

CUSTOMARY LAW IN A PERSPECTIVE OF DEVELOPMENT NATIONAL LAW BASED ON PANCASILA

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ABSTRACT

As is known, customary law has certain features as the source of identification. Some features embedded in customary law which can be used as sources of customary law recognition can be mentioned, ie traditional, religious, concertual and visual features, open and simple, altered and adjusted, un codified, deliberative and consensual. This is where customary law is born from the necessities of life, way of life, mindset, and life view of a society. Thus, it appears that between law and society can not be separated, although it may be distinguished. Satjipto Rahardjo mentioned that law, socio-anthropologically can not be separated from the socio-cultural context from which the law was born, lived, grew and developed. Flower or death of life customary law in line with the flower kempis or die life of customary law community. Development in the field of law within the State of Law of Indonesia is based on the basis of the source of legal order is the ideals contained in the view of life, awareness and moral ideals that include the noble atmosphere and the nature of the Indonesian nation obtained on Pancasila and Law Basic 1945. For that customary law should be able to take a role in the development of national law, thus; customary law in perspective The development of national law is a just and civilized law that encourages progress and ensures the welfare of its citizens.

Keywords : Customary Law, Development of National Law, Pancasila

I. PRELIMINARY

The title of this paper is synonymous with the notion of "The process of making law that is characterized by national / nationality, by looking at customary law as its point of view (a law that departs from the experience of Indonesian human life derived from the basic values of Pancasila)".

Adat is a reflection of the personality of a nation, is one of the incarnations of the nation's psyche concerned from the century to the century. Therefore, then every nation in this world has its own customs that one with the other is not the same.

Within the State of the Republic of Indonesia, customs possessed by regions and ethnic groups are diverse, although its basis and nature are one, namely to its Indonesiaan. Therefore, the custom of the Indonesian nation is said to be "Bhinneka" (different in the tribal regions of its nation), "Single Ika" (but still one also, that is the basis and nature of its Indonesianness). And the Indonesian custom of "Unity in Diversity" is not dead, but always evolving, always moving and based on necessity always in a state of evolution following the process of development of civilization nation. The living customs as well as those associated with this folk tradition which is an admirable source of our customary law.¹⁾

As is known, customary law has certain features as the source of identification. Some of the features embedded in customary law that can be used as sources of identification can be mentioned that are traditional, religious, togetherness, concrete and visual, open and simple, can be changed and adjusted, not codified, deliberation and consensus.²⁾

Likewise with the customary law system, its legal identity will grow with the identity of the community that formed it. Therefore, customary law is a legal system formed based on the nature, outlook of life and way of thinking of the people (nation) of Indonesia.

This fact has been confirmed by Soediman Kartohadiprodjo in his book National Legal Several Notes (1974), stating that, "customary law is not customary law because the form is not written, but customary law is customary law because it is composed with a certain mind base, Western legal thought. "

1) Surojo Wignjodipuro, *Introduction and Principles of Customary Law*, Jakarta, PT. Gunung Agung, 1982, p.13

2) Dewi Wulansari, *Indonesian Customary Law (An Introduction)*, Bandung, PT. Refika Aditama, 2010, p.15

In this regard, customary law which is an aspect of the life and culture of Indonesian society, which is also the essence of the necessities of life, way of life and life of the people of Indonesia can be the framework and spirit of the development of national law based on Pancasila. Therefore, this paper is more visible from the point of view "Customary Law In Perspective Development of National Law Based Pancasila"

II. DISCUSSION

A. Description of Customary Law

Humans in society need protection of interests. The protection of that interest is achieved by the existence of guidelines or rules of life that determine how humans should behave in society in order not to harm others and themselves. Guidelines, standards or measures to behave or behave in a collective life are called social norms or rules.

Social rules are essentially the formulation of a view of behavior or attitudes that should be done or should not be done, which is prohibited to run or which is recommended to run. With this social norm to be prevented disturbances of human interest, will be avoided clash between interests, will be expected protected human interests. This social rule is in the form of written there are also oral which is a habit that passed from generation to generation.³⁾

As is known, social rules that are lesan or unwritten are called customary law. If a Western-trained lawyer studied Indonesian customary law, he entered a new legal world, in a very different field than he normally encountered. He is used to studying the laws contained in the rules, in codification, such as civil law in the Civil Code, criminal law in the Criminal Code and so on. He believed in his upbringing, that the law should be distinguished from customs, decency and others. The general fact is that he only knows that the rules of the law and in those decisions have its history, but generally do not notice that history, tradition, can always live in society past and present.

In our law there is also codification, there are also laws, but most are not so. In other words: In Indonesian law there is little jurisprudence, most of which is people's law.⁴⁾

For a foreign legal expert who has just studied customary law, in general and at the beginning the customary law is not understood. It has been suggested that "the customary law is as if it were the most magical rules of wandering." That is because, the concerned does not understand the nature of the customary law.

Seen from the eyes of a jurist who holds firm to the law is indeed " the whole law in Indonesia is irregular, not perfect, not firm '. However, if they really deepen their knowledge of customary law, not only with their thoughts but also with a sense of being, they see a source that embodies, past and present customs, living customs, evolved customs, rhythmic customs.

As is known, in the previous discussion that the law was born from the daily experience of individuals in society. This life experience lasts not only days but years and even centuries. Life experiences like this because it lasts for a very long time and by the perpetrators are considered useful and provide benefits in their social life, then maintained. Thus the experience crystallizes in their lives, both in their interactions between individuals, individuals and society and between societies with one another. Crystallization of the experience was transformed into a value that is considered noble, sacred so must be kept even passed on to posterity. For those who injure the value it is regarded as a disgraceful act and considered taboo. Thus, if any injury value is mandatory sentenced.

These values are abstract because they are too broad and can not be captured by the senses. This value is considered something noble and very valuable, so it must be maintained in everyday life. But to apply it is very difficult because it is so abstract and broad. To actualize, the value is derived or derived into a more specific form. These specific forms of value derivation results are called legal principles.

These legal principles can be used as guidelines to behave. But the principles are still very wide and abstract. Therefore, it is still difficult to apply into real life. So it takes a process of development that azasazas it needs to be derived again into the norms. Given these norms, values can be actualized. Norms are specific and applicable, meaning that they can be applied directly to the form of behavior.

These legal norms serve as guidelines for behavior, guidance to do, because they contain about things that are applicative. The norm contains: rights and obligations; duty and authority; and / or orders and restrictions.

³⁾ Sudikno Mertokusumo, *Know the Law, (An Introduction)*, Yogyakarta, Liberty, 2014, p.1-5

⁴⁾ Soekanto, *Reviewing Customary Law of Indonesia*, Jakarta, PT. Raja Grafindo Persada, 1996, p.1-3

As mentioned before, every human being has their own views and standpoints on what is called safe, orderly, peaceful, and prosperous. Therefore, in order to avoid collisions with each other, guidelines are needed. Guidelines that are called norms or kaedah. Guidance is a tool as well as a view or a way of assessing human behavior or behavior.

If the guidelines have been established or determined, then required another means of an institution that serves to apply and enforce the norm. However, the institution alone is not enough, therefore another guideline is created that is a means and mechanism of implementation and enforcement of norms. That is, if people want a behavior that is expected to happen and obeyed by its members, it is needed: norms, institutions, and mechanisms. This mechanism in customary law is called the social control system.

Sociologically, the system of social control is a planned or unplanned activity, to educate, invite, or even force members of the community. Thus, it is expected that the values, principles, and norms that form the basis of community members behave in compliance. However, it should also be emphasized that the social control system by itself always aims to impose the values, principles, and norms that apply within each member, especially the community leaders. Coercion can actually give rise to resistance. Therefore, an attitude of togetherness and kinship is necessary so that the adherence or compliance of members of society to it consciously, or at least obedience or compliance is not necessarily forced.

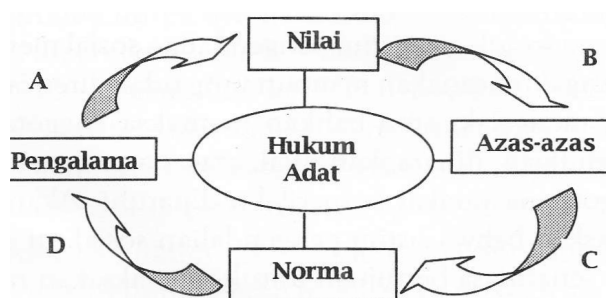
The social control system aims to keep the behavior of community members going directionally and not too distorted or even contradictory. Due to excessive or even contradictory deviations can actually shake social joints and affect the estrangement of social cohesion leading to conflict and division. So, the main purpose is to maintain harmony or integration of that society. That is the essence of the objectives and benefits of the norm, especially the legal norms, namely customary law norms.

Every human in everyday life always perform an act called social behavior (social behavior). One element of social behavior is social action. Social action is an act perpetrated by members of a society. The social act of becoming a legal act shall meet the following conditions:

- a. done with a certain intention to achieve certain goals,
- b. occurs in certain situations,
- c. governed by certain kaedah-kaedah,
- d. driven by a certain motivation.

The following is presented about the scheme of customary law norms:

Scheme Occurring Customary Law Norms:



Information :

- A. The process of crystallizing the value of experience that has been experienced for many years since from the ancestors. In this process not only maintain the old experiences, but also changes into something new. Hereditary experience has been crystallized to become a value.
- B. The value is very abstract, in order to be applied it is derived or derived into several principles. These principles have become the basis for the formation of norms or, in other words, of these principles are translated into some positive legal norms.
- C. Although somewhat more concrete than value, the principle is still too abstract to apply. Hence the principle of being derived or derived into several norms or kaedah. It is this method that serves as a guideline for community members to behave.
- D. Norms are used as guidelines for a person to behave.

These behaviors gradually become an experience. This process continues.

We return to the principle, the notion of the principle of law put forward by some law scholars, namely:

- a. Bellefroid, says that the principle of law is the basic norm outlined by the positive law and which by law does not come from the more general rules.
- b. Paul Scholten argues that the principle of law is the tendencies required by moral insight. we are to the law and are common traits with its limitations as a common trait, but must exist. Furthermore, the principle of law is the basic thoughts within and behind the legal system, each formulated in the rules of legislation and judgmental judgments, with respect to which individual provisions and decisions may be seen as elaborations.
- c. Satjipto Rahardjo, argued that the principle of law is an important element and the principal of the rule of law. The legal principle is the heart of the rule of law because it is the broadest foundation for the birth of the rule of law, or the law principle is the ratio of legislation to the rule of law. He further said that ultimately the rules of law must be restored to the principles.
- d. Eikema Hommes, says that the principle of law is not a norm of concrete positive law, but it is the basis of common thoughts or guidelines for the law. The principle of law is the basics or direction in the formation of a positive law.
- e. Theo Huijbers said that the principle of law is the principle that is considered the basis or fundamental law. These principles are born of values that became the starting point of thinking about the law. These principles become the basis and reference in the formulation of laws, even in the interpretation of the law. According to Huijbers the legal principle consists of: a. the objective principles of moral law (the moral basis); b. the objective principles of rational law, namely principles that include a rational (reasonable) sense of the law and a common life rule; and, c. moral legal principles as well as rational, the rights that exist in humans and which became the starting point of the formation of the law.

Thus it can be said that the principle of law is the general foundations contained in the law, and the general foundations serve as the logical basis of the enactment of the positive law. Therefore, positive law or every legal norm is always and must be sought and returned to the principles of this law, because the principle of this law is the embodiment of the value of the goal and the moral basis for the enactment of a law.

The legal norm is a concrete provision on the way a person's legal subject behaves within a society. According to Prof. Satjipto Rahardjo that the principle of law is not a legal norm or in other words that the principle of law is not the law but the spirit of the legal norm. Thus it means that a legal norm which is not derived from a principle or even against the principle, will lose its power. It is said to be the spirit or soul of the legal norm because it is the basis of the logic of the birth of the rule of law, the ratio of legisnya legal norm.

Thus, it can be said that in the end all legal rules must be restored to the principle of law, and the principle of law must be restored to its original value. Values according to scholars are primarily rooted in morals or values of morality, religion, and custom. In a country, values are derived from the Philosophy / Ideology of the State. Indonesia has a value that serves as Grundnorm for Positive Legal Procedure namely Pancasila, and the general principles contained in the Constitution of the 1945 Constitution of the Republic of Indonesia.

The following examples are given below :

- a. Azas nullum delictum nulla poena sine previa lege poenalli = no one can be punished, except for the force of the existing law the act was committed. This principle is also called the principle of legality, (see Article 1 of the Criminal Code).
- b. Azas in dubio pro reo is a principle which says that in doubt the enactment of the provisions that most benefit the defendant.
- c. The principle similia similibus is a principle that says that the same or similar case must be decided similarly.
- d. The principle of pacta sun servanda is the principle which says that the agreed agreement is valid as the law for the parties concerned.
- e. Azas geen straf zonder schuld means no penalty without error.
- f. The principle of nebis in idem ie the same case (subject and object of the same case) is forbidden to be brought to court for the second time.

In this connection, it is necessary to discuss customary law as part of culture. As part of customary law culture has properties that include: magic-religious, communal, cash, and concrete. According to this study, the four properties above also contain values such as religiosity, family values and mutual cooperation, cash value, and concrete value. Departing from the four attributes which at the same time the value indicates that no matter how small the law is contained in a human society, however simple and small the society is, the law is a reflection because the law is the soul or the supportive society or the human community member as its legal subject. Because every society must have its culture with its character and characteristic, nature and structure of its mind or philosophy (geestesstructuur = psychological structure or the composition of its morality). Thus, customary law is the embodiment or embodiment of the geestesstructuur = the psychological structure of that society. Von Savigny calls it "volk geist" ie the soul of the nation or the spirit of society where the law is born, alive, growing, and developing. Therefore, the geestess tructuur = the psychological structure of the community as

part of its culture varies from one to the other, then the adatnyapun law differs between the customary law community with the other customary law community. That is why legal pluralism was born.

This is where customary law is born from the necessities of life, way of life, mindset, and life view of a society. Thus, it appears that between law and society can not be separated, although it may be distinguished. Satjipto Rahardjo mentioned that law, socio-anthropologically can not be separated from the socio-cultural context from which the law was born, lived, grew and developed. Flower or death of life customary law in line with the flower kempis or die life of customary law community.

What is the form and content of geestesstructuur = psychological structure or so-called volkgeist customary law? F.D Holleman mentions four things as the nature of customary law: magic relais, communal, cash, and concrete. As said before, these four traits are basically also a principle for the birth of customary law norms. The explanation of four properties of customary law as follows:

1) Value of Religiosity:

The value of religiosity is the embodiment of the nature of the Indonesian people who believe in God Almighty. If it is associated with Pancasila as the basic value of the Republic of Indonesia, then this value by the founding fathers is attached to the First Precept of Pancasila, namely Belief in the One Supreme. This value is the embodiment or actualization of the value of the Godhead of the beliefs of the entire nation of Indonesia. This value has existed since ancient times since the Indonesian nation has not known the religion of revelation. Anthropologically, Koentjaraningrat mentions the elements of this value, as follows:

- a. Belief in the spirits, good and evil spirits that occupy the universe and especially the phenomena of nature, plants, animals, human bodies and objects.
- b. The belief in the powerful power that encompasses the whole universe and is especially present in extraordinary events, extraordinary herbs, extraordinary beasts, extraordinary objects and extraordinary sounds.
- c. The assumption that the passive power of magic is used as 'magische kracht' (magical power) in various deeds of wisdom to reach the will of man or to resist the unseen danger.
- d. The assumption that the excess power of the magic in nature that causes the critical state, causing the emergence of various unseen hazards that can only be avoided or avoided with various abstinations.

This value appears in the norms that morally oblige members of the community to conduct salvation, ceremonies, or rituals in every act of legal traffic, such as the sale and purchase of land, clearing forests to be agricultural land that breeds ownership of land called yasan land.

Moreover, in the marriage law the principle of religiosity arises in the principle that marriage is lawful if according to the law of their respective religion and carried out according to his belief. Normatively, this principle is actualized in Article 2 paragraph (1) of Law no. 1 Year 1974 about Marriage. In the Constitution this principle also appears in Article 29 of the 1945 Constitution on freedom of religion and worship according to his belief.

If considered in every judge's decision in court, both the religious court, the district court, the state administrative court, and the military courts, as well as labor dispute trials, and taxes, are always at the beginning of its verdict the judge mentions "Justice by the One Godhead."

Especially a magical belief, such as animist belief that all things in nature have a spirit dwelling within him. There is also a stream of fetishists that everything in nature is soulless and within there is a power beyond human power. Or a spiritist who says that the spirits within the universe have a passion, and that there is a spirit that comes from an ancestor who always dwells in the civilization of his descendants, and therefore needs to be worshiped and regarded as a god. This is according to Cassutto, that the indicator is still visible in:

- a. worship of ancestral spirits,
- b. believe in good spirits and evil spirits,
- c. fear of threat or revenge from the unseen,
- d. believe in the skill of the mediator (dukun) with the spirits and supernatural powers.

2) The value of Communalism

The value of communalism gave birth to the principles of mutual assistance and kinship. This principle is normative, emerging in everyday life in the form of cooperation or clean-up work of the environment, fall mountain build village, please help in making a house, sambat sinambat in village ceremony. Although it is now rarely done, it does not mean its value is lost. The value remains only a different way of embodiment. The following will be presented some principles derived from the value of communism, namely:

- a. Neighborly neighborhood. The actualization of the value of communism is reflected in the principle of a harmonious neighborhood. Someone will let the driveway on his property for his neighbor who built a house behind his house. There is also, a farmer let the land or rice fields flooded by neighbors whose rice fields are on the top or next to the rice field. In rural areas with large numbers of livestock, they will allow moorings or newly planted fields to be used for grazing or kite-play areas for children or football pitches as long as the rice fields or fields have not been worked on.
- b. Human Social Functional Platform and Private Property. Another principle born of the value of communalism is the principle of human social function and private property. The actualization of this principle arises in the use of residents' residential spaces as meeting places, assemblies, or as meeting halls during the meeting hall does not yet exist. If a person dies, builds a house, marries off his or her children, or certain ceremonies that require labor, then community members will jointly help their neighbors performing the ceremony. Individual labor is used for the common good. Thus, the treasures of which are necessary. This is apparent in the form of help and synchronous *sambat*. Please help, *sambat sinambat*, help help as described above is classified as the norm. Anyone who is not involved or evasive may even abstain from such common activities, will be judged as a person who has no neighbors. Customary law sanctions as a legal consequence is that such a person will be ostracized from his social environment.
- c. The principle of mutual consent or deliberation of consensus. This principle appears in every important decision making or decision concerning the life of the people. A wise arief leader, when making important decisions or concerning the life of the people is always done through consensus deliberations. Although the idea or idea arises from the leader's mind, but consideration of the important considerations regarding the idea needs support. A leader who does not do this will be judged as a 'dictator' or 'authoritarian' or 'menage dewe.'
- d. Representative principle. With regard to the preceding principle, a representative is required. Representatives are not necessarily parents, but rather an appreciation of one's presence. A person's presence at an invited meeting is a tribute, and the ultimate reward is attention. Attention is to give a special heart. Although the person is not present, but the invitation given is a concern. That attention is a tribute, that his presence is appreciated, although perhaps in the meeting he is just silent, or perhaps even opposed. However, inviting attention is an appreciation. His presence is seen as the representation of his family or relatives. If an important decision is made or made with the presence of those invited to it, then the value of the legality is very high. That is the meaning of representation that is actualized through presence or invitation. If in the village there is a village hall, then the village hall is a concrete manifestation of the principle of this representative.
- e. The principle of tolerance, which is a principle relating to feelings as a family, a relative, or assumes that all humans are a single taste (man = manungsa = manunggal ing rasa). Therefore, there is mutual respect, respect, help, and mutual help. Thus, the principle of tolerance is born from the soul of mutual cooperation, kinship, and togetherness (*kekitaan*, togetherness). This principle also supports the principle of good neighborly life.
- f. The principle of anti-extremism, the principle that rejects extreme behavior. The Javanese in his proverb says '*ngono yo ngono ning ojo ngono*' (acts so allowed to do so do not overdo it). This proverb indicates a spirit of tolerance and rejection of extreme behavior. Against the wrongdoer, may be pinched, but do not be tortured let alone be killed. Attitudes contrary to the above principles are often influenced by the value that comes from outside. Such a value is sourced from Europe, Arab, American, or foreign.

The essence of the principles is aimed at realizing the noble values that have grown hundreds or even thousands of years that have been constructed by the ancestors. The ancestors were based on their experience, and in that experience that the attitude of life that contrasted with those values would bring harm. Conflict, enmity, even fighting and war are very harmful to life together. So here is the main value of harmony.

3) Value of Cash

One of the *cirikhas* of customary law that has become a customary law system is a cash value. The point is that customary law always cares about an event that always recurs life relationships in legal traffic. These repeated relationships must always be in their concrete or concrete form. The repetitive pattern is the *cirikhas* of a habit and if this custom continues it will become customary, and if this custom has legal consequences, then it has turned into customary law.

Actualization of this value is evident in the principle of honesty, ie the only between words and deeds. The spoken word is seen as a debt to be paid. In western law known as the principle of 'promise is debt' and debt must be paid. This promise payment must be made in cash means it must be done in the light. Light means to be done in the presence of the people, witnessed by the people, especially the legal functionaries, traditional leaders. The implementation of an appointment is a debt payment. Even in the daily life of a person who meditates, he must pay for it. Otherwise, it is considered a debt.

As is known, the nature of cash or cash implies that by a real action, a symbolic act, or a pronouncement of legal action in question has been completed immediately, at the same time when acting or reciting the required custom. Thus, in customary law everything that occurs before and after weigh is received in cash is outside the legal consequences and does not concern or cause the consequences of law and law. The act of law in question has been completed immediately it is also a legal act which in a juridical sense stands alone. Examples: selling off in land transactions, *kabul levy*, honest marriage,

release of land rights, adoption of children, and others. With a ritual, the appearance of symbols as a representation of the presence of something sacred, meaning the symbolized presence. This is a cash deed.

4) Concrete Values

The basis of this realm of existence in customary law is its concrete nature. In this case something to be attempted on certain matters is always tried and attempted so that things intended, desired, or desired or to be worked on are transformed or given the existence of things, are marked visible either directly or symbolically. The embodiment of this fourth value is always concerned with the other values in an integrated manner, related to each other, such as ritual symbols.

For example paningset in engagement, or a land transaction. Paningset as a finished sign, in contrast to voorschot or down payment. Often also found in magical deeds, a person is symbolized by a statue. So, concretely it is something that is visual, tangible, and visible form, even if only in the form of symbols or signs. Thus, in customary law, socialization or objectivation of customary law is done through visible symbols or signs.

Why is the symbol used in the objectivation or socialization of customary law? because the symbol is always used almost in every traffic or legal act. For example a symbol is used in a ritual or ceremony or a magical deed. Symbols are physical signs of a substitute or a symbolic representation. Symbols in the form of physical objects because Indonesian society is a society that uses oral culture, not writing culture. In contrast to European societies who use writing because they use written culture.⁵⁾

B. Development of National Law Based on Pancasila

Every independent and sovereign nation must have a national law, both in the field of criminal and civil, reflecting the nation's personality, soul and worldview. If France can show Code Civil which is its pride, Switzerland has Zivil Geztzbuch also famous. The People's Republic of China and the Philippines already have the Civil Code as well, so Indonesia has not yet been able to show its foreign guests the National Law Code either in criminal or civic. Shortly after the proclamation of independence, we have been screening Wetboek van Strafrecht, the Dutch Colonial Government's relics and customizing the Criminal Code with the realm of independence, namely our Law of 26 February 1946, with the intention that the Code of Justice can be used temporarily pending the creation of our own National Criminal Code.

As is known, from the formal perspective of national law is a law established or established by the forming of laws / regulations of national legislation. Similarly in terms of material National law is a law that contains the ingredients that exist and live within the Indonesian nation itself, both the idial and real.⁶⁾

Actually, the Republic of Indonesia which was born in 1945 at that time did not start with the sheets of order of the empty order. Because since its birth our country has been bound by a system of order, both in the form of Dutch East Indies, as well as many forms of local order, commonly called customary law.⁷⁾

In this case, customary law for the establishment of Indonesian national law becomes relevant because only appropriate customary laws or at least do not contradict Pancasila and the 1945 Constitution, which may form part of our national law. But the Indonesian national law is not entirely a modernization of customary law but if we may borrow the Outlines of State Policy, customary law is "the basic capital for the formation of our national law in addition to other elements, such as legislation and rules institutions / old legal institutions, such as BW, HVK and / religious legal institutions that are not contradictory to the 1945 Constitution and Pancasila."⁸⁾

Keep in mind, with the Act of 13 January 1951 No.1 temporary measures were held to organize the unity, order, power and events of the Civil Courts, which actions are necessary as soon as the Unitary State of the Republic of Indonesia on August 17 1950, because in the constellation of the United States of Indonesia, the composition of powers and events of the courts were colorful in various states. On that occasion also the original and Swapraja tribunals, until that time still running, was abolished gradually. And with the abolition of the original and autonomous courts, the Penal Code shall enter into force throughout the territory of Indonesia.

5) Dominikus Rato, *Customary Law (A Brief Introduction to Understanding Adat Law in Indonesia)*, Yogyakarta, LaksBang PresSindo, 2011, p.53-71

6) Iman Sudiyat, *Development of Customary Law of Aceh as a Potential Contribution to the Development of National Law*, in "Adat and Modernization of Law", FH. UII, Yogyakarta, 1998, p.89

7) Satjipto Rahardjo, *Progressive Law Enforcement*, Kompas, Jakarta, 2010, p.97

8) Sunaryati Hartono, *Contribution of Customary Law for the Development of Establishment of National Law in Customary Law and Modernization of Law*, FH. UII, Yogyakarta, 1998, p.169

As is known, the basic and principles of national law are as follows:

1. The basic principle of the national law of the Republic of Indonesia is Pancasila.
2. National law is:
 - a. Supervision;
 - b. Mutual cooperation;
 - c. Kinship;
 - d. Tolerance;
 - e. Anti-colonialism, imperialism and feudalism.
3. All laws as much as possible are given a written form.
4. In addition to the written law, it is recognized that there is an unwritten law as long as it does not impede the formation of Indonesian socialist society.
5. The judge guides the development of the unwritten law through jurisprudence to the widest possible uniformity of law (homogeneity) and to the familial law in the direction of the parental system.
6. Written laws concerning certain areas of law may be collected in the form of codification (Civil Law, Criminal Law, Commercial Law, Civil Procedure Law, Criminal Procedure Code).
7. To build an Indonesian socialist society endeavored legal unification.
8. In a criminal case:
 - a. The judge has the authority as well as to decide the civil aspect both for his position and for the parties' demands;
 - b. The judge is authorized to take appropriate and fair action in addition to or without a criminal.
9. The criminal nature shall provide education to the prisoner to be a beneficial citizen of society.
10. In the field of Civil Procedure Law there is a guarantee that justice proceeds quickly and cheaply.
11. In the field of Criminal Procedure Law there are provisions which are strong guarantees to prevent:
 - a. a person without a strong legal basis is held or held for longer than is actually required;
 - b. searches, foreclosures, opening of letters is done arbitrarily

A very important event in the development of this national law is the discovery of the Coat of Justice in harmony with the personality of our nation by the late Minister of Justice Dr. Saharjo, in the form of the Banyan Tree which gives "auspices" to people seeking justice. The symbol that comes from the western countries that we know, namely the Goddess of Justice (Themis) who wrapped his eyes and holding the sword and traju (scales) rejected by him because it is less suited to the feelings of our people. As is known, Dr. Saharjo has also solved the difficulties faced by legal officers (Judges) in applying the legacy of the colonial Government by teaching a transitional law. The proverbial law can not be disputed properly, he said. But it is very awkward to do with the inheritance laws of the colonizers. Therefore he stated that *Burgerlijk Wetboek* and *Wetboek van Koophandel*. which is based on the Indonesian population in groups (unknown to our Constitution) is no longer valid as a *Wetboek* but only as a "rechtsboek" is a document that describes a group of laws that the judge should use as " guidelines "in conducting the judiciary. Dr. This Saharjo is approved by the Supreme Court.

In the area of crime it may be mentioned, that the Prison Institution by him has been transformed into a correctional service, which is more in line with the joints of our Pancasila state.

In 1973 the MPR Decree was stipulated. IV / MPR / 1973 on the Guidelines of State Policy, within which the Indonesian national legal policy is legally defined. In MPR Decree no. IV / MPR / 1973, the political law of Indonesia is formulated as follows :

1. Development in the field of law within the State of the Law of Indonesia is based on the foundation of the source of Law and Order of the ideals contained in the view of life, awareness and moral ideals that include the noble atmosphere and the character of the Indonesian nation obtained on Pancasila and Undang -The Basic Society of 1945.
2. Fostering the field of law should be able to direct and accommodate legal needs in accordance with the legal consciousness of the people who evolved toward modernization according to the level of progress Development in all areas so as to achieve order and legal certainty as an infrastructure that should be aimed at increasing the development of national unity , as well as functioning as a means to support the development of modernization and comprehensive development, carried out by:
 - a) Improvement and refinement of the National Law guidance by among others organizing renewal, codification and legal unification in certain fields by observing legal awareness in the community;
 - b) To discipline the functions of the Legal Institutions according to their respective proportions;
 - c) Enhancement of law enforcers' capabilities and authority.
3. Fostering legal awareness in society and fostering the attitude of rulers and government officials toward law enforcement, justice and protection of human dignity, and law and order of law in accordance with the 1945 Act.

The formulation of Indonesian legal politics in the Guidelines of State Policy is very short, but solid enough if implemented properly we can catch up in the field of coaching and law enforcement in Indonesia.

In the politics of the law should note the following:

1. Heads of Government and Parliament are burdened with the task of modernization, codification and unification in certain fields;
2. In the institutional field it is desirable to curb the functions of legal institutions. determine and regulate the authority of each law enforcement apparatus such as police, prosecutors and judges and advocates, so as not to be confused.
3. In the field of skills it is necessary to increase the capacity and authority of law enforcers; for that it is necessary to improve the quality of scientific education in the field of legal science, as well as mental coaching on law enforcement for the creation of their own dignity.⁹⁾

Back to the issue upfront, is adat law a national law or a state law? Customary law is part of national law, not the law of the State. The national law consists of: laws that used to be from Europe that continue to be used up to the present to meet the needs of law and prevent legal vacuum, customary law, religious law, and laws arising from legislation and jurisprudence. These last two laws are the laws of the State.

State law is a law established by the sovereignty of the State, both by the Legislature, the Executives, and the Judiciary. The legislature establishes the law, Executif establishes a Government Regulation, a Presidential Regulation, a Ministerial Regulation, a Regional Regulation, and a Village Rule, and the Judiciary establishes a law through its decisions that have been in *kracht* and has been used by another judge as the basis of a decision or jurisprudence. The difference between the two, as shown in the table below:

Table Differences of National Laws with State Laws

Number	Unsure	Legal Category	
		National Law	State Law
1.	Source Historical	Customary law, religious law, the former law came from Europe, and the laws established by the State (legislation and jurisprudence)	laws established by the State in the form of legislation and jurisprudence
2.	Maker	Not necessarily by the State, but recognized by the state	Formed by the State (Legislative, Executive, and Judicative)
3.	Form	<i>Four in one</i>	<i>One in one</i>
4.	Type	Selection	Required
5.	Scope	Wider	Tighter

If customary law is part of national law, then the study is conducted with the *Bhinneka Tunggal Ika* approach, diverse but still one that is Indonesian national law. Thus to understand customary law must be done holistic-integral, both social aspects, culture, economy, environment, and community trust. Understanding customary law can not be done partially, for example, only the local political aspect, culture, or social environment only as the social context of the work of customary law.¹⁰⁾

Therefore, modernization must now be carried out within the framework of equality, be it social status, legal status, human rights, and politics. Globalization must be truly within the framework of gender equality, not just gender equality in the sense of men and women, but gender equality between sovereign nations. If modernization is done by law as an instrument, then law should function as an instrument of liberation, enlightenment, and empowerment. But it should be questioned, that

⁹⁾ Kansil, *Legal History in Indonesia*, Jakarta, PT. Sound of Hope of the Nation, 2014, p.268-276

¹⁰⁾ Dominikus Rato, *Contemporary Traditional Law, Surabaya*, LaksBang Justitia, 2013, p.113-114

who the perpetrators of liberation, enlightenment, and empowerment? If we realize that all human beings in the world share the same rights, dignity and image as God's creation, then by borrowing the slogan of French independence: freedom, equality, and brotherhood must be a common vision of all nations. Because, "Independence is the right of all nations, then the colonization of the world must be abolished, for it is incompatible with humanity and justice." Such modernization is oriented towards the necessary Constitutional rights at this time.

Since the reformation of 1998, there has been a fundamental change in the constitution of the Unitary State of the Republic of Indonesia. The fundamental change is a demands of the times that necessitate a change. The fundamental change is the Amendment of the 1945 Constitution became the 1945 Constitution of the Republic of Indonesia. The change not only from the short name of the '1945 Constitution' became the length of the 1945 Constitution of the Republic of Indonesia but also the number of articles increasingly and complex. The amendment to the Constitution or the Constitution is also due to the demands of an age in which society has changed while its law for 50 years has not changed. Changes to the Constitution are in fact common, but not positivist views, since the change has taken place since 1945 when the Vice President issued the Vice President's Declaration which gave space for the fundamental shift from the Presidential Cabinet to the Parliamentary Cabinet. However, since it is not done through a positive legal process, people also do not recognize it as an amendment to the Constitution.

We return to customary law as a positive law. The existence of customary law as a positive law legally after the amendment of the 1945 Constitution becomes the 1945 Constitution of the Republic of Indonesia in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that: "The State recognizes and respects the unity of indigenous and tribal peoples as long as it is alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, regulated in law. "Further Article 281 Paragraph (3) of the 1945 Constitution states:" The cultural identity and rights of traditional communities are respected in harmony with the times and civilization. "Thus, customary law based on Article 281 paragraph (3) is a cultural identity, which according to Article 281 paragraph (4) must be realized by the State.

Departing from the two Constitutional Articles above, several laws were born as actualization such as Law Number 39 Year 1999 on Human Rights, Law No. 41 of 1999 on Forestry, Law Number 7 Year 2004 on Water Resources, Law - Indonesia Number 18 Year 2004 regarding Plantation, Law Number 6 Year 2014 on Village, and other regulations.¹¹⁾

National laws should be based on the Pancasila cultural value system. The cultural value system is a conception of values that live in the minds of most members of society in Indonesia. If the values are Pancasila values, the cultural value system is called the Pancasila cultural value system. The cultural value system is so pervasive in the souls of community members that it is difficult to be replaced with other cultural values in a short time. The cultural value system of Pancasila serves as the highest source and guide for the rules of law and behavior of members of the Indonesian people.¹²⁾ As known, the law must be based on the cultural value system of the nation that is the Pancasila cultural value system that departs from diversity or diversity of the nation.

In the context of the diversity of the nation, the Indonesian nation is a pluralistic nation because it consists of various ethnic groups, customs, local languages, and different religions. The diversity is found in various areas spread from Sabang to Merauke. The irrefutable fact that Indonesian society and people can simply be called a culturally diverse society.

Cultural diversity in Indonesia is something that can not be denied existence. In the context of the understanding of plural society, in addition to the culture of ethnic groups, Indonesian society also consists of various regional cultures are territorial which is a meeting of various cultures of ethnic groups in the area. With a population of more than 237,000,000 (two hundred and thirty million) lives living in the islands of Indonesia (Badan Pusat Statistik 2010). It can be said that Indonesia is one country with high level of cultural diversity or heterogeneity level. Not only the cultural diversity of ethnic groups but also the diversity of cultures in the context of civilization, traditional to modern, and cantonal.

The Indonesian nation has more than 1,128 (one thousand one hundred and twenty-eight) tribes. Every tribe in Indonesia has different life habits. For the sake of unity and unity, this diversity is a powerful force and has advantages over other countries. With the motto of *Bhinneka Tunggal Ika*, ethnic and cultural diversity is one of the basic capital in Development.

The founders of the state have realized the reality as a foundation for the development of the Indonesian nation. It is on this basis that they formulate that the state of Indonesia consists of *Zelfbesturende landschappen* (swaraja) and

¹¹⁾ Dominikus Rato, *Ibid*, p.77-80

¹²⁾ Abdulkadir Muhammad, *Civil Law of Indonesia*, PT. Citra Aditya Bakti, Bandung, 2010, p.11

Volksgemeenschappen (village or equivalent) in the 1945 Constitution (before the amendment). This step has two implications: first, by absorbing the peculiarities of each group of people, the Indonesian state is formed trying to create a nation. Second, ignoring the existence of these groups will have implications for the failure of the ideals of building an Indonesian nation.

In general, the pluralism of the Indonesian nation is not only characterized by horizontal differences, as is commonly encountered in different tribes, races, languages, customs, and religions. But there are also vertical differences, in the form of achievements obtained through achievement. Indications of such differences appear in the socio-economic strata, political position, level of education, quality of work, and conditions of settlement.

The Unitary State of the Republic of Indonesia is a "unitary state" in the sense of being a country of united citizenship, which transcends all individuals or groups who guarantee all citizens at the same time before the law and government without exception. Within the united state, individual autonomy is recognized in equal importance with the interests of the collectivity of the people. The life of individual persons or groups within society is recognized as an individual and a collectivity of citizens, irrespective of the specific characteristics of a person or group of persons on a tribal and religious basis and so on, which makes a person or group of persons distinct from persons or groups others in society.

The principle of democracy is only possible to live and thrive in an open civil society, whose citizens are tolerant of differences of any kind, because of the equality of respectful humanitarian degrees, and governed by just and civilized laws that promote progress and ensure prosperity lives its citizens.¹³⁾

Reflecting on the discussion of national law based on Pancasila, Pancasila itself has been placed as a legal rechtsidee and the source of all sources of law which is the highest level in the theory of the level of legal norms. So the legal ideals (rechtsidee) Pancasila in the development of the national legal system has three values, namely:

1. The basic value, ie the accepted principles as the argument is a bit more absolute. The basic values of the pancasila are divinity, humanity, unity, community values and justice values.
2. Instrumental value, ie the general implementation of the basic values. Especially the form of legal norms which further crystallized in legislation.
3. Practical value, ie real value implemented in reality derived from the basic values and instrumental values. So practical value actually becomes a test stone whether the basic values and instrumental values that really live in Indonesian society. For example, public compliance with law or law enforcement.

These three values are then consonantized into legal norms. The realization of these three values is very important because the law to be built should be able to integrate and harmonize the national interests of Indonesia both nationally, regionally and globally. So that based on the values of Pancasila as a guide star to test and give direction to positive law in Indonesia. The translation of the values of Pancasila in the development of the law are:

- a. God Value. This means that in the formation of law in Indonesia must be based on the values of God or religious. In addition, in every formation of the law there must be a guarantee of religious freedom and there can be no law that privileges one particular religion and misrepresents another. So the law in Indonesia can create Indonesia as a nation and a religious country.
- b. Humanitarian Value. It means that in every form of law must be able to create a civilized nation and a law that upholds respect for human rights.
- c. Unity Value. This means that in the formation of the law must pay attention to the unity or integrity of the nation and state. In the formation of the law should not lead to disintegration (disintegration) and divide the nation and state.
- d. Community Value. This means that in the formation of the law must be based on democratic values that involve all the elements that exist in the state whether the executive, Legislative, judiciary or society. So that law in Indonesia can support the creation of democracy in Indonesia.
- e. The value of social justice. It means that in the formation of national law should aim to provide justice and prosperity for all Indonesian people.

Meanwhile, the explanation of the values or precepts of Pancasila in the development of law according to Magnis Suseno includes five things:

- a. Legal development can only maintain its human qualities when based on respect for human beings, acknowledge the same human position, not treating human beings as objects of planning, never sacrificing one party for the benefit of the other and not purchasing progress by harming others. The manifestation of this attitude, according to the second precepts of a just and civilized humanity.

¹³⁾ Secretary General of MPR RI, *Four Pillars of Life of the Nation and State*, Jakarta, 2014, p.184-202

- b. The development of the law does not make the human being as the object of the target or even the means and the victim for the progress effort, so development should not be carried out paternalistik and teknokratis, but the dialogical and participative. The manifestation of this attitude, in accordance with the fourth precepts of democracy is led by the wisdom of wisdom in deliberation / representation.
- c. Legal development must respect people in a concrete way which means to guarantee human / human rights aspects. The manifestation of this attitude corresponds to the second and fourth precepts.
- d. Legal development must operate the principle of respect for human dignity into the structures and institutions of people's lives. This manifestation corresponds to the fifth precept of social justice for all Indonesians.
- e. The development of law must have a respect for human dignity for a development should be raised normative targets on the determination of development priorities. This manifestation corresponds to the second and third precepts.

Development of national law based on Pancasila values is expected to follow the development of society. This is because Pancasila excavated from the culture and life of the Indonesian people themselves, resulting directly or indirectly, will be able to keep abreast of the developments.¹⁴⁾

III. COVER

Fostering the field of law should be able to direct and accommodate legal needs in accordance with the legal consciousness of the people who evolved toward the modernization according to the level of progress of Development in all fields, so as to achieve order and legal certainty as an infrastructure that should be aimed at increasing the fostering of national unity, as well as functioning as a means to support the development of modernization and comprehensive development.

Development in the field of law within the State of Law of Indonesia is based on the basis of the source of legal order is the ideals contained in the view of life, awareness and moral ideals that include the noble atmosphere and the nature of the Indonesian nation obtained on Pancasila and the Law Basic 1945. For that customary law should be able to take a role in the development of national law. Thus, customary law in perspective Development of national law is a fair and civilized law that encourages progress and ensures the welfare of its citizens.

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¹⁴⁾ Teguh Prasetyo dan Arie Purnomosidi, *Building Laws Based on Pancasila*, Nusa Media, Bandung, 2014 p.155-157