STATE RESPONSIBILITY FOR THE LEGISLATION PROGRAM OF INDONESIA CUSTOMARY LAW

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ABSTRACT

This paper examines the existence of state responsibility in the national customary law community legislation program. The position of cultural community nationally is indeed not underestimated, so that it needs to be given legal certainty through the normalization of norms, which should be done immediately by the government to ensure the implementation of state authority as a state with high plurality identity than other countries. The result was shown that the indigenous peoples' legislation program system indeed emphasizes the aspect of the cultural approach rather than the structural approach aspect in which efforts to develop Indonesian people as a whole.

Keywords: Accountability, Customary, And Legislation Programs

INTRODUCTION

The concept of law, according to Hart, is far more complicated than the definition of law, according to John Austin. According to Hart, the first law is the rule of law that gives rights and obligations. For example, criminal law rules that prohibit and provide sanctions to a thief, robber, fraudster, pickpocket, and many more. Whereas secondary law, according to Hart, is the rule of law that regulates how and who makes, enforces, or changes the first law. Regarding this secondary law, Hart called it a "rule of recognition" because it is a rule that determines which of the rules in society made with procedures that comply with the law so that we can consider these rules as law (Fuady, 2010; Scarciglia, 2015)(Munir Fuady, 2010; 39).

The substance of recognition in the realm of national law in Indonesia is synonymous with written nature. Aspects of drafting procedures that are adaptive to the needs become the primary identity in legal drafting. By starting from this, each of the community's problems or conditions of the community we must manifest into written legislation.

In the view of the same as mentioned earlier, Lon Fuller proposes eight conditions so that a rule we can say as "the rule of law," which he calls as an internal moral requirement (inner morality of law). The eight conditions are as follows:

- There must be rules;
- Rules must apply to the future (prospective); not backward (retrospective);
- These rules we must announce;
- These rules must be following common sense (intelligible);
- Rules may not be contradictory;
- The rule we must obey;
- Rules must not always change;
- There must be congruence between the written rules and those enforced by law enforcement.

According to Fuller, the eight conditions must be met by the rule of law, although we must recognize that there will be no rule of law that can fulfill these requirements perfectly.

However, a good rule of law must try to meet as secure as possible and as close as possible to these conditions (Fuady, 2010; MacCormick, 1994).

The role of the authorities is crucial for ensuring the implementation of such a legal product drafting system. Hart said that because the law must be concrete, there must be someone who writes it. The definition of "who writes" refers to the understanding that the law must be issued by a person (subject) who does have the authority to publish and write the law. The authority is the state. State authority is indicated by the existence of state attributes, in the form of state sovereignty. Based on its sovereignty, the state is internally authorized to issue and enforce what is called positive law. (Sutrisno, 2016)

Furthermore, HLA Hart states that law (concretized in the form of a positive law) must contain an order. He also states that it does not always have to be a link between law and morals and differentiated from the law that we should have created (there is no necessary connection between law and morals or law as it is and law as it ought to be). Hart's opinion, as described in the latter statement, indicates Hart's HLA repulsion that the law must be sourced and abstract. It is a logical consequence of the way of thinking in positivism, which sources and the causal relationship between a symptom and another symptom concretely, (invisible). Therefore, moral considerations do not have to be related to the issuance of positive law because moral considerations are not tangible things (Samekto, 2013; Scarciglia, 2015). The identity of the Indonesian state as a customary community is undoubtedly a serious concern that must be responded to by the authorities in the drafting of national legislation programs in terms of and relating to ensuring a system of guaranteeing legal certainty. Recognition of customary law is a social basis that is recognized and respected not only by our national law but also by international law. In 1899, Fyodor Martens laid down the principle that applies to cases that are not covered by humanitarian law. The principle referred to is that civilians and combatants remain under the protection and power of international legal principles derived from Established customs; humanitarian principles; and values of public awareness (the dictates of public conscience). (Asshidiqie, 2007).

Other countries even adopted such a model where a customary law system formed, which is legal and influences the implementation of law and governance. In the environment of the sovereign states that adopt a parliamentary democratic system, there is always a separation between the position of head of state held by the King or Queen (women) and the position of head of government held by the Prime Minister (or with another name). There is Prime Minister Tony Blair and Queen Elizabeth, in Malaysia there is Sultan and the Prime Minister, and so are Germany, the Netherlands, Spain, and Japan (Asshiddiqie, 2006; Teuscher, 2010).

In Indonesia, the position of customary law is also affirmed in article 18b paragraph (2) of the 1945 Constitution which states that the State recognizes and respects the customary law community units along with their traditional rights as long as they are alive and following the development of society and the principles of the Unitary State Republic of Indonesia, which is regulated in law. However, in affirming the national legislation program in Indonesia, the drafting of implementing regulations both in Laws, Government Regulations, regional regulations, and others do not regulate the specificity of regulations related to indigenous peoples in written regulations and often do not even animate the values of the legal community of the customary law in the regulations legislation both in local and national level.

RESEARCH METHOD

This study uses the normative law research method, namely researching, tracing, assessing, and analyzing with the object the legal certainty of evidence to provide benefit to those entitled to the investigation process.

RESULT AND DISCUSSION

Government policies directly into indigenous peoples indeed scatter in a variety of provisions. It has become a significant factor in the adjustment of regulations related to indigenous peoples, which so far we have not appropriately needed because the compilation methodology system was not used, namely by regulating itself in the provisions of the Law governing indigenous peoples.

In addition to the Indonesian Constitution, several sectoral laws also provide guarantees for the rights of indigenous and tribal peoples, including:

- Law Number 32 of 2009 concerning Environmental Protection and Management;
- Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (LoGA);
- Law Number 26 of 2007 concerning Spatial Planning;
- Law Number 41 of 1999 concerning Forestry;
- Law Number 6 of 2014 concerning Villages;
- Law Number 39 of 2014 concerning Plantations;
- Law Number 23 of 2014 concerning Regional Government.

However, there are weaknesses if the provisions relating to customary law communities are scattered thus. The codification in a customary law product will be weaker in carrying out the social change of the customary law community for the better. It reflects in the argument that in the twentieth century, we recognized that legislation does not only consist in determining what constitutes law in society. In particular, we recognize that the law can also be an instrument for influencing society, a means for implementing policies (*beleid*). People talk about "modifying" (*modificeren*) rather than about "codifying" (*codificeren*). The legislation is explicitly related to the future. The thing is different in the legal codification. The law codification aims to ensure that it is the applicable law and, in the first instance, based on the past. If, on the other hand, people talk about modifying concerning legislation, then people aim to direct (drive, engineer) the community with the legislation. In the direction in which things bring about changes in society will have to take place, it depends primarily on the political path and a politically conscious legislator. In a parliamentary arrangement, people assume that the side is to determine the law is the government and the parliamentary majority at a specific time (Nur, 2016; Pointer & Sidharta, 2008).

Also, there are various kinds of considerations why special arrangements for indigenous peoples must exist. The consideration in question is the signs which are then strengthened by the existence of four legal guidelines that we must follow as rules in politics or legal development. National law must be able to maintain integration (integrity) both ideologically and territorially. It must aim to protect the whole nation and all the Indonesian people. The emergence of legal products that have the potential to divide the unity of the Indonesian nation and state must be prevented, including discriminatory laws based on primordial ties. Second, national law must be developed democratically and nomocratically in the sense that it must invite participation and absorb the aspirations of the broader community through fair, transparent, and accountable procedures and mechanisms. It must avoid the appearance of legal products that are processed cunningly, secretly, and illegally.

Even though democratically the formation of the law is correct, but if it is wrong nomocratically (the principle of law), then the law is null or void by the judicial institution. Third, national law must also aim at creating social justice in the sense that it must be able to provide exceptional protection for the weak in dealing with the strong, both inside and outside the country and within the country itself. Without special protection and the law, the weak will surely always lose if released competing or fighting freely with a more substantial group. Fourth, the law must guarantee religious freedom full of tolerance between its adherents. It is not allowed to give the privilege of treating religion and its adherents based on how big and a small number of its adherents. Equal treatment is, of course, allowed, but the privilege is not allowed. The state may regulate religious life to the extent that maintaining order does not occur in conflict and facilitates that everyone can practice their religious teachings freely without disturbing or being disturbed by others. The state should not impose religious law because of the implementation of religious teachings assigned to each of its adherents, but it can regulate its implementation by each adherent to guarantee freedom and maintain order in its implementation. (Mahfud, 2010; MD, 2016)

Such basic construction given by the form of regulations specifically regulates indigenous people, gives birth to the constitutional guarantees of indigenous people. The regulative and constructive nature can affect the constitutional rights inherent in the *Sedulur Sikep* Customary Law Community. The central teachings of *Samin*, which is a way of life for *Sedulur Sikep*, namely: first, religion, is a weapon or way of life. *Saminism* does not discriminate religions; therefore, the *Samin* people never deny or hate religion. The most important thing is the nature in someone's life is, secondly, do not disturb people, do not fight, do not be jealous, and do not like to take people's property. Thirdly be patient and do not be arrogant. Fourth, humans must understand their lives because life is the same as spirit, which is only one and carried forever. According to the *Samin* people, the spirit of the dead person does not die, but only takes off his clothes when speaking, people must be able to control the word, be honest, and respect each other. Trading for the *Samin* is prohibited because, in trade, there was an element of "dishonesty" (Rosyada et al., 2018).

If we actualize these values in precise legal products, then it is also clear that indigenous peoples have certainty overprotection, as is the tradition of civil law. The flow of civil law that we follow emphasizes the guarantee of rights if the actualization of regulations codified, the affirmation between the position of private and public law is clear and includes affirmation between commercial law and civil law.

To make it easier to understand the character of the civil law system, the following characters are described below:

(1) The existence of codification of law so that decision making by judges and other law enforcers must refer to the Laws or Regulations. Therefore, the law becomes the primary source of law or, as a result, judges are not bound by precedent or jurisprudence;

(2) There is a sharp difference between private law and public law. Although conceptually, the common law and civil law systems recognize that private law regulates the relationship between citizens and between companies, while public law regulates relations between citizens and the state. However, the difference in civil law has more profound practical implications. Because of differences in civil law then appear two kinds of court hierarchy, namely civil justice and criminal justice.

Even in the character of civil law such as in Indonesia, the difference injustice is not only limited to criminal and civil justice, but there is also a State Administrative Court, Court for resolving Bankruptcy, Tax Courts, Constitutional Court, Military Courts, and Special

Courts for criminal acts corruption ("Tindak Pidana Korupsi/TIPIKOR"). In the conventional law system, there is no separate court regarding public law disputes. In the civil law system, a collection of the substance of private law principally consists of civil law in the sense of civil law, which is then broken down into several sub-chapters or legal divisions such as person and family law, property law, legal ownership regime, and contractual law;

(3) In the civil law system, there are differences between civil law and commercial law. Commercial law is a part of civil law. However, it regulates a different set of laws contained in a separate Act (Commercial Law in France) or the Commercial Law Act (KUHD in Indonesia). In the conventional law system, there is no difference between civil law and commercial law for the same reason that commercial law is part and civil law as opposed to criminal law (Asikin, 2013; Lindsey & Butt, 2018)

The existence of the idea of indigenous peoples as a form of attention in the context of the legalization of their existence certainly raises one interpretation that the community has a legal system. Such a legal culture system is undoubtedly one of the alternatives in the existence of indigenous peoples to carry out a form of legal culture as a whole within the framework of the implementation of the state system (MacCormick, 1994). To understand the purpose of legal culture, it is first necessary to describe the meaning of culture in general because the legal culture is a part of the culture in general. Culture has been defined by various approaches by various experts. In the book *Communicating Between Cultures*, it is stated that Taylor, in 1871, defined culture as "an entire complex that contains the knowledge of beliefs, art, morals, laws, customs, and all the abilities and habits acquired by humans as members of society." Meanwhile, Clyde Kluckhohn defines culture as the whole life of society as a social inheritance obtained by individuals and groups. In a more practical sense, culture is a design for life in the sense of a plan, and following that plan, the community then adapts itself to the environment of physical, social, and idea.

Such form needs to be carried out by the acquisition of the indigenous people's model, which is positively regulated in the law so that recognition will be formed. The extent to which the state recognizes this recognition, the extent to which the existence of the state can adjust the legitimacy of the interests of its people. The legal culture that develops in a society cannot be separated from its political culture because the law is a political product. As a political product, the law is the crystallization or formalization and political will which contest each other. By looking at legislative institutions, for example, it will be evident that this institution, even though its legislation product is imperative law, actually (as often mentioned by Satjipto Rahardjo) does not do legal work but instead does political work. The law is the result of bargaining or power competition among legislative members so that the product is a mere political product. That is why if the dominant political power holder rejects a draft legal product, the draft will never become law (MD, 2013).

The positive approach to indigenous peoples in the norm system of law is undoubtedly also one of the approaches that we can use to solve problems in Papua. We base on the consideration that if indigenous peoples dominate the number of Papuan communities, then the regional autonomy approach based on structural aspirations will not be able to resolve the Papuan custom problem. However, with clear regulations relating to the regulation of indigenous peoples in the Act, the existing approach may be more emphasized on the cultural approach.

It is reflected in consideration of the decision of the Constitutional Court of the Republic of Indonesia with decision No. 35 / PUU-X / 2012 which states that in practice, the Government often issues decisions to designate forest areas without first checking the claims

of indigenous peoples over the area which there are indigenous peoples' settlements in it. The data from the Ministry of Forestry and the Central Statistics Agency (BPS) show that 31,957 villages interact with forests, and 71.06% of these villages depend on forest resources for their livelihoods. In general, people who live and stay in villages in and around the forest either identify themselves as indigenous peoples or local communities live in poverty. CIFOR (2006) states that 15% of the 48 million people living in and around forests are poor. This condition is a reflection of the responsibility of the Indonesian government for indigenous peoples is less responsive, considering that the legislation program has been neglected. So it is as good as possible for the policies on the national indigenous peoples' legislation program to be ascertained to be done as soon as possible and emphasize the efforts to build the cultural basis of indigenous peoples as people who have social nobility in developing the country.

CONCLUSION

The state's responsibility towards the indigenous peoples' legislation program should be an alternative in overcoming the fundamental problems in this country, including poverty, humanity, and so forth. The identity of the indigenous peoples' legislation program system indeed emphasizes the aspect of the cultural approach rather than the structural approach aspect in which efforts to develop Indonesian people as a whole. Through a very dominant number of indigenous peoples' occupations, protection efforts from policies that are not following the nation's appearance are prioritizing the values of indigenous peoples. It is expected in our national legal development system not only to place the position of indigenous peoples as objects of national policy but more importantly, to place indigenous peoples as subjects in national legal policy through clarity in the national legislation program.

The state's responsibility is significant in its capacity to guarantee the position of indigenous peoples concerning its position at the level of the norm system in our national legislation. It will strengthen the authority of our country as a nation known as the *Pancasila* culture.

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