

The Existence of Civil Law Amidst The Embeddedness of Customary Law (Living Law) In Indonesia

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Abstract

Indonesia is a country full of culture that has lived for thousands of years. The custom that live in Indonesian society shape the Indonesian nation as we know it today. Indonesia is a rule of law country with a constitution based on the 1945 Constitution. Although the constitution applies to all levels of society, there are stronger rules called norms. Norms have a stronger influence than positive law because there are sanctions imposed directly by society on violations of norms. The reason writer bringing this Topic is because the writer trying to analyze the cultural influences to the positive law in Indonesia This research uses qualitative because we were trying to analyzing this issues by the whole, which shows the importance of the depth and detail of the data being studied.

Keywords: norm, custom, civil law, cultural, constitution

I. Introduction

There are three sources of law recognized in Indonesia namely Islamic Law, Customary Law, and Positive Law. All of this source of law has been acknowledged and listed on Indonesia Constitution, Pancasila. The first clause of pancasila is "ketuhanan yang maha esa". believing in the one and only God, in which this clause describes that Indonesia acknowledged the existence of God and his rules.

Islamic Law

Islamic law entered Indonesia at the same time as Islam entered Indonesia, which According to some experts, it has been going on since the VII or VIII century AD. Islamic law (Syara') is more theocratic, that the law comes from God, not from society's legal consciousness or comes from the power, authority and sovereignty of the state. Islamic law has been applied for a long time by followers of the Islamic religion. At that time Islam has rapidly spreading in all over the country it starts from the port city in Indonesia like Aceh and then spreading into another region like Jawa and Sumatera. And at this point of history starts the age of islamic kingdoms in Indonesia. One of the largest islamic kingdom in Indonesia is Samudera Pasai kingdom which is located in Aceh. The influence of Islamic culture in Indonesia causes Islamic Law to be implemented in almost every region in Indonesia, this lead Islamic law to be an acknowledged law in Indonesia.

Customary Law

Customary Law, is the oldest form of law its already exist even before the civilization. Customary law is a collection of norms and rules that originate from the customs or customs of society. It regulates behavior in social life and has sanctions for those who violate it. Customary law is unwritten and grows from community behavior, and is recognized by the state as a valid form of law. In Indonesia, customary law has existed for a long time and is recognized in the 1945 Constitution, so customary law is one of the oldest laws in Indonesia because it has been applied for generations by the people.

Positive Law

Positive law in Indonesia refers to the law that applies at a certain time in the territory of our country. In general, positive law consists of two types: written law (Institution) and unwritten law (customary law). These laws are generally or specifically binding and are enforced through the government or the courts. The objectives of positive law include:

1. Establish a state government that protects all Indonesian citizens.
2. Advancing general welfare.
3. Brightening the nation's life.
4. Implement world order based on freedom, eternal peace and social justice.

II. Method

Qualitative descriptive method is a research method that combines descriptive and qualitative research. In this research, the data collected will be served directly in the form of a description or description of the atmosphere or condition of the object as a whole and as it is. The data can be the person's word, written words, observed behavior, images, or even behavior. Data is not expressed in the form of numbers or statistical figures, but rather provides an explanation or description of the situation or conditions studied in the form of a narrative description.

III. The Existence of Customary law

From these three sources law, there are often contradictions between them one of the example of this case is a tradition called "Carok" in Madura this tradition has existed for a long period of time, this is a tradition to duel one by one by using sickle to death in order to maintain honor. This tradition is very dangerous and violating the law, but it is consider to be an honorable way to solve a conflict. This example describes the existence of customary law in the midst Indonesian positive law.

Even though customary law contradicts with the positive law this is because customary law or living law have a stronger influence in the society. Living law its live and develop on the society its constantly changing throughout generation every Generation have a different form of living law, they have a different standard form one and another.

A. Positive Law in Indonesia

Positive law is a law that's arranged by authorized person and its a political product by the authorized person to rule the public. Positive Law have a some characteristics :

1. Regulations Regarding Human Behavior

Positive law includes regulations that regulate human behavior in society. It includes norms that regulate the rights and obligations of individuals and groups.

2. Made by Official Bodies

Positive law is made by authorities or authorized official bodies, such as the government or the courts.

3. Coercive in Nature

Positive legal regulations are binding and coercive. Violation of these regulations may result in sanctions.

4. Strict Sanctions

Positive law establishes strict sanctions for violations of regulations. These sanctions may take the form of fines, imprisonment, or other measures.

Positive law is based on constitution, and the constitution in Indonesia is Pancasila, Pancasila is the 5 values that underlie the laws that apply in Indonesia. Before this positive law has been undergoing so many changes:

The Beginning of Positive Law in Indonesia

Dutch Colonial Era.

During the Dutch colonial period, Dutch positive law was applied in Indonesian territory. This includes regulations issued by the Dutch colonial government.

Law Codification.

In 1847, the Dutch colonial government published *Burgerlijk Wetboek voor Nederlandsch-Indië* (BWNI), which was a civil law code for the Dutch East Indies. BWNI regulates various aspects of law, including civil, criminal and administrative.

Independence Era

1945 Constitution

After Indonesia's independence in 1945, the 1945 Constitution became the legal basis of the country. It establishes the basic principles of the state, including Pancasila as the state ideology.

Positive Legal Development

The Indonesian government has begun to issue positive legal regulations, such as laws, government regulations and presidential regulations. This includes civil, criminal, employment law, etc.

Indonesian Law Codification

Civil Code (KUHPerdata)

In 1847, the Civil Code was implemented in Indonesia. It governs civil law, including property rights, contracts, and responsibilities.

Criminal Code (KUHP)

The Criminal Code was enacted in 1918 and regulates criminal law in Indonesia.

Trade Code

The Trade Code regulates trade and business laws in Indonesia.

Modern Development

Revised 1945 Constitution

Since the reform in 1998, the 1945 Constitution has undergone several revisions. It strengthens the principles of democracy, human rights, and regional autonomy.

Employment Law The Employment Law regulates the relationship between workers and employers.

B. Customary Law (Living Law) in Indonesia

Indonesia is known as a country that has extraordinary cultural riches. With more than 17,000 islands and hundreds of ethnic groups, customary law, or what is often referred to as "living law," plays an important role in the lives of Indonesian society. These customary laws not only regulate various aspects of daily life, but also reflect the values, traditions and norms passed down from generation to generation. This article will discuss in depth customary law in Indonesia, including its history, characteristics, role, challenges and integration efforts with national law.

Customary law existed long before Indonesia's independence and is an integral part of people's lives. During the ancient kingdoms in Indonesia, customary law was used to regulate social, economic and political relations in society. The influence of kingdoms such as Majapahit, Sriwijaya and Mataram is very visible in the development of customary law in various regions. During the Dutch colonial period, customary law received special attention. The colonial government recognized the existence of customary law and used it to govern indigenous communities through a legal system known as the "Indische Staatsregeling".¹ However, customary law is often considered inferior to colonial law which is more formal and written. Post-independence, customary law continues to exist and is recognized in the Indonesian constitution. The 1945 Constitution states that the state respects indigenous community units and their traditional rights, as long as these are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia.

¹ R Mayasari Eka. (2018). "Tantangan Hukum Adat Dalam Era Globalisasi Sebagai Living Law Dalam Sistem Hukum Nasional," *Journal Equitable* : 100–101, <http://ejurnal.umri.ac.id/index.php/JEQ/article/view/819>.

Customary law in Indonesia has several main characteristics that differentiate it from formal law:

1. **Unwritten and Flexible:** Customary laws are generally not written, but are passed on orally from generation to generation. This makes customary law very flexible and able to adapt to changing social and environmental conditions.
2. **Communal in nature:** Customary law emphasizes the interests of the community rather than the individual. Customary legal norms are often designed to maintain balance and harmony in society.
3. **Social Sanctions:** Violations of customary law are usually subject to social sanctions rather than physical or financial sanctions. For example, violators may be subject to fines in the form of goods or traditional ceremonies, or even excommunicated from the community.
4. **Diverse and Contextual:** Because Indonesia consists of various tribes and cultures, customary law is very diverse and contextual. Each indigenous community has different rules and norms according to their local traditions and beliefs.

Customary law plays an important role in various aspects of the lives of indigenous peoples in Indonesia:

1. **Social and Economic Regulations:** Customary law regulates various aspects of social and economic life, including land distribution, inheritance rights, marriage, and relationships between community members. For example, in many indigenous communities, land is not owned by individuals but by the community as a whole, and land use is regulated by customary law.
2. **Conflict Resolution:** Customary law is often used as a conflict resolution mechanism. The process of resolving disputes through customary law usually involves respected traditional figures or community leaders, and often focuses on restoring harmony within the community rather than punishment.
3. **Cultural Preservation:** Customary law plays a role in preserving local culture and traditions. Through customary law, cultural values and traditions that have existed for a long time can be preserved and passed on to the next generation.

Even though customary law has an important role in Indonesian society, its existence is not free from various challenges. One of the main challenges is harmonization between customary law and national law. The fundamental differences between these two legal systems often give rise to conflicts, especially in matters of natural resource management, land rights, and recognition of the rights of indigenous peoples.

1. **Natural Resource Management:** Many indigenous peoples live in areas rich in natural resources, such as forests and mines. National laws often regulate the exploitation of these natural resources without considering customary law, which can lead to conflict and losses for indigenous communities.

2. **Land Rights:** One of the most controversial issues is land rights. Many customary lands are not recognized by national law, which causes indigenous peoples to lose their land rights. This is often caused by differences in the concept of land ownership between customary law and national law.
3. **Recognition of the Rights of Indigenous Peoples:** Although the Indonesian constitution recognizes the rights of indigenous peoples, implementation is often inconsistent. Many indigenous peoples' rights are not yet fully recognized or protected by national law.

To overcome these challenges, the Indonesian government has taken steps as an effort to integrate customary law into the national legal system. Some of the steps that have been taken include:

1. **Legislation and Regulations:** The government has issued various laws and regulations that recognize and protect the rights of indigenous peoples. For example, Law Number 6 of 2014 concerning Villages provides official recognition for the existence of traditional villages and grants autonomy to traditional villages to manage their own affairs in accordance with customary law.
2. **Recognition by the Constitutional Court:** The Indonesian Constitutional Court has issued several important decisions recognizing the existence and validity of customary law. One of the significant decisions was the recognition of indigenous peoples' rights to their customary forests, which provides a legal basis for the protection of indigenous peoples' rights.
3. **Dialogue and Participation:** The government encourages dialogue and active participation of indigenous peoples in the policy-making process that concerns them. Through this dialogue, it is hoped that there will be better understanding between the government and indigenous communities, as well as the creation of more inclusive and fair policies.

Customary law in Indonesia is an important element in community life that reflects cultural diversity and traditional values. Despite facing various challenges in harmonization with national law, customary law continues to play a vital role in regulating the social, economic and cultural life of indigenous peoples. Efforts to integrate customary law into the national legal system through legislation, judicial recognition and participation of indigenous peoples are expected to create a legal system that is more inclusive, fair and responsive to the needs of indigenous peoples.² In this context, customary law is not only seen as a legacy of the past, but also as an important part of Indonesia's diverse and dynamic legal future.

C. Interaction Between Civil and Customary Law

Indonesia is a country with extraordinary cultural riches, where civil law and customary law interact with each other in everyday life. Civil law, which is part of the

² IR Mayasari Eka. (2018). "Tantangan Hukum Adat Dalam Era Globalisasi Sebagai Living Law Dalam Sistem Hukum Nasional," *Journal Equitable* 102-104, <http://ejurnal.umri.ac.id/index.php/JEQ/article/view/819>.

national legal system which is formal and written, often has to clash and interact with customary law, which is not written and is passed down orally in indigenous communities. The interaction between these two legal systems creates complex and challenging dynamics, but also offers opportunities to understand and appreciate the diversity of law in Indonesia.

Civil law in Indonesia is largely inherited from the Dutch colonial era. The Civil Code (KUHPerdara), adapted from *Burgerlijk Wetboek*, has been the basis of civil law in Indonesia since the colonial era. On the other hand, customary law existed long before colonialism and is an integral part of the lives of indigenous peoples throughout the archipelago. After independence, Indonesia faced major challenges in harmonizing these two legal systems. The Indonesian Constitution, the 1945 Constitution, recognizes the existence of indigenous peoples and their traditional rights, but implementation and harmonization with national law often encounter obstacles. The government and policy makers are trying to integrate customary law into the national legal system without losing the essence and values contained therein.³

To understand the interaction between civil law and customary law, it is important to understand the characteristics of each legal system.

1. Civil Law

- **Formal and Written:** Civil law is regulated in the form of written laws that are clear and formal. All legal rules and procedures are described in detail in the Civil Code.
- **Individualistic:** Civil law places greater emphasis on individual rights and obligations. A clear example is individual ownership rights to land or property.
- **Universal:** Civil law applies universally throughout Indonesia, regardless of differences in local customs or culture.

2. Customary Law

- **Unwritten and Flexible:** Customary law is not written and is transmitted orally. Customary law is very flexible and can adapt to social and environmental changes.
- **Communal:** Customary law emphasizes the interests of the community rather than the individual. Land ownership, for example, is often communal.
- **Varies:** Customary laws vary across regions and ethnic groups in Indonesia, reflecting the diversity of local cultures and traditions.⁴

One area where interaction between civil law and customary law is often seen is in the management of natural resources, especially land and forests.

1. Land Ownership

³ Sartika Intaning Pradhani. (2021). "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional," *Undang: Jurnal Hukum* 4, no. 1 89–91.

⁴ I Sartika Intaning Pradhani. (2021). "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional," *Undang: Jurnal Hukum* 4, no. 1 91–92

- In civil law, land ownership is regulated through land certificates issued by the National Land Agency (BPN). This certificate gives an individual or legal entity ownership rights to land.
- On the other hand, customary law regulates communal land ownership. Land is considered the common property of traditional communities and is used for shared welfare.
- Conflicts often arise when customary land used by indigenous communities is not recognized by civil law and land certificates are issued to other parties, including non-indigenous companies or individuals.

2. Customary Forest

- Customary forests are recognized in several Constitutional Court decisions that give indigenous communities the right to manage their forests. However, implementation in the field often faces challenges due to overlapping claims between customary rights and rights granted by the government.
- Plantation or mining companies that obtain permits from the government often operate in customary forest areas without the consent of indigenous communities, giving rise to long-lasting conflicts.

To resolve conflicts between civil law and customary law, various dispute resolution mechanisms have been attempted:

1. Courts and Arbitration

- Land and natural resource dispute cases are often brought to court. However, the formal court system sometimes lacks understanding of the complexities of customary law and is more inclined to follow civil law.
- Arbitration and mediation are also used as alternative dispute resolution, involving a neutral third party to reach a fair solution.

2. Role of Traditional Figures and Community Leaders

- In many cases, dispute resolution is carried out through customary mechanisms involving traditional leaders and community leaders. This process is more accepted by indigenous communities because it is more respectful of their values and traditions.
- Settlements through traditional leaders often focus on restoring harmony and balance within the community rather than mere punishment.

The Indonesian government has made various efforts to integrate customary law into the national legal system:⁵

⁵ I Sartika Intaning Pradhani. (2021). "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional," *Undang: Jurnal Hukum* 4, no. 1 92–93

1. Legislation

- Law Number 6 of 2014 concerning Villages provides official recognition for traditional villages and grants autonomy to traditional villages to manage their own affairs in accordance with customary law.
- The Existing Communities Bill which is currently in the discussion process is expected to provide more comprehensive protection for the rights of indigenous peoples.

2. Judicial Recognition

- The Indonesian Constitutional Court has issued several important decisions recognizing the rights of indigenous peoples to their customary lands and forests, providing a strong legal basis for the protection of customary rights.

3. Dialogue and Participation

- The government encourages dialogue between indigenous communities and policymakers to increase understanding and cooperation. It is hoped that the active participation of indigenous communities in the policy-making process can produce more inclusive and fair policies.

The interaction between civil law and customary law in Indonesia is a complex and dynamic phenomenon. These two legal systems have different characteristics and principles, but both strive to provide justice and prosperity for society. The challenge of harmonizing and integrating these two legal systems requires an inclusive approach, constructive dialogue, and respect for existing cultural diversity. With the right efforts, Indonesia can create a legal system that is fairer, more responsive, and respects traditional values that have long been an integral part of people's lives.

D. Legal Pluralism and Its Challenges

Legal pluralism is like a situation where there is more than one legal system operating simultaneously in one society. So, legal norms can come from state law, customary law, religious law, and even international law. This legal pluralism reflects the cultural, religious and ethnic diversity that exists in society, which often requires a more flexible and inclusive legal approach to meet the needs of various groups. This legal pluralism is nothing new. Since ancient times, many traditional societies have had customary legal systems that run alongside the laws brought by colonialists or the central government. The theory of legal pluralism says that law does not only come from the state, but also from other sources that are legitimate and recognized by society.

Legal pluralism is characterized by the diversity of recognized sources of law, equality between various legal systems, the application of law adapted to social and cultural contexts, and the ability of various legal systems to operate side by side without significant conflict:

1. **Diversity of Legal Sources:** There are many sources of law that are recognized and applicable, including customary law, religious law, and international law.

2. **Equality of Legal Systems:** No one legal system dominates another, although in practice, state law often has greater power.
3. **Contextualization of Law:** The application of law is often adapted to the local social, cultural and economic context.
4. **Legal Cohabitation:** Different legal systems can work together, often without much conflict.

The benefits of legal pluralism include, among other things, making conflict resolution more effective because it is in accordance with the values recognized by the disputing parties, increasing more equitable justice by considering various perspectives, preserving community culture and identity through recognition of customary and religious law, and making the legal system more flexible and adaptive to social and cultural changes:

1. **More Effective Conflict Resolution:** Legal pluralism allows dispute resolution based on the values recognized by the disputing parties.
2. **More Inclusive Justice:** By recognizing various legal systems, legal pluralism can improve justice by considering different perspectives.
3. **Protection of Culture and Identity:** Legal pluralism helps preserve community culture and identity through the recognition of customary law and religious law.
4. **Flexibility and Adaptability:** Legal pluralism makes the legal system more flexible and adaptive to social and cultural changes.

The challenges of legal pluralism include conflicts between various legal systems, such as state law and customary or religious law, difficulties in coordinating and maintaining consistent law enforcement, lack of legitimacy and recognition of several legal systems, potential violations of human rights, legal uncertainty for individuals and businesses, as well as the challenge of updating the law so that it remains relevant to rapid social change:

1. **Conflict between legal systems:** One of the biggest challenges is the conflict between state law and customary law or religious law. For example, in cases of customary land rights that conflict with state law on property.
2. **Coordination and Consistency:** Managing various legal systems requires good coordination to avoid overlaps and inconsistencies in law enforcement.
3. **Legitimacy and Recognition:** Not all legal systems receive the same recognition from the state, which can reduce the legitimacy and effectiveness of some legal systems.
4. **Human Rights:** Sometimes, customary law or religious law may conflict with international human rights principles, such as in cases of gender discrimination or minority rights.

5. **Legal Uncertainty:** The existence of multiple legal systems can create legal uncertainty for individuals and businesses who do not know which system applies in a particular situation.
6. **Social Change:** Rapid social change can make some legal systems obsolete or irrelevant, which creates challenges in updating or reforming laws.

Cases of legal pluralism in various countries show how state law, custom and religion interact with each other; for example, in Indonesia, India, South Africa and Canada, various challenges and conflicts arise such as differences in land rights, family law and natural resource management, which require a special approach to harmonize the various legal systems:

1. **Indonesia:** Indonesia is a clear example of legal pluralism, with state law, customary law and Islamic law working together. However, the main challenge is the conflict between state law and customary law, especially in cases of land and natural resource rights.
2. **India:** India has legal pluralism which includes state law, religious law (Hinduism, Islam, Christianity), and customary law. One of the big issues is different family laws. different for each religion, which often conflicts with the principle of gender equality.
3. **South Africa:** South Africa recognizes customary law and state law. Conflicts often occur over issues such as land rights and natural resource management.
4. **Canada:** Canada recognizes the customary laws of First Nations communities. The main challenge is the integration of customary law with state law on issues such as land rights and self-government.

Strategies to overcome the challenges of legal pluralism include conducting dialogue and consultation with various parties to understand and unify the legal system, harmonizing state law with customary and religious law to reduce conflict, increasing public education and awareness about legal pluralism, providing official recognition for customary and religious law , develop inclusive dispute resolution mechanisms, and carry out legal reforms so that they remain relevant to the social changes that are occurring:

1. **Dialogue and Consultation:** Engage various stakeholders in dialogue and consultation to understand and harmonize various legal systems.
2. **Legal Harmonization:** Efforts to harmonize state law with customary law and religious law can reduce conflict and increase legal consistency.
3. **Education and Awareness:** Increasing education and awareness about legal pluralism can help society understand and respect various legal systems.
4. **Official Recognition:** The state can grant official recognition to customary law and religious law, provided they do not conflict with human rights principles.
5. **Dispute Resolution Mechanism:** Develop an inclusive and fair dispute resolution mechanism, which can accommodate various legal systems.
6. **Legal Reform:** Legal reform that is adaptive and responsive to social change can ensure the relevance and effectiveness of various legal systems.

Legal pluralism reflects the diversity and complexity of modern society. Although it offers many benefits, such as increased justice and cultural protection, legal pluralism

also faces significant challenges, including conflicts between legal systems and human rights issues. To overcome these challenges, strategies are needed that involve dialogue, harmonization, education and legal reform. With an inclusive and adaptive approach, legal pluralism can be an effective tool for achieving justice and prosperity in diverse societies.

Conclusion

In Indonesia, the existence of civil law amidst the presence of customary law known as "living law" reflects the complexity of this country's legal system. Civil law based on national laws goes hand in hand with customary law which grows from the practices and traditions of local communities. This condition creates a situation where two different legal systems with different principles and procedures also operate simultaneously. Civil law provides a general national legal framework, usually based on legal codes applicable throughout Indonesia. In contrast, customary law is more rooted in local customs and traditions that vary in various regions. Although efforts to harmonize these two legal systems exist, the main challenge is in understanding and applying them consistently.

Living law or customary law continues to change, reflecting society's adaptation to social, economic and cultural changes. However, there is often tension between civil law which is based on official rules and customary law which is more flexible and can be interpreted differently in different places. This shows the need for Indonesia to continue to develop mechanisms that combine these two legal systems in harmony, while respecting cultural values and local wisdom contained in customary law to achieve justice and balanced legal certainty.

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