



Research proposal on positivization of Customary law in dispute resolution

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Abstract

Based on the formalization of customary law is a change in customary law norms that were previously unwritten or other terms are positivization, within the scope of customary law there is also a process of positivization. However, the positivization of customary law will cause several problems, due to differences in sources, customs originate from customs and traditions that develop in society, while positive law comes from laws and regulations set by the Government. The existence of customary law in the national legal system in Indonesia there are various ethnic and cultural groups that coexist. Aceh after the birth of Law Number 18 of 2001 concerning Special Autonomy for the Province of the Special Region of Aceh as Nanggroe Aceh Darussalam Province and Law Number 11 of 2006 concerning the Government of Aceh has given special treatment to Customary institutions. Constitutionally, the 1945 Constitution has recognized the existence of indigenous peoples which was later strengthened by the birth of Law Number 6 of 2014 concerning Villages, specifically regulating villages as a unit of customary law communities (MHA). In Aceh, villages are referred to as *gampong* or other designations and village regulations are better known as *qanun* or *reusam*. This study aims to determine and explain whether the influence of legal positivization can reduce the nature and characteristics of Acehnese customary law in dispute resolution and to determine and analyze the supporting and inhibiting factors of Acehnese customary law positivization. The research method used is a normative juridical method with a statutory approach. The data sources used are derived from primary, secondary and tertiary legal materials. The data obtained was then analyzed by quality method. The results showed that. First, the influence of legal positivization in dispute resolution results in customary law being weakened and uprooted from the roots, dispute resolution is only limited to formalities in the village that do not provide justice and benefits for indigenous peoples. Judicial practice is limited to accelerating local law by reproducing customary or local laws in formalistic form (*qanun*) but does not provide substantive justice. The nature and characteristics of Acehnese customary law in dispute resolution, which should reconcile with the mechanism of 'discussing' turned into 'reading'. Second, the supporting factors for the positivization of customary law arise due to the current modernization and additional functions of *gampong* leadership in addition to customary leadership as well as administrative leadership. Customary law communities currently prioritize legal certainty alone (juridical dogmatic) as their goal, no longer on justice (ethical) and expediency (utilitis) and the obstacle factor to legal positivation is diversity in the interpretation and implementation of customary law, because each region has different practices, differences in values and priority goals between customary law and positive law.

Keywords: Positivization of Customary law, dispute resolution

Introduction

The existence of customary law in the national legal system in Indonesia there are various ethnic and cultural groups that coexist. Aceh after the birth of Law Number 18 of 2001 concerning Special Autonomy for the Province of the Special Region of Aceh as Nanggroe Aceh Darussalam Province and Law Number 11 of 2006 concerning the Government of Aceh has given special treatment to Customary institutions. Constitutionally, the 1945 Constitution has recognized the existence of indigenous peoples which was later strengthened by the birth of Law Number 6 of 2014 concerning Villages, specifically regulating villages as a unit of customary law communities (MHA) ^[1].

In reality, Customary Law is 'only' documented in jurisprudential texts. In countries that adhere to the French *civil law system* tradition, such as Indonesia, legal materials that exist as jurisprudence are never seen as the main source of formal law. In Indonesia, although jurisprudence is recognized as a source of formal law, because the continental European tradition established by the Dutch colonial government was more prominent, it was more widely used. In fact, if studied substantially, *the Anglo*

Saxon tradition is somewhat more similar to the building of customary law ^[2].

The idea of doing customary law positivism in a *Qanun* is not without consideration and legal basis. In addition to Article 18 B paragraph 2 of the 1945 Constitution which states that "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia," is the basis for state recognition of MHA (Customary Law Peoples). In addition to Article 18 B paragraph 2, Article 28 1 Paragraph (3) of the 1945 Constitution states that the cultural identity and rights of traditional communities are respected in line with the development of times and civilization, the article expressly recognizes and provides a place and basis for the enforceability of legal norms and legal institutions derived from living law and applies in society (*living law*), i.e. customary law and Islamic law as part of national law.

The enactment of customary law in positive law is spread in various laws and regulations. In the context of Acehnese customary law, the granting of authority for dispute resolution in *Gampong*, one of which is regulated in Aceh

Qanun Number 9 of 2008 concerning the Development of Customary Life and Customs. In Aceh there are their own specificities related to customary law. The existence of customary courts in Aceh to resolve disputes or disputes between communities has been regulated in Aceh Qanun Number 9 of 2008 concerning the Development of Customary Life and Customs and is technically strengthened by a Joint Decree between the Governor of Aceh, the Chairman of the Aceh Customary Council (MAA) and the Head of the Aceh Regional Police Number: 189/677/2011 concerning the Implementation of Gampong and Mukim Customary Courts or other names in Aceh. In the order of government, gampong is in the lowest government structure, like other governance, gampong also has power and authority in the executive, legislative and judicial fields.

The implementation of Gampong customary court decisions does not all have executory power or are final and binding, as stated in Article 18 paragraph (1) of Aceh Governor Regulation Number 60 of 2013 concerning the Implementation of Settlement of Customary and Customary Disputes/Disputes that "customary court decisions are peaceful and binding" and also explained in the Joint Decree between the Governor of Aceh, Chairman of the Aceh Customary Council (MAA) and Head of the Aceh Regional Police Number: 189/677/2011 concerning the Implementation of Gampong and Mukim Customary Courts or Other Names in Aceh ^[3].

This anomaly creates problems in its implementation. The most concrete positivization efforts are in procedural law and legal remedies for customary court decisions. The problem that arises in this context is that the positivization of customary law into positive law is an effort to harmonize the principles and norms of customary law with the principles and norms of positive law applicable at the national level.

Results and Discussion of Research on the Existence of Aceh Customary Law in Dispute Resolution Dispute resolution can be done through two processes. The oldest dispute resolution process through litigation in court, then developed a dispute resolution process through cooperation (cooperative) outside the court. The litigation process produces adversarial agreements that have not been able to embrace common interests, tend to cause new problems, are slow in resolution, require expensive costs, are not responsive and cause hostility between the disputing parties ^[4]

The settlement of criminal cases through customary law is a process of resolving cases outside the court consisting of first, a mediation system with a consensus approach through deliberation. Second, the restorative justice system is a case resolution system with the intention of restoring the situation arising by the victim so that the sense of brotherhood between each party is re-established. From this system, it produces a win-win solution, guaranteed confidentiality of the parties' disputes, avoids delays caused by procedural and administrative matters, and resolves problems comprehensively in togetherness and maintains good relations ^[5].

In the settlement of arable land disputes in Aceh Jaya that a person was reported to the Keuchik Gampong Meunasah

Lampuuk Mosque, which is also his residence Keuchik is in Lhoknga District, Aceh Besar Regency. This action was taken by considering laws and regulations, such as Law Number 11 of 2006 concerning the Government of Aceh, Law Number 6 of 2014 concerning Villages, Qanun of Nanggroe Aceh Darussalam Province Number 5 of 2003 concerning the Government of Gampong in Nanggroe Aceh Darussalam Province, and Qanun of Aceh Besar Regency Number 11 of 2009 concerning the Government of Gampong.

Keuchik then held peace deliberations or mediation at the gampong level which resulted in Rusly. R is willing to give 25% of the land area because the garden land really belongs to Rusly. R. However, Amiruddin M. Ali did not agree with the decision made at the Gampong deliberation, because he still held that the land belonged to him and he did not want to give up the land. The matter was then settled in the Calang District Court and Rusly R filed a lawsuit. However, the decision did not consider the decision of the Gampong Meunasah Musawarah Board of the Lampuuk Mosque as the basis for the decision. Because the judges are not bound by the customary decisions of gampong.

The other case is the Dispute over the Division of Property in Lampuuk as Bustaman Bin Abu Bakar and Novianti Binti Zulkifli had a marriage which later broke up due to divorce. After the breakup of the marriage of Bustaman Bin Abu Bakar and Novianti Binti Zulkifli, decided to divide property together with family deliberation, held in Gampong Meunasah Masjid Lampuuk, Lhoknga District, Aceh Besar Regency. The division of joint property between Bustaman Bin Abu Bakr and Novianti Bint Zulkifli has been agreed upon by both parties. However, the BPN Aceh Besar Regency resulting from the customary decision cannot be used as a basis for changing / changing the name. Then Bustaman Bin Abu Bakar sued the Jantho Shar'iyah Court with a decision to punish the Plaintiff and the Defendant to obey and implement the agreed Peace Deed.

So that decisions from the customary dispute resolution process are recognized as one of the sources of law for judges. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. This provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and the sense of justice of the community. Structurally, however, customary courts are not bound in a hierarchical relationship with formal judicial bodies in Indonesia ^[6]. If it is related to cultural relevance, the settlement of customary disputes in customary law courts is to maintain and maintain cultural heritage and customary law traditions. When viewed from the factor of community participation, customary law courts often facilitate active community participation in the dispute resolution process. Decisions are generated through consensus and discussions involving community members ^[7].

In the course of time, the implementation of customary courts in resolving customary disputes often encounters challenges. In terms of legal clarity, customary courts face vagueness in customs and applicable rules. This may result in uncertainty in dispute resolution and fairness for the disputing parties.

Research Solutions on the Existence of Aceh Customary Law in Dispute Resolution

Importance The norms and workings of customary law recognized by indigenous peoples are not the same as the provisions and workings of positive law. This problem of legal norms makes it difficult to positivize customary law into positive law, for example in dispute resolution. The implementation of customary law in dispute resolution can face challenges in terms of law enforcement, vagueness in customary law enforcement procedures and because dispute resolution mechanisms that accommodate both types of law can lead to conflict and legal uncertainty.

The idea of doing customary law positivism in a Qanun is not without consideration and legal basis. In addition to Article 18 B paragraph 2 of the 1945 Constitution which states that "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia," is the basis for state recognition of MHA (Customary Law Peoples). In addition to Article 18 B paragraph 2, Article 28 1 Paragraph (3) of the 1945 Constitution states that the cultural identity and rights of traditional communities are respected in line with the development of times and civilization, the article expressly recognizes and provides a place and basis for the enforceability of legal norms and legal institutions derived from living law and applies in society (living law), i.e. customary law and Islamic law as part of national law. Based on the legal basis and historical values above, the Aceh Special Region Province is considered necessary to get the opportunity to organize regional government in the form of special autonomy for the Aceh Special Region Province as Nanggroe Aceh Darussalam Province in the Unitary State of the Republic of Indonesia^[8].

In Acehese language this term is relatively very popular and still used in the community, because one of the traditional proverbs that explains the relationship between adat and shari'a that remains alive and even very often quoted uses this term. In Acehese Malay literature, qanun has been used for a long time, and is interpreted as a rule derived from Islamic law that has become customary. One of the texts entitled *Qanun Syara' Kingdom of Aceh* written by *Teungku in Mulek* in 1257 H, on the orders of Sultan Alauddin Mansur Shah who died in 1870 A.D. This short text (only a few pages) contains various matters in the field of constitutional law, division of power, various judicial bodies and judicial authorities, police and prosecutorial functions and protocol rules in various state ceremonies.

It is important to note that the Qanun may contain provisions on the imposition of mandatory prosecution fees, in whole or in part, to violators, as required by law. Qanun can be sentenced to a maximum of 6 (six) months imprisonment and/or a maximum fine of Rp50 million, unless stipulated in other laws and regulations. However, this provision is exempt for the qanun of criminal law (criminal law)^[9].

Aceh Customary is regulated in Aceh Qanun Number 9 of 2008 concerning the Development of Customary Life and Customs, in general contains the application of Acehese customary law. Customary Law is defined as a set of unwritten norms that live and develop in Acehese society, which provides sanctions in case of violations, and its application upholds customary values, norms and

institutions. Aceh Customary Institutions are regulated in Aceh Qanun Number 10 of 2008 concerning Customary Institutions ("Qanun Lembaga Adat"), customary institutions in Aceh consist of customary law communities in which there are customary law holders. Customary institutions in Aceh function to resolve disputes arising within communities and customary law. There are several formal legal institutions in Aceh, but there are also informal institutions called customary institutions that are very influential on the life of the community. Customary institutions have a legal basis, namely Regional Regulation Number 7 of 2000 concerning the Implementation of Customary Life and Qanun Number 5 of 2003 concerning Gampong Government in Aceh. by Qanun No.10 of 2008 concerning Customary Institutions in the nature of different interpretations of the power to be exercised.

The need to strengthen capacity for gampong government officials because according to Article 14 of Aceh Qanun Number 9 of 2008, customary settlement in gampong is carried out by traditional leaders consisting of: *keuchik*, *imeum meunasah*, *tuha peut*; *secretary gampong*, and ulama, scholars and other traditional leaders in gampong as needed. In principle, customary court hearings are held in *meunasah* (musalla, gampong mosque), not anywhere else. This is important because it concerns the legality of the results of the dispute resolution deliberations.

Conclusion

The influence of legal positivization in dispute resolution results in customary law being weakened and uprooted from the roots, dispute resolution is only limited to formalities in the village that do not provide justice and benefits for indigenous peoples. Judicial practice is limited to accelerating local law by reproducing customary or local laws in formalistic form (qanun) but does not provide substantive justice. The nature and characteristics of Acehese customary law in dispute resolution, which should reconcile with the mechanism of 'discussing' turned into 'reading'. Currently, the focus of customary dispute resolution is influenced by textual dogma that is procedural based on written speech (laws and regulations) Factors supporting the positivization of customary law arise due to the current modernization and additional functions of gampong leadership in addition to customary leadership as well as administrative leadership. Customary law communities today prioritize legal certainty alone (dogmatic juridical) as their goal, no longer on justice (ethical) and expediency (utilitis). The obstacle factor to legal poitivation is diversity in the interpretation and implementation of customary law, because each region has different practices, there are differences in values and priority goals between customary law and positive law.

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