

Reciprocal Interaction Between the Nusantara Customary Law System and International Law

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Abstract

Talking about national law is certainly inseparable from the contribution of legal systems and traditions that have developed before. From the beginning, the founding fathers agreed on a recognition of the legal system that had lived before in society. This is answered in the provisions of the Explanatory Article 18 of the Constitution which was later re-adopted in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Not only that, this paper also discusses the archipelago's legal system which has more or less contributed to international law, especially international maritime law. In conducting this research, the author uses doctrinal law research by studying literature that is strengthened by normative legal rules such as laws and provisions that have existed in society for a long time. In this paper, a fact is found that it turns out that in the formation of national law in some ways it is influenced by international law that has been ratified. However, it is undeniable that there is also a contribution to national law and the indigenous law of the archipelago that affects international law.

Keywords: National Law, international law, maritime law, ratification.

1. INTRODUCTION

There is a lot of literature that discusses the development of the law but ignores the legal developments that have lived in the archipelago. This postulate is based on the development of law after the colonialist era which tries to draw conclusions that Indonesian law is greatly influenced by western law brought at that time. Subsequent studies have contradicted this opinion, a study conducted by Agus Brotosusilo, for example, found that there is a connection between international law and the indigenous laws of the archipelago that have survived.

Article 18 of the 1945 Constitution of the Republic of Indonesia states that the State recognizes and respects the units of customary law communities 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, which are regulated in law" (UUDRI, 1945). This is an explicit statement that the state recognizes the existence of a living customary law in addition to the applicable national law. In addition, this also shows the existence of customary law that has existed even long before we know the tradition of western law brought in the colonial era.

The process of legal transplantation under the Dutch colonial government at that time was like a double-edged sword. On the one hand, it introduces the civil law tradition that focuses on the existence of laws and legal certainty, but on the other hand, it causes a shift in the values of customary law that have existed before. This also in the future caused a debate by the founders of the nation about how the legal system would be enforced by the newly established Indonesian nation.

Soepomo at that time wanted a collective state form, which emphasized his attention to the integralistic state system. This system can be traced back to Soepomo's speech on May 31, 1945 which emphasized the concept of totalitarianism in the state. This means that all groups in the state do not favor the largest or strongest groups, but the state as the embodiment of the nation's livelihood as a whole (Sugiarto, 2013).

On the other hand, Mohammad Yamin's opinion emphasizes the recognition of individual rights. One of the most important things that Yamin said was the right for citizens to test state rules if they conflict with individual rights (Ministry of Health, 2010). Even so, the concept received rejection from the participants of the PPKI session at that time because the newly established Indonesian state was not ready to adopt the idea. From this, it is illustrated that although the debate on what state model will be adopted by Indonesia which is considered a 'short constitution', it turns out that there are still ideological reasons behind it. It was this debate that would later become the model of Indonesian government until decades later, until the emergence of the amendment to the 1945 Constitution of the Republic of Indonesia.

This is also not limited to how to perform a legal transplant from another country. With the amendment of the Constitution of the Republic of Indonesia which was carried out from 1999-2002, one of which shifted the strengthening of human rights, there began to be many ratifications of international rules governing the strengthening of individual rights such as the ratification of the Charter of Human Rights, the ratification of civil and political rights, and the ratification of economic, social and cultural rights. This is the most relevant example of how the shift in values from the constitution can affect the acceptance of contemporary ways of states in adopting the application of laws from other countries.

This paper will discuss how the influence of national legal thinking can affect international law and vice versa. In the first part, we will discuss the contribution of archipelago customary law to international law. Then, it will be continued with the influence of national law on national law, especially for the recognition of individual rights of citizens and the recognition of monoism and dualism in national law. This paper is then closed with conclusions and suggestions from the author on the journal entitled *Reciprocal Interaction Between the Customary Law System of the archipelago and International Law*.

2. METHODS

This research uses the doctrinal law method, which is research that relies on laws and regulations as well as theories and doctrines of experts as the basis for analysis. This method is applied by examining the theory of national and international legal developments associated with the concept of legal transplantation, especially the adoption of international law into national law.

The data used in this study are secondary data. The secondary data consists of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include laws and regulations related to the adoption of foreign law as well as several Constitutional Court decisions related to ratification laws. Secondary legal materials are in the form of scientific literature such as books, journal articles, theses, and dissertations that discuss legal standing, constitutional rights, and the use of tax-payers in legal testing cases, both in Indonesia and other countries. Tertiary legal materials in the form of dictionaries and encyclopedias are used to ensure the accuracy of the meaning of legal terms and doctrines. The data were analyzed using a descriptive research typology to describe the phenomenon being studied, which was then used as the basis for the formulation of a prescriptive analysis.

3. RESULTS AND DISCUSSION

a) Contribution of Indonesian Original Legal Thought

Along the way, many Indonesian legal values were adopted in later legal developments. For example, Agus Brotosusilo is of the view that the foundation of international law as initiated by Hugo Gratius has more or less similar to the concept of Indonesian customary law. He bases his argument on facts that prove that the archipelago is known as a nation of explorers. Because the majority of the archipelago consists of water areas, the exploration is carried out by sea transportation mode. It is from the exploration of the sea that the Indonesian nation has become familiar with international boundaries, treaties, and laws of the sea (Brotosusilo,, 2010).

Not only that, Indonesia's role in supporting the development of international law can also be seen with the ratification of *the United Nations Convention on the Law of the Sea*. This role proves Indonesia's existence in the arena of international law, especially international maritime law (Abdusyahid, et al, 2023).

b) Establishment of Indonesian National Law

As explained in the previous section, it is clear that national law has a contribution of thought to international law. This was the basis for the formation of national law when the Indonesian state was formed led by the *founding fathers*. Article 18 of the Constitution of the Republic of Indonesia of 1945 states that the State recognizes and respects the units of customary law communities 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, which are regulated in law" (Indonesia, UUNRI 1945) This is an explicit statement that the State recognizes the existence of a

living customary law in addition to the national law that applicable. In addition, this also shows the existence of customary law that has existed even long before we know the tradition of western law brought in the colonial era.

If you look further, Article 18B of the 1945 Constitution of the Republic of Indonesia is a form of crystallization of the explanation of Article 18 of the original Constitution. "In the territory of the State of Indonesia there are approximately 250 *zelfbesturende landchappen* and *volksgetneenschappen*, such as villages in Java and Bali, countries in Minangkabau, hamlets and clans in Palembang and so on. The areas have an original structure, and can therefore be considered as special areas. The State of the Republic of Indonesia respects the position of these special regions and all state regulations concerning these regions will bear in mind the rights of origin of these regions.

If you read some of the discussion documents in the Indonesian Independence Preparatory Committee and the Indonesian Independence Preparatory Agency, this effort is one of the embodiments of the explicit recognition of the law that has lived before in society. The process of legal transplantation under the Dutch colonial government at that time was like a double-edged sword. On the one hand, it introduces the civil law tradition that focuses on the existence of laws and legal certainty, but on the other hand, it causes a shift in the values of customary law that have existed before. This also in the future caused a debate by the founders of the nation about how the legal system would be enforced by the newly established Indonesian nation.

The proposal to form an institution that can carry out the function of testing the law has actually been submitted during the trial of the Independence Business Preparatory Agency (BPUPKI) and the Indonesian Independence Preparatory Committee (PPKI) with the agenda of discussing the formulation of the 1945 Constitution. In several BPUPKI and PPKI trials, Yamin argued that it was necessary to establish a Supreme Court containing customary courts and sharia courts and/or *civil courts* and *criminal courts*. According to him, this Supreme Court is a court that is within the structure of the Supreme Court and has the function to test a law whether it is contrary to customary law, sharia law, or the Constitution:

In other words, here Yamin argues that the Supreme Court is not only an institution that carries out the judiciary. More broadly, the Supreme Court also functions to appeal (test) laws made by the House of Representatives when they are considered to be contrary to customary law, sharia law, and the 1945 Constitution. The results of the opinion of the Supreme Court are then reported to the President and the House of Representatives to then take action to cancel if there is considered to be a contradiction.

Yamin's proposal received opposition from Soepomo who underpinned his disagreement because for him the concept of testing was not in accordance with the formulation of the Constitution at that time. According to him, in principle, the 1945 Constitution does not separate the executive, legislative, and judicial powers. This means that the judiciary cannot control the legislative power, and vice versa.

If a law is considered to be contrary to the Constitution, then in this case it is classified as a political realm, not juridical one. The judge in this case becomes deviant in order to carry out his duties, namely to carry out the law, instead of testing the law

itself. In addition, Soepomo argued that Indonesian legal experts at that time were not many familiar with the concept of legal testing as it occurred in other parts of Europe. This is what makes Yamin's proposal difficult to realize.

Then after Soepomo's rebuttal to Yamin, there was no debate again about the testing of the law. This is suspected that the participants of the session focused more on discussing other matters, instead of debating the existence of testing a law. The discussion resurfaced after the 1955 election, one of the objectives of which was to form the Constituent Council which was tasked with forming the Constitution.

Several Members of the Constituent Council such as Hermanu Kartodiredjo (PKI), Soeripto (PNI), Oei Tjoe Tat, Siauw Giok Tjhan, and Yap Thiam Hien (Baperki) and supported by the Indonesian Judges Association (IKAHI) were the parties who re-rolled the proposal for the inclusion of the right to test the law in the formulation of the Constitution. They argue that it is necessary to include the constitutionality of the Supreme Court in order to assess a law as contrary to the constitution. In addition, laws that have been declared to be contrary need to be declared unconstitutional and unenforceable. Unfortunately, this progressivity later became *deadlocked* after the issuance of a Presidential Decree on July 5, 1959 which dissolved the Constituent Assembly and re-enacted the 1945 Constitution.

After the issuance of the Presidential Decree, the idea of accommodating the right to test the law went through a phase of ups and downs. This is suspected by the author because of the difficulty of making changes to the Constitution in the New Order era. Around 1968, when the Judicial Power Law was drafted, the idea of giving authority to the Supreme Court to test laws and regulations under the law against the law arose. This was then accommodated through Article 26 of Law Number 14 of 1970 concerning Judicial Power (hereinafter referred to as the Judicial Power Law. Article 26 of the Judicial Power Act reads:

"(1) The Supreme Court has the authority to declare invalid all regulations from the lower level of the Law on the grounds that they are contrary to the higher laws and regulations. (2) A decision on the declaration of invalidity of such laws and regulations may be taken in connection with an examination at the cassation level. The revocation of the laws and regulations that are declared invalid is carried out by the agency concerned."

This condition is the initial milestone in the recognition of the right to material testing in Indonesia. At least, since then, there has been a legal basis for conducting material testing in Indonesia even though the test is limited to the norms that apply to legal norms (*Verordnung & autonome satzung*) to formal laws (*formal gesets*) and does not include formal laws (*formal gesets*) to basic rules (*staat grundgezets*) (Indrati, 2019). The *a quo condition* then continued during the New Order until the emergence of the Reformasi which was followed by efforts to reform the law and the judiciary through the amendment of the 1945 Constitution.

From this, it is illustrated that although the debate on what state model will be adopted by Indonesia which is considered a 'short constitution', it turns out that there are still ideological reasons behind it. It was this debate that would later become the model of Indonesian government until decades later, until the emergence of the amendment to

the 1945 Constitution of the Republic of Indonesia. The amendment of the 1945 Constitution, especially in the field of judicial power, led to several main ideas, including strengthening the independence of the judiciary and the beginning of the recognition of legal testing of the Constitution. In addition, the amendment of the Constitution resulted in a new institution in the judiciary, namely the Constitutional Court. The Constitutional Court was then given the authority, one of which was to test the law on the Constitution.

The proposal to make the institution of the constitutional judiciary reached its climax in the second and third sessions of the Constitution amendment session. Through input from experts consisting of practitioners from state institutions including the Supreme Court and Komnas HAM, community organizations such as the Indonesian Legal Aid Foundation (YLBHI), and proposals from various campuses, the proposal to form an institution called the Constitutional Court was crystallized and ratified at the third session of the amendment of the Constitution. This new institution is not an institution under the chamber of the Supreme Court, but an institution of its own consisting of nine judges proposed by the President as many as three judges, the House of Representatives as many as three judges, and the Supreme Court as many as three judges. Regarding the authority, the Constitutional Court itself, in addition to testing a law that is contrary to the Constitution, also has other powers as stipulated in article 24C paragraph (1) of the Constitution, namely deciding disputes between state institutions, dissolving political parties, and resolving disputes over the results of general elections. In addition, the Constitutional Court also has another task mandated by the Constitution, namely to decide on the allegations of the House of Representatives related to violations committed by the President/Vice President in relation to the impeachment process.

In the Indonesian context, the establishment of the Constitutional Court itself is inseparable from the collapse of the New Order regime which is considered to be an authoritarian regime. This led to the emergence of demands from the people at that time to ensure the implementation of democracy through the adoption of human rights instruments. The enforcement of these human rights also needs to be accompanied by institutions that can test decisions and laws that are contrary to constitutional rights.

The phenomenon of the birth of the Constitutional Court in Indonesia, which was mediated by constitutional amendments, has similarities with the emergence of the spirit to include basic rights along with the mechanism for enforcing these basic rights in the constitution. At least, in the 1990s, countries, especially in Asia and Eastern and Central Europe, began to regulate the inclusion of basic rights provisions and their enforcement mechanisms in their constitutions (Elster, 1993). One of the factors behind this is the emergence of awareness to achieve a democracy that protects itself from the tyranny of the majority against vulnerable groups and minorities. Therefore, efforts can be made to create a judicial institution to test policies or laws issued by the government (Elster, 2002).

Andrew Harding classifies the establishment of the Constitutional Court in Indonesia as *the New Asian Constitutionalism*. This opinion was expressed against three patterns of constitutional judicial formation by Tom Ginsburg, the first was against the *Marbury vs. Madison case*, the second was against the reaction after the collapse of the fascist regime and the fading of colonialism in the 1940s and 1950s, and the third occurred in the 1990s caused by more diverse factors (Ginsburg, 2003). Some of these factors

include the collapse of communist regimes in Central and Eastern Europe, the beginning of the transition from dictatorial regimes in Asia, and the emergence of a wave of legal thinking inspired by the process of enforcing new constitutional rights in countries that have imposed tests on constitutional rights before (Harding, 2001).

Regarding the testing of the law in the Constitutional Court itself, it is divided into two, namely the material test and the formal test. A material test is a test of the substance of a phrase, article, or even the entire law that is contrary to one or more articles in the Constitution. Meanwhile, formal testing itself can be interpreted as testing the procedure for forming laws. The decisions that have been decided by the Constitutional Court in both material and formal testing are *final and binding*, and are *erga omnes*. *Final and binding* means that the Constitutional Court's decision is the first and last which closes the possibility of carrying out legal resistance such as appeals in the general court. Meanwhile, *erga omnes* itself means that the Constitutional Court's decision does not only apply to the applicant or the party concerned, but the Constitutional Court's decision also applies to other institutions and all persons regulated in the provisions of the law. In other words, the Constitutional Court's decision when it has been decided applies to all parties as long as the law regulates it.

This is also not limited to how to perform a legal transplant from another country. With the amendment of the Constitution of the Republic of Indonesia which was carried out from 1999-2002, one of which shifted the strengthening of human rights, there began to be many ratifications of international rules governing the strengthening of individual rights such as the ratification of the Charter of Human Rights, the ratification of civil and political rights, and the ratification of economic, social and cultural rights. This is the most relevant example of how the shift in values from the constitution can affect the acceptance of contemporary ways of states in adopting the application of international law. However, until now there are no clear rules regarding legal transplantation carried out by Indonesia either in the constitutional rules or the laws under it. As explained in the previous section, generally a country uses the approach of monism and dualism in carrying out legal transplants.

From here, it causes uncertainty about the applicability of national law when it is the adoption of international law. On the one hand, Indonesia has always argued that sovereignty is the highest thing, but on the other hand, it focuses on international rules as the basis of law. The ratification of civil and political rights and economic, social, and cultural rights was also carried out with the first enactment of the Law on Human Rights, thus causing confusion on the other hand about how to apply international law in the context of national law.

4. CONCLUSION

1. The dynamics of Nusantara customary law have an important role in shaping the foundations of international legal thinking. As a maritime nation, the people of the archipelago have long been familiar with principles such as territorial boundaries, inter-community agreements, and the law of the sea which then have relevance to modern international legal concepts. This shows that customary law is not just a local system, but also contributes to the development of the global legal order. The

formation of Indonesian national law since the beginning of independence is undeniably influenced by customary law, western law, and international law. The nation's founders recognized the importance of recognition of customary law as reflected in Articles 18 and 18B of the 1945 Constitution, but at the same time also faced the need to adopt the modern legal system introduced by the Dutch colonial as well as international legal instruments.

2. Indonesia's post-reform constitutional developments, especially with the birth of the Constitutional Court, further emphasized the relationship between national law and international law. The ratification of various international human rights instruments and the strengthening of judicial review mechanisms indicate Indonesia's openness in absorbing global values. But in reality, this adoption often raises polemics related to the consistency between the sovereignty of national law and international obligations. Until now, Indonesia does not have clear rules regarding the mechanism for legal transplantation. As a result, there is confusion about the position of international law in the national legal system. This situation shows that although the relationship between customary law, national law, and international law is related to each other, a clarity of normative framework is needed so that the integration of the three layers of law can run effectively and not clash with each other.

ADVICE

1. The government needs to develop more comprehensive rules regarding the mechanism for legal transplantation. Without clear regulations, the process of adopting international law into national law will continue to cause confusion both in terms of hierarchy and implementation. This arrangement is important to ensure legal certainty while maintaining national sovereignty.
2. Strengthening the position of customary law as a living law must be a priority. This effort can be carried out through limited codification, formal recognition in laws and regulations, and the involvement of customary law communities in the legislation process. That way, customary law is not only a symbol of identity, but also has a real role in the development of national law.
3. In adopting international law, Indonesia needs to ensure that the principles taken remain in line with the values of Pancasila and the principles of social justice. This is important so that acceptance of international law is not simply driven by global pressures, but is truly relevant and contextual to the needs of the Indonesian people.
4. The academic world and legal practitioners need to further encourage comparative research on the relationship between customary law and international law. An in-depth study will help to find a model of legal integration that is unique to Indonesia, so that national law is able to stand on the foundation of local traditions while remaining adaptive to global dynamics. Thus, the direction of Indonesia's legal reform will be clearer, more consistent, and sustainable.

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