



REORIENTATION OF APPROACHES IN INDONESIAN CUSTOMARY LAW STUDIES

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ABSTRACT

This paper is intended to describe some approaches in studying the Indonesian Adat Law. From the exposure is expected to provide various perspectives in studying the sides of Indonesian Adat Law that is used as the object of study of legal scholars today. The current issue of Indonesian Adat Law studies shows a very distressing and lagging state when compared to other legal studies such as Western Law. This situation indicates how Indonesian Adat Law will be left behind and will likely be alienated from the academic community in the future. The problem is allegedly caused by among others the lack and freezing of existing materials and the absence of unity of theme and orientation of study. This paper is intended as an effort to respond to the situation, namely the effort to provide direction and contribution of thought and further development of the study and teaching of customary law which is still ongoing in the faculties of law in general. This study is considered a study of doctrinal law with reference to secondary data. Secondary data collected were processed in a non-statistic, analyzed descriptively-qualitative, and presented narratively based on the topic of the problem studied. The results of this study indicate the need for the Indonesian Adat Law study approach within the framework of Indonesian national jurisprudence. The object of study of this approach is the idea of Adat Law that was born and started since the Indonesian Youth Congress in 1928, which in its development has spawned Pancasila and the 1945 Constitution as the basis and constitution of the independent Indonesian state. In this development Adat Law is essentially an escalation of the values

and principles of local adat law into the values and principles of law that serve as the basis of the framework of Indonesian National Law. Therefore, it is necessary to approach Indonesian national jurisprudence in studying Adat Law

Key Words: Adat Law; national jurisprudence approach;

PREFACE

BACKGROUND

Customary law studies in Indonesia at this time show a situation of concern and lagging when compared with other legal studies such as Western Law. This situation suggests how customary law will be increasingly left behind and more likely to be alienated from the academic community in the future. The problems that arise in the study of customary law are allegedly caused by among others the lack and freezing of available materials and the lack of unity of themes and orientation of their studies. This paper is intended as an effort to respond to these conditions, it is the efforts to provide direction and contribution to thoughts and further development of the study and the teaching of customary law which has been ongoing in law faculties in general.

The need for a review of the paradigm, approaches and theories of customary law is a necessity for Indonesian (customary) law experts, because the concept of customary law which is followed by Indonesian law scholars is still largely guided by Western Science regarding customary law

which began in 1894 AD by a Dutch eastern literary expert named Snouck Hurgronje. This effort was further developed by a literary scholar and law scholar named C.van Vollenhoven, a professor from Leiden University in the Netherlands. As the culmination is the study of customary law carried out by ter Haar which gives a positive color to customary law (Koesnoe, 1992: 35).

Long before, actually there were already the thoughts of indigenous experts or poets and the original Indonesian intellectuals or experts in local customary law, but with the efforts of western scientific circles to study scientifically using the principles and dimensions of Western Social Sciences, then Customary Law which has been pioneered by traditional experts or poets and graduates are slowly cleared. Gradually the results of the customary experts are not considered by the legal experts and those who interested in the Law Sciences in Indonesia. In the 1920s C.van Vollenhoven himself had warned that the actual knowledge of Customary Law was the knowledge produced by the sons of the nation itself, and that must be eagerly awaited (Vollenhoven, 1928: 173-174). He further said that the Science of Modern Knowledge of Customary Law was built on the ruins of the Indonesian Law, which already existed and developed before Westerners came (Vollenhoven, 1993: 791).

The concept of customary law that was developed and presented by the West by using the social science approach was felt as an inadequate matter for the legal needs of the Indonesian people which in its taste was based and sourced on the taste of Indonesian cultural values. This situation then arose an educated group and law graduates from the Indonesian people,

who tried to combine the two studies in accordance with the view of life that he believed which later, resulted in the concept of ideological and national customary law. This idea was pioneered by the professor of the Faculty of Law, Universitas Airlangga, Surabaya, M. Koesnoe.

PROBLEM FORMULATION

For the purposes of analysis and discussion of approaches in the study of customary law in Indonesia, this paper will follow the flow of thought put forward by M.Koesnoe. He divided the development of the conceptualization of customary law into 5 (five) stages, there are: (1) The introduction and acceptance in the common sense stage; (2) The acceptance of experts stage; (3) The filling stage by the Social Sciences and Western Law Sciences; (4) Ideological filling stage; and (5) the filling stage in national law (Koesnoe, 1992: 37). By following this line of thought, this paper seeks to explore and at the same time develop the ideas initiated by M.Koesnoe, with the following issues: (1) Customary Law Studies based on Local Indigenous Law approaches; (2) Customary Law Studies based on the Western Law approach; and (3) Customary Law Studies based on the Indonesian National Law approach.

RESEARCH METHOD

This study belongs to the realm of doctrinal law study, which sees law as abstract norms in the form of principles, ideas and ideals (*ius constituendum*). The data needed to answer and explain the subject matter comes from secondary data with qualitative data types. Secondary data is

collected by literature study and document study, processed non-statistically and analyzed descriptively and qualitatively and presented narratively based on the topic of study problems.

STUDY RESULTS AND DISCUSSION

Customary Law Study Based on Local Customary Law Approach

In general, customary law experts agree that the term '*adat*' (Customary) comes from Arabic '*aadah*', the plural form is '*awaa'id*' (customs) (Alkalali, 1987: 4). On the other hand, there are customary law experts who doubt the origin of the word comes from Arabic, but comes from Sanskrit *adhi*. M.Koesnoe, for example, notes that before the Indonesian people came into contact with the Arabs who introduced the Islamic Religion with its *Fiqh* Law, the Indonesian people had been in close contact with Hindus with their religion. Among adherents of Hinduism, the term *adhi* is known in Sanskrit which means "from a time that cannot be remembered". The term is still known in the Balinese community where until now it was known as the name of the scripture called *Adhigama*. Therefore the customary term taken from Arabic can be doubted (Koesnoe, 1992: 37).

The term '*adat*' (Customary) which experts generally considered as originating from Arabic, but the concept of custom itself can still be considered abstract in terms of its contents. The fact that Indonesian people are more familiar with the term '*adat*' (Customary) than other terms, such as

'*urf*' in the tradition of *Fiqh* Law. Why is the term '*adat*' (Customary) more popular than the term '*urf*' in Indonesian society? According to M.Koesnoe, this is more due to the historical conditions in which the term *adat* has been known before, namely in the Hindu era with the term *adhi* (Koesnoe, 1992: 38).

It was further stated that in Arabic, the terms of law and terms of customary law are two different terms that are difficult for each other to become a compound words. This is because the legal term in Arabic is always associated with the understanding of the *Shari'a*, which is the will of God (Allah), whose basis is only found in the Al-Qur'an and Al-Hadits, which is based on the revelation of Allah. On the other hand '*adat*' (Customary) is human behavior that transforms into local customs and tribes customs, which is commonly referred to in Arabic as the term *urf*. Even though in the Law of *Fiqh* there is an attempt to link the law (*shari'a*) with *urf*, but in the tradition of related science it is difficult to say the existence of the term Customary Law as it is found in Indonesia. Therefore it can be noted that the term *Adat* (Customary) Law is a specific Indonesian term. It also cannot be connected with legal terms and conditions as contained in *Fiqh* Law. Linking the term in the framework of theories and teachings of *Fiqh* Science, will only lead to misunderstandings (Koesnoe, 1992: 36).

The efforts to explain the contents of the traditional concept of '*adat*' (Customary) are carried out by indigenous customary experts and also Muslim customary experts. The efforts made by the real indigenous experts to explain the concept of '*adat*' (Customary) are often associated with other terms such as *resam*, so that it becomes a *resam*-custom

compound word. The experts have not been able to determine exactly the origin of the word *resam*, whether it is original from the language in Indonesia that is included in Malay Language or derived from an outside term. *Resam* is commonly defined as good behavior, which is upheld and carried out at all times by members of the community and therefore there is an obligation of community members to take and do it. The designation of *resam*-custom indicates that in the past people still distinguish between the two. The difference is that *resam* is a good behavior, while ‘*adat*’ (Customary) is defined as something that must be done in a binding manner. The term *adat-resam* is a development and means a *resam* that is strongly binding on the citizens to be carried out

The term *adat* in other principles from *resam*, it is clearly shown in the proverbs in Aceh which show their location, such as: *reusam bak laksamana, adat bak peunteu meureuh, hukoum bak syah kualala*. In its development the content of the term *adat-resam* gradually diminished and blurred, so did its place. Similarly, the term *adat-resam* is in a less popular practice. In general, people only use the term *adat* as a guide to good behavior in society. Even in practice people often use the term *adat* is associated with the term habit to be an *adat*-custom term rather than *adat-resam*. (Koesnoe, 1992: 38).

In some indigenous communities there are several custom categories and each categories have certain meanings from these concepts. For example, the following will describe the categories of ‘*adat*’ (Customary) found in Minangkabau, Bugis and Balinese people.

In Minangkabau community there are two main categories of 'adat' (Customary) known, first, *adat sabana adat* (the real custom); and second, *adat pusaka usang* (the obsolete heritage custom). (Koenoe, 1992: 42-44). *adat sabana adat* (the real custom) are customs that are not thought-provoking and man-made custom. This custom is found in all the realms of occurrence in the universe and become the source for humans to get the ideas in disciplining humans. For example, the expression contained in *Gurindam* in Minangkabau is as follows:

Panakiek pisau sinawiek (Panakik pisau seraut)

Ambiek galah batang lintabuang (ambil galah batang linatbuang)

Silodang ambiek keniru (selodang ambil untuk niru)

Nan setitek jadikan lawiek (yang setetes jadikan laut)

Nan sekepal jadikan gunung (yang sekepal jadikan gunung)

Alam terkembang jadikan guru (alam terkembang jadikan guru)

Adat Pusaka (Customary Heritage) is the custom of human thought since ancient times from a time that can no longer be remembered. This custom was formed by drawing teachings from natural events, which in Minangkabau customary teachings were formulated as *alam terkembang jadikan guru* (the universe is made into as a teacher). *Adat Pusaka* (Customary Heritage) is often referred to as '*Adat Pusaka Usang*' (the obsolete heritage custom) because it is a thought, processing and discovery of the ancestors and past people, which was later passed on to generations of

society until now. This *Adat Pusaka* (customary heritage) is of course subject to the changes and alterations formulated in the Minangkabau expression: *sekali aye gadang, sekali tepian beranja, sekali raja baganti, sekali adat baubah*. Therefore the *adat* (Customary) experts in Minangkabau distinguish the *Adat Pusaka* (Customary Heritage) in the following categories:

- 1) *Adat-Istiadat* (Customs), which are customary principles in general;
- 2) *Adat nan teradat* (Custom of customs), which are more concrete customs that are preferred by the community in using them;
- 3) *Adat nan diadatkan* (the customized customs), which are the customs in the form of decisions from the community through deliberation as filling in the *Adat Pusaka* (customary heritage).

From the description above, it can be seen that there are 4 (four) levels of *adat* in the Minangkabau society there are (Hadikusuma, 1990: 10-11):

- 1) *Adat sabana adat* (the ral custom), it is the customs which are not bend by the heat and not rotten by rain (Everlasting Customs). This custom is a creation of Allah, as described in the phrase: "*ikan adatnya berada di air, air adatnya membasahi, pisau adatnya melukai*" (The fish are supposed to be in the water, water is supposed to be wet, knife is supposed to cut/hurt). So this custom is a natural behavior because it is God's provision that does not change, it is the behavior that should be done. This shows that the teachings of *adat* (Customary) are identical with the

laws of Allah (*sunnatullah*) which are scattered in the universe. This custom is something that should be according to the plot and appropriate, according to the religion, according to humanity, according to place and according to time. It is a nature law, wherever and whenever it will be the same (universal), as the water will soak, as the fire will burn and so on.

- 2) *Adat Istiadat* (Customs), it is custom as a norms determined by previous ancestors. In Minangkabau it is said that the norms are came from Ninik Katamanggungan and Ninik Parpatih nan Sabatang at the Balai Periangnan Padang Panjang Hall. As in the expressions *negeri berpenghulu, suku berbuah perut, kampung bertua, rumah bertungganai, diasak layu dibubut mati* (the land with a leader, the tribe that bear fruit of the stomach, the village of the elder, the house with a hut, move it and it withered, pull it out of the ground and it dead). So customs are the norms of habits that have traditionally been applied since the time of the ancestors up to the generations in the present time. Although traditional, but in general this custom is not easy to change.
- 3) *Adat nan diadatkan* (the customized customs), that is custom as a norms established based on the consensus of the leaders, the elders of *adat* (customs experts), the well educated in customary meeting assemblies based on the plot and proper norms. This provision can change according to the place and time. Therefore, different *Nagari* (place) also have different views on the plot and proper norms. This is often expressed with proverbs: *lain ladang lain belalang, lain lubuk lain ikannya, lain orang lain kepala, lain pula hatinya* (different field has different

grasshopper, different pond has different fish, different person different head, has different heart too).

- 4) *Adat nan teradat* (Custom of customs), is a customary behavior that is used because it imitates the behavior between the members of the community. Because the habitual behavior is getting used to be done, it is felt not appropriate to be abandoned. For example, among the Minangkabau people, they were already customized when there were relatives who passed away or to welcome honorable guests, they will arrive dressed in black.

In the Bugis Indigenous community, *adat* (customs) is known as *ade'* or *ada'*. There are five categories of *adat* (customs), as outlined in *Lontara' Sukkukna' Wajo*, there are: (1) *ade' pura ouro*; (2) *ade' assituruseng*; (3) *ade' maraja ri arungngo*; (4) *ade' abiasang ri wantue*; dan (5) *ade' taro anang* (Abidin, 1983: 125-131). Those five categories of customs are explained as follows:

- 1) *ade' pura ouro* is a fixed custom, which cannot be changed, because it has been agreed upon by the king and the people to be carried out and obeyed that has been witnessed before the One God. If the provisions are amended or canceled, the country will be damaged, because it violates something that is correct and denies honesty;
- 2) *Ade' assituruseng* is a custom stipulated by the agreement between the king and the people, which can amend if the process of executing is still imperfect or because it cannot meet the needs of the community. The changes can be made by discussion or meeting and meet the consensus;

- 3) *Ade' maraja ri arungngo* is a custom that applies to kings and aristocrats, who come from *ade' assituruseng*, because they are considered to have no more flaws or defects and therefore are carried out by kings and aristocrats. For example if the king will hold a formal party (ceremony) or will build a house, then the king must cut a buffalo and then gather all the people to help him and provide food and drink for the people who come and help the king;
- 4) *Ade' abiasang ri wantue* is a custom that applies to all people based on the mutual agreement that is no longer have flaws and must be carried out continuously by the people;
- 5) *Ade' taro anang* is a custom that born from the village elders whose point is said: *Illuka taro Datu telluka taro Ade', Illuka taro Sde telluka taro Anang, Illuka taro Anang telluka taro ta ega* (The cancelation of the king's decree does not means that the decision of the Customary Board's is also cancelled, the cancellation of the Customary Board decree does not cancel the provisions of Elders of *adat* (the customary experts), the cancellation of the provisions of Elders of *adat* (the customary experts) does not cancel the provisions of many people). So people's decisions are above other decisions.

In indigenous communities in Bali there are 3 (three) known categories of *adat* (Customs), There are *gama*, *sima* and *pararem* (Koesnoe, 1978: 14-18). Among the three categories of *adat* (Customs), the best known is *adat sima*, which is a custom whose validity is limited to a certain

area in a village or a group of villages. The three categories of customs are explained as follows:

- 1) *Gama* is the highest category of *adat* (Customs), it is abstract and general. All members of the Balinese community uphold this custom and try to implement it. *Adat* (Customs) in this category is qualified as constitutive. This custom is the basic of teaching and the basic principles in community life, so it is very difficult to amend. As a constitutive agreement, to carry out the teachings and the principles of life is carried out by means of interpretation / explanation so that it become the answers to various problems faced by indigenous peoples in Bali in all circumstances and situations;
- 2) *Sima* is the custom categorized at the second level after *gama*. This custom provides forms and guidelines for carrying out *gama* in all circumstances and situations. Therefore *sima* can change according to place, time and circumstances. This custom is an implementing rule of the constitutively *gama* customs. With the *sima*, the *gama* can be implemented. Therefore this custom categorized is qualified as an institutive customs.
- 3) *Pararem* is a custom category at the third level or the lowest level. This custom gives direction to the practice of everyday life in concrete situations. This custom is very flexible and able to change quickly in order to adjust to the demands of place, time and circumstances. Its very flexible nature allows the *sima* custom to be manifested in its actualisation. Therefore, this third categorized custom is referred to as

being rality, which means this custom in the form of real or concrete implementation in the community's daily life.

A concise picture of the three categories of customs was presented by Koesnoe as follows. In Balinese society, a person acts according to his view of humanity, life and the world. This in Balinese society is expressed in teachings and principles regarding the way in which people can obtain the preservation of life in this world and in the afterlife. This is called *gama*. From this *gama* then emerge institutions that contain guidelines to carry out called *sima* and this can be carried out differently from one village to another. The many differences and complications of actual problems in daily life regarding the implementation of the guidelines of *Sima* always demand for a concrete answer which in fact are indicated by decisions made on these concrete problems in its form as *pararem*.

Since the *pararem* custom is related to the realities and practice, therefore in the implementation, the special circumstances and situations in the process of implementation are very important so that this custom is truly actual and operational. Here applies the traditional teachings which state that everything must always consider the place, time and circumstances (*desa, kala, dan patra*).

Meanwhile, the efforts made by Muslim customary experts (*fiqh* experts), among others, were carried out by Jalaludin of Trusan in Aceh in 1630 AD. In the article entitled *Safinatul Hukaam Fi Tahlisil Khasam* explained the meaning of adat as follows:

Customary law is the connection between the former and the later generation which on the existence or absence by reviewing it repeatedly on the matters. There can be no depth of vision, as fire burns for those who touch it, and the sharp one hurts for the affected, and the food is filling for those who eat it, and the light illuminates the dark, for there is an increase in the inner meeting.

M. Koesnoe gave a commentary note on Jalaludin's formula, that the concept of customs (customary law) must considering the following, *first of all* is the *connection* between the former and the later generations. This means that customs (customary law) does not lie in the event, but in what is not written on the back of the event, and the unwritten is a provision of necessity that is behind the facts that require the linking of an event with another event. *Second*, there is whether or not the connection by judging it from the 'repeated' matter. This means that customs (customary law) can only be known as the connection of two or more events that occur at different times. So customs (customary law) is known only when there are events that occur at different times, but it turns out to have a concurrent manifestation, as if it were a repetition of the past. From the concept, Jalaludin did not provide a substantial understanding, but only gave instructions on the sources of identification of customs (customary law), its called the existence of repetition of things in different times. Customary law itself is only indicated where it is in the event or the recurring thing, called the 'connection' and the connection itself is not visible or abstract.

So for Jalaludin, customs (customary law) does not lie on what is seen. This opinion can also be shown in his opinion regarding *urf*, *adat* and

resam. *Urf* is 'all the work that has been determined by the clerics to order all of Islam and Kitabullah all that is wise and accept him'. Here it appears that *urf* is the provision of the Muslim scholars. *Adat* (Customs) is 'repeating the law like a long time ago, there is no end in it'. Here it appears that *adat* (Customs) does not lie in the real aspect of experience, but as the character located in another realm than reality that can be seen. *Resam* is a 'former law that applies to all countries, no desire to speak again because of its birth and fame'. So *Resam* means former, it means what has been done. It is in the realm of empirical reality and can be seen. The meaning of former earlier is the former and the provisions that have been carried out in the community concerned.

Jalaludin's opinion about *adat* (Customs) from 1630 AD according to M.Koesnoe shows that customs (customary law) is not the same as real habits. Indeed, in his description it appears that customs (customary law) as a 'connection' is only seen in what has become a habit. But the connection itself is not the habit. Customs (customary law) according to Jalaludin's view is in different realm beyond its empirical reality or in the inner realm.

From the results of cultivation by customs experts, both the original and the Muslim are more familiar with the term Custom than Customary Law. To find out what customs can be seen in the sayings/proverbs, figures, verses, and other terms used in connection with *adat* (Customs). However, these ingredients are very difficult to find and it is very difficult to present whether the ingredients are originally from their thoughts.

In general, the concept of custom according to traditional custom experts is interpreted as order in society by holding on to a particular goal which is jointly fought for the implementation of the community's daily life. At this stage it appears that the traditional concept of adat is cultivated by traditional experts, for example in Minangkabau and Melayu. In this community, there is known theory of *adat* (Customs) that distinguishes between the traditional customs called *adat sabana adat* (true adat) and *adat pusaka usang* (custom that can change). The second category of *adat* (Customs) is further subdivided into *adat istiadat*, *adat nan teradat dan adat nan diadatkan* (the meaning of each category can be seen again in the previous description).

Muslim custom experts also try to link up the concept of *adat* (Customs) with Shari'a (*fiqh*). The relationship is reflected in a variety of *gurindam*, proverb and saying. In Aceh's proverb, for example, the relationship between adat and the Shari'a is described as *dhat* and characteristic. In Minangkabau, for example, there is a saying that stated *syara' mengata adat memakai, syara' disunggi adat dipangku* (syara' said customs used, syara' uphold customs put on the lap).

Customary Law Studies Based on Western Legal Approach

At the end of the 19th century, customary law studies entered a new stage of studies whose studies were entirely different from the previous one. The effort to provide understanding of customary law is completely new. This study was pioneered by Snouck Hurgronje, which was then

continued by C. van Vollenhoven. This study is actually a reaction to groups who want to override even replace the Indonesian law (customary law) with western law. Because the customary law was considered as if it were only miraculous rules which were mostly deviant and considered by the authorities to be low (Soedarso, 1998: 2).

In compiling his views on customary law, this writer was rooted from the western scientific thought by using empirical materials that the way and size of collection are used by means and measures of western scientific, called Social Science. From the perspective of social science, it was tried to establish the contents of the term of customary law, which at the time Snouck Hurgronje was in Aceh has already existed and lived and was widely used by the general public and the scientific community in Aceh.

Snouck Hurgronje is famous for his researches in Aceh and Gayo and his knowledge of Islam in theory and practice, as well as the way he studied Islam in Mecca. The results of his researches distinguish between customary law and religious law, people's law and the laws of the kings, life law and written law. Snouck criticized the theory of *receptio in complexu* maintained by Van Den Berg. With this criticism, it is assumed that the main source of customary law is the law of *fiqh* (shari'ah) (Soedarso, Ibid).

The term customary law by Snouck Hurgronje is translated as *Adatrecht*, is an introduction and beginning of the recognition of the existence of customary law as the law of indigenous Indonesians in the environment of the Western Law Science attention. *Adatrecht* is defined as custom that has legal consequence. This legal consequence is the central

measure of Snouck's definition. From this definition it can be drawn the conclusion that the habits and behaviors that exist in Acehese society that are seen as having legal consequences are qualified as law. He was then given the name of customary law which is custom that has legal consequences¹.

Snouck Hurgronje's thoughts caused stimulation for the western legal community to study further, especially the adat section which has legal consequences. There was a law scholar and scholar of eastern literature, known as C. van Vollenhoven. In giving an explanation to the western sciences, this writer states, among other things: 'whoever as a jurist enters the realm of Indonesian law; he will be confronted with a legal realm which is very different from what he encountered in the Netherlands. In Indonesian society an unwritten law called customary law and what constitutes *adatrech* (customary law) is custom (not written) which has sanctions (because that is a law)' (Vollenhoven, 1925: 3).

With this van Vollenhoven's view, then the real stage of thinking and cultivating the Customary Law in modern science is begun. He rooted from realities with very strong evidence. Then proceed with the effort to find conclusions in various fields of law along with questions both principal and detail.

¹ Against this definition M. Koesnoe, posed the question: first about the meaning of custom that what is called custom according to Snouck is what he sees in the empirical realm of what happens repeatedly in the order of time. In short the habits that occur in society. The second is about legal consequences. What law is meant by law? Western law or Shari'a law, because the location of the research is Aceh which applies Shari'a law (Al-Qur'an and Hadith). When the law is considered "*recht*" as a Western concept, then the meaning of it is a set of compelling or separated rules made by the community. If that's what Snouck meant, then the definition is still difficult to understand and unclear.

The results of his research on customary law were titled *Het Adatrech van Nedertandsch-Indie*, consisting of three volumes of books, collected from 1919-1931. The first volume is an orientation study of the world of customary law in Indonesia, which shows basic problems and an introduction to customary law. The second volume is the basis for Customary Law Science, which shows the problem in each place. The third volume is regarding the development of customary law which shows the necessary studies on customary law.

The conviction of van Vollenhoven was then continued by his students, among others, Ter Haar. Law as developed by ter Haar is the inseparable basics from the basics provided by van Vollenhoven, but what he provides is a further development and improvement and leads to positive legal studies.

According to Ter Haar to be able to find out customary law, then it can only be found in the decisions of legal officers against issues resolved inside and outside the dispute that hold first to the structural ties held by the community, and the second holds on to the values that live in that community².

According to Ter Haar in studying scientific customary law, the decisions of customary law officers are very important. According to him,

² Against Haar's view, Iman Sudiyat said that Ter Haar had a very in-depth view of customary law, proved by his words that said every judge must make a decision according to customs; they must deeply understand the customary law system or *stelsel*, social reality and demands for justice and humanity to be able to carry out their duties properly. This means that Ter Haar does not forget the realities in Indonesian society and the unique realm of mind that must be used by a wise judge as the base of direction

the old issue of whether customary law is a habit that has legal consequences, or custom that has sanctions, or something that is in the normative realm, gets another confirmation

Decisions as a basis for knowing customary law as taught by Ter Haar have consequences in effort to find out customary law. The consequence is that to find customary law, it is necessary to collect the fixed decisions of legal officers. This is to get general conclusions contained in the decision made by the officers in order to know how the line of customary law sounds on the legal issues implicitly stated in those decisions. It seems that Ter Haar was influenced by western law teaching about 'fixed jurisprudence' to capture the sound of a substantive customary law.

With Ter Haar's teachings, customary law studies derive their form as positive legal knowledge about customary. Referring to the Western Science discipline about unwritten legal studies that develop in the society, customary law by Ter Haar was brought to the view that it was in the literature study of customary law officers

Thanks to ter Haar, the study of customary law got the development of the conceptualization of positive legal science that was worked out in the positive model of western law. Ter Haar is a *system bouwer van net adatrech* "or builder of the *adatrecht* system, meaning that Haar has built *afsluitsel van het verleden en een bouwsteen voor de toekomst* or 'cover for the past and build for the future'. Djokosutono said in his lectures in 1953-1954 (Koesnoe, 1992: 55).

In 1924 The College of Law was established in Jakarta. Customary law, which has obtained the theoretical basics compiled by C.van Vollenhoven is taught as a subject. This Law Science is under the care of Ter Haar as the professor.

Through ter Haar, the Indonesian educated students are seen as having a new round of thinking about the concept of customary law which led to the birth of the study of customary law within the framework of National Law which began with customary law as the ideology of national law in 1928.

The Approach of Customary Law Studies Based on the Indonesian National Law

The results of the study of customary law according to traditional and Western science experts in the next development gave birth to a new approach to the study of customary law which led to the study of customary law within the framework of Indonesian National Law. This study approach emerged because of the Indonesian independence movement at that time so the first impression that emerged was an ideological legal conception³. This means that the definition of customary law is carried out within the

³ However, the custom during the Dutch East Indies era played a patriotic role and therefore it was very understandable for the freedom fighters who at the time felt they were included in the 1928 Youth Pledge. With the provisions governing legal pluralism it could be said that precisely with the regulation the freedom fighters obtained weapons to consolidate themselves through customary law as a symbol of integration

framework of national ideology, it is as a belief in the truth that customary law is a law that is truly legal from the people of Indonesia.

This ideological view of customary law was introduced as an idea starting in 1926 in the first Indonesian youth congress. At the time that the First Congress had not been able to formulate a definite decision, it was then continued at the Second Congress on October 28, 1928. In the Congress it was confirmed in the form of a congressional decision regarding the belief of the congress regarding Indonesian unity. The decisions of the congress, among others, are explained as follows: 'releasing the belief of Indonesian unity is strengthened by paying attention to the basis of unity, such as: the willingness, the history, the language, the custom law, education and leadership '(Koesnoe, 1992: 56)⁴.

The contents of this decision were explained by Koesnoe about what is the function and the role of customary law in the ideological concept is that customary law acts as one of the foundations of Indonesian unity. In that statement, customary law was accepted as a law which is a joint legal value of all people and binds all Indonesians into one nation. Such thoughts are in accordance with the views that lived at that time in the political sciences, which stated that the nation can only be called a nation if it has its own laws which are different from the laws of other nations. As a binder of

⁴ Also see the full text of the 1928 youth congress decision;

the unity of the entire Indonesian nation, customary law is not seen in its diverse statement in an area that is different from other regions⁵.

The birth of the establishment and belief in the matter of Indonesian law clearly has something to do with the education that was carried out by members of the congress who had an educational background in the Law School which was established in 1924 in Jakarta who have provided customary law courses. Among the figures who formulated the decision was Mohammad Yamin.

In following developments in 1945, between June-August 1945, the views of customary law ideologically obtained their formulation in the form of a more definite view which included: philosophy of state customary law, customary state theory, and basic state law. The three formulations can be examined in BPUPKI trials under the leadership of Dr. Rajiman Widyodiningrat. Soekarno said that the philosophy of the Indonesian state based on the customary philosophy about the state which was named "Pancasila". The point is explained that none other than mutual cooperation.

⁵ The ideological concept of customary law, which emphasizes its views on the law in terms of "spirit", which transforms into philosophy and Indonesian basic law, is theoretically explained by Koesnoe as follows: The law consists of two factors, there are the ideal factor, and the second is real factor. The ideal factor consists of materials that are included in the moral nature, so it is irrational and materials that are included in rational materials, while the real factor consists of human, natural and traditional materials. The moral ingredients include things related to good and bad views, goals to be achieved. Parts which include rational material consist of matters relating to understanding, techniques and systems contained in every law. The real factors which consist of three materials are the things that give a real form to the law. As a real material, these materials provide different forms between one region and another in Indonesia. In the decision of the 1928 Youth Congress the views on customary law ideologically constituted legal awareness and ideals that rooted from the spirit of the Indonesian people

Likewise M. Yamin put forward this philosophy which essentially contained the same elements as Sukarno's.

Soepomo (expert in customary law) in discussing the theory of state expressed his opinion that the state and the people were single. On this basis, the sovereignty of the people, according to the theory of customary law, gave birth to an integralistic state, which stated the state and the people is one where sovereignty is in the hands of the people.

The conception of customary law which was described since July 1945 was the maturation of the ideology of the views of customary law as coined in 1928. All of that was still an attempt to formulate more clearly the content of ideology that was believed and had to be lived and fought for into political reality in Indonesia. The ideological maturation of the customary law was also at that time gave birth to the basic draft of the juridical formulation in the form of a state history document known as the Jakarta Charter. In the Jakarta Charter, it is formulated the matters relating to the basic philosophy of law must be carried out by the Indonesian people regarding the state theory and its objectives.

Customary law in this ideological conception as contained in the decision of the youth congress from 1928 to 1945 for the first time was associated with the philosophy of law and basic law of Indonesian nationality. Customary law is seen as a legal value of Indonesian folk culture, a law that governs the Indonesian legal system as a whole, as a rule of law that forms the basis of Indonesian unity.

From the ideological conception of customary law in the next development on August 17, 1945 to be exact, customary law is truly a national concept which manifests in an independent Indonesian nation according to customary law (Rahardjo, 1977: 143)⁶. The different views of customary law since 17 August 1945 and before is that previously that view had not been an official view of the Indonesian nation; it was only the view of a group of Indonesian people and leaders who sat in the PPKI formed by the Japanese occupation army government. Meanwhile, since August 17, 1945, even though most of the people are the same, the groups of figures have other positions and qualities, which is as the conceptor of the 1945 Constitution from an independent country.

In such position and quality, the views that are imbued and guided by customary law are the official views of the Indonesian state builders and no longer merely as a group or individual ideology or spirit. Their opinion is the opinion of the official agencies of the state and it is the view and position of the state regarding what is positive law in Indonesia.

Since then the views of customary law can be said as a view of National Law. The National view of customary law other than theoretical nature also has the force of force as a positive law in matters concerning the Basics of Indonesian Law.

⁶ However, after Indonesia became independent, in reality it was different, that the role of customary law had been taken over by National Law that the basis was contained in the 1945 Constitution. Pluralistic Configuration was ended. What used to be called Customary Law, now turns into a complex of values that influence the workings of the National Law

In the national conception of customary law, the fields include, among others: the philosophy of national customary law, the theory of the rule of law according to customs which is nationally appointed and the Basics of National Law in accordance with the philosophy and theory (Koesnoe, 1992: 65).

According to Koesnoe, the view of the National Customary Law was reflected in the three documents contained in the Preamble of the 1945 Constitution, the Body of the 1945 Constitution, and the Explanation of the 1945 Constitution. The first is about the Law and its form, the second is the system, and the third is the basics (Koesnoe, 1992: 8)⁷. Koesnoe, furthermore, proposed several notes about what is called Customary Law in the framework of national understanding, such as: about legal criteria that are necessary to determine whether from custom that can be classified as law. Here it should be noted that the legal definition as commonly used in the mind of customary law cannot be used. Sanctions cannot be used for customary law as the main criterion. Similarly, personal interests must take precedence.

Customary law as stated by various western and Customs groups is a matter that regulates and disciplines the community. This disciplining practice in daily life when compared to the practice of western law is very different in terms of circumstances and work. In addition, because the law is

⁷ M. Koesnoe explained that the three documents constituted the agreement on the concept of customary law in the fourth stage (He divided the five stages of conceptualizing Customary Law). This can ... be examined in the formulation of the explanation of the 1945 Constitution where it can be found how national "rechtidee" that binds the nation and state of Indonesia. The Rechtidee is a modern appointment of Indonesian people's legal ideas which are based on the cultural values of the Indonesian people, namely Customary Law

always born from the legal sense of the community concerned, the definition of customary law, in terms of the legal sense of the community needs attention. The sense of law is the sense of law which is a reflection of the cultural values of the Indonesian people.

The next thing that needs attention is that physical certificates for customary law are generally not contained in written law. In this case the filling of customary law in the national framework shows a gradual development. The stages are explained by Koesnoe as follows: *First*, the basic elements of the concept of customary law in the national framework are those concerning the National Soul. This element is placed as a statement of the values of Indonesia's national culture regarding the field called law.

Second, that customary law is always connected with the Indonesian people as a whole, especially the original group. In this case, customary law is not the result of thinking from an elite group of the Indonesian people, for example the Juris, therefore the source is not written law but a direct statement of the Indonesian people's legal sense of Indonesian culture.

Third, that the taste of customary law among others has a universal nature of humanity. This means that customary law is seen as a normative principle, therefore abstract and not in its actual and empirical form.

Fourth, that customary law is seen as a manifestation of real behavior in society both in actions that take place once (*einmalig*) and in the

form of habits, or in the form of decisions by not closing the possibility of written form.

Fifth, that in providing a definition of customary law there needs to be a double definition. That is a formal definition and material or substantial definition. The development of customary law studies in this case is associated with the Preamble of the 1945 Constitution and its explanation. From here Customary Law can be seen as what is described by the Explanation of the 1945 Constitution as an unwritten law, which includes basic law to the implementation or details. This view provides a consequence and continuation of the view that customary law can take the form of written law, as long as it has an unwritten sense of people's law (Koesnoe, 1992: 76)⁸.

In its relation to the 1945 Constitution this view will see the 1945 Constitution as an incarnation in written form from an unwritten people's law. Such a view does not deviate from the views that are developing and openly, by the explanation of the 1945 Constitution it is not closed the possibility of incarnation of 'spirit' becomes and masters the written law.

In the explanation of the 1945 Constitution, this is clearly explained that all written regulations are determined by the 'spirit' which animates the executors. The spirit referred to in the 1945 Constitution

⁸ According to Koesnoe, Customary Law can give birth to a written law that is not new. In the past, there were those seeds. Customary law is given a written form in the past stated in the form: *Angger-angger* (Java), *awig-awig* (Bali). It is not clear yet whether this question can also be called "law" as is well known in Minangkabau and Melayu societies. *Angger-angger*, *Awig-awig* is written in form and takes the form of an arrangement similar to the articles of modern law

system is the taste of people's law (customary law). The basic principles are described in the Preamble and Explanation of the 1945 Constitution, which is the basis of its principles, namely the values that exist in national culture. From the written law in the form of this law, the source, called unwritten basic law or "spirit" according to M. Koesnoe, is nothing but customary law.

CLOSING

CONCLUSION

The results of the study of customary law which is understood by most Indonesian law scholars are still referring to and guided by the approach of the Western Law on Customary Law, so what emerges is the view of customary law in the western conception. Although this study has succeeded in systematically presenting the concept of Customary Law in a modern way, the results of the study of customary law are only limited to the outer skin, the empirical aspect alone. The results of the studies have not been able to reveal and touch the psychological aspects of customary law, such as the taste that animates the cultural values of the Indonesian people.

The study of customary law which is able to establish and build a strong theory for the science of customary law which has a national perspective was started by the youth of Indonesia itself in 1928. With the discovery of the Youth Oath manuscript in 1928 it can be concluded that since that year the Indonesian nationalist pioneers have had the concept of

customary law which is ideological, called customary law as the basis of the unity and ideals of the law together with an independent of Indonesia.

In contrast to the concept of customary law according to Western Law circles who follow the theory of division of Customary Law in various environments (19 customary law environment), the concept of customary law followed by the pioneers of the Indonesian national movement emphasizes the uniformity of customary law as the law of the entire Indonesian nation, which in its development has given birth to Pancasila and the 1945 Constitution as the basis and constitution of an independent Indonesian state. In this development, it is essentially an escalation of the values and principles of customary law that are local in nature the values and principles are used as the basis for the Indonesian National Law framework. This Customary Law Study within the framework of National Law is still in the form of searching for forms and requires further cultivation.

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