soerahardjo who stated that the codification of Adat could cause the soul and spirit of the law to fade because adat was no longer flexible to handle changes in society. Codification makes adat rigid while adat should be flexible. However, if it is not codified, how can adat be identified and recognized as law? The criteria that can be used to test the validity of adat as a law include; natural, general in nature, antique in nature, in harmony with morals and not contrary to civil law. The criteria used have the effect of positivist understanding, especially when it involves civil law. For

other characteristics, keep in mind that the size used should be in line with the local environment where the custom is used and not as a whole.

Pressure on Custom

Because adat is born and formed from people's habits, adat should describe the way of life of the group in which it is enforced. Communities around the world today are not only experiencing sudden political changes, but also experiencing changes in technology and the surrounding environment. Once upon a time in longhouse society, social position was determined by success in bringing home a human head, but today social position is measured by money and materials such as vehicles and other possessions. The arrival of Islamic clerics and Christian missionaries caused a change in people's responses, especially to adat. Customs are gradually marginalized if they are contrary to religious teachings. Judging from the influence of Islam, some customs are marginalized, as in Sabah and Sarawak, customs that are contrary to Christian teachings are likely to be abandoned. However, for people who adhere to the perpatih customary pattern such as in Negeri Sembilan, customs and religion are carried out in harmony, therefore there is the expression 'Adat is based on law, law is based on the Book of Allah'. However, this situation only applies if the custom is not contrary to religious teachings. Customary law in Malaysia or Indonesia views society as a unit, individual citizens of the community, seeing themselves as part of the community and not separate. Their lives are communal or group, where people live together and seek harmonious relationships between individuals and all members of society. This is different from the philosophical thought of western legislation, which prioritizes individual interests. Therefore the spirit of solidarity and the spirit of togetherness (communal) in law is getting less and less.

Customary Laws That Have Been Converted To Law

It is rather difficult to find customary law that has been updated as law, that is, as a rule that comes from the government. Referring to the Malaysian experience, between the customs that have been codified and turned into law is a treasure of search.

Shared assets are assets obtained by joint efforts between husband and wife in a marriage bond. In the Perpatih custom this is known as the property of the man of the wife. The notion that sepencarian property is customary law has changed after independence because research shows that there are similarities between Islamic principles regarding property ownership and the practice of sepencarian treasures. Therefore, most provinces in Malaysia have made a written distribution in the application of the Islamic Family Law in the provisions regarding the distribution of assets. The acceptance of search property as a family provision is made because Islam does not reject custom, the position of search property is recognized by Islamic law based on the principle of muhakamah custom.

The civil law also uses the adat of sepencarian assets, the civil court in the case of Roberts alias Kamaruzzaman v Umi Kalthom [1966], recognizing the customary

practice of the Malay community. Today cases involving Malays are no longer heard in the Civil Court, the Act to Amend the Law (Marriage and Divorce), recognizing the principles born of Malay customary practice that are in harmony with British common law and the principles of justice. Assets acquired during marriage are known as 'marital assets', 'family assets' and 'marital assets', are objects or goods or donations given or individual or joint efforts for the welfare of the family. extensively.

Custom Eradication

There are also customs that are not recognized by law and cause these customs to disappear. Among the rejected customs is the custom of taking adopted children. The practice of taking adopted children is a custom that has been going on since time immemorial and applies in all societies, including Asia, Europe and the Middle East. In Malaysia, this custom applies as a whole and there are times when it is inter-ethnic. However, this custom is seen as a threat to the welfare of children because there is abuse that occurs which involves elements of selling children and child abuse. The Deed of Adoption 1952 (Deed 257) has been established to control the custom of adopting children and today adoption of children through customary law is not allowed, and must be done through law.

The two examples given earlier are of a local nature, i.e. somewhat specific to Malaysia and perhaps also to parts of Indonesia. However, there are common elements in most customary law that has a place in law, namely those relating to the judiciary or also called dispute resolution. The element of togetherness can be obtained by looking at the principle of principle which is the basis for a custom. In courts based on customary law, there are two important principles, namely communal and consensus. These two principles are also used by different cultures.

4. Conclusion

The theory of positivism from Hans Kelsen cannot be applied in Indonesia, because it is still valid and it is recognized that customary law is not written in indigenous peoples in Indonesia. With the large number of ethnic groups, races, religions, and various customs and cultures that have different customary laws, customary law in Indonesia cannot be codified or made in writing. Customary law which, although not summarized in written form, must still be recognized as existing law in Indonesia, and should not be abolished considering the position of customary law which is still recognized, grows and develops in indigenous peoples. So that Indonesia is more appropriate to use the Responsive and Progressive flow.

And positive law in Indonesia or the law that is expected to be present in the future in Indonesia, must be seen from the aspect of culture or customary law that grows and develops in the environment of indigenous peoples. Considering the purpose of the form of a regulation or law is to meet human needs in social life. So the people who enjoy the law are the people.

Whereas in Malaysia customary law is still recognized as long as it grows and develops in the community and does not conflict with the Islamic religion and has been promulgated, what can be said is the same thing as the distribution of gono gini assets or joint assets with Spencerian assets in Malaysia.

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