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Supremacy of Ethic: National Law, Customary Law and Islamic Law Collided

Ida Susanti
Faculty of Law
Parahyangan Catholic University
Bandung – Indonesia
idasusanti_mg@yahoo.com

Tanius Sebastian
Faculty of Law
Parahyangan Catholic University
Bandung – Indonesia
sebastian_tanius@yahoo.com

***Abstract*—Indonesia is a Nation that embraces many different ethnic groups. Each of them has its own customary law, which has been implemented for centuries. Even though Indonesia is regulated by its rules of law, for the private matters, some customary laws and Islamic law are still applicable. Problems are arisen when rules regarding certain things in customary or Islamic laws and national law are conflicting. The solution is usually a traditional approach that put supremacy of national law. Many indigenous people who have bound by their customary law or Islamic law for decades, cannot easily accept enforcement of the national law. Therefore, positivistic approach *per se* will potentially create more problems. This paper will examine how ethics or morality may play important roles in determining what is the best solution that can maintain the balance of principle of legal certainty and principle of fairness.**

Keywords—conflict of laws, legal collision, ethic supremacy, national law, adat law, customary law, Islamic law, law as integrity.

I. INTRODUCTION

Many pluralistic communities in the world have implemented some different legal systems in their society. Indonesia is one of a good example of a pluralistic community. Indonesia, the country that will be used as an example of a country with pluralistic societies, is one of the largest and fastest developing countries in South-East Asia. It has a population of 250 million, with over 300 ethnicities and 700 languages [1]. All ethnic groups have their own customary laws. They also practice different religions. Acehnese, Sundanese, Minang are Moslems, while Balinese practices Hinduism and Manado is Christian. Other religion practiced by Indonesian are Buddhism and Taoism. For the religious law, the most prominent applicable religious law is sharia law, since on one hand Indonesia is the biggest Moslem population in the world, and on the other hand sharia law has the most applicable norms of conduct for its follower than other religions.

The most affected legal problems by customary law or religious law are in the field of family law, especially marital law and inheritance law. Based on the Marriage Act No. 1 year 1974, a marriage must be valid based on the parties' religious law and has been registered at the registration offices (for Moslem is at Religious Court, while for non-Moslem is at Civil Registration Office. In this case, it is clear that religious law must be considered, in order to determine legal validity of a marriage.

In the law of inheritance, customary law and religious law are very relevant to be considered. Islamic inheritance law is the case that concerns us most here, especially as the tradition embodied in this religious law makes clear distinctions on the basis of sex. The same approach is also applied by many customary laws.

In the Civil Code, the inheritance law applies a gender-neutral inheritance system. This system has been challenged by certain traditions of inheritance that view difference in gender as a criterion for distributing the estate [2]. As an example, if a father was a Batak who applied Batak customary law using patrilineal approach, while his two children got married with people from different ethnic groups (as an example one daughter got married with an Ambonese Christian man, and a son got married with a Minang Moslem woman), then an issue regarding what is the applicable law to inherit family's property becomes important. This issue is arisen since in Indonesia there is no legal unification in the succession law.

Furthermore, recognition of the rights of indigenous people (later it will be referred as MHA, or *Masyarakat Hukum Adat.* Those two terminologies are used for addressing the same meaning) is another problematic issue. Recently, many MHAs fight for their indigenous rights, especially related to land use and land tenure of MHA. National land certification program that uses a formal registration system has very different system than land tenure of *ulayat* land, which uses an intensive tenure from many generations as the proof of *ulayat* land tenure. As the implication, there are many different perceptions regarding land use rights from MHA and other parties than MHA such as government, private companies.

Those different systems of laws potentially create conflict of laws. As a pluralistic country, it is very important to find the best solution, in case those legal systems are inharmonious, or even in contrary one to another. Indonesia is a country that is bound by its rules of law. It means that hegemony of national law will be unavoidable. Nevertheless, there is possibility that application of national law to MHA or to a group of people from certain religion will create injustice. Therefore, legalistic approach *per se* will potentially create more problems. This paper will

examine how ethics or morality may play important roles in determining what is the best solution to settle laws collisions, which can maintain the balance of principle of legal certainty and principle of fairness.

II. RESEARCH FINDINGS & DISCUSSION

National Law, Adat Law and Islamic Law. National law in Indonesia can be defined as the law that had been issued and legalized by the official authority in Indonesia. If the legislation is covered at hierarchy of legal sources as it is arranged at article at article 7 paragraph (1) Law No 12 year 2011 regarding Lawmaking, hierarchy and format of legislation are divided into: a. Indonesian Constitution; b. Decree of People Consultative Assembly; c. Law or Act / Government Regulation in Lieu of Law, d. Government Decree; e. President Decree, f. Provincial Regional Decree, and g. District or City Level Regional Decree. This national law applies the philosophy of legal positivism. This Law indeed puts written regulation as the main legal source in Indonesian. Neither in that Law nor in other Laws, the status of adat law or sharia law as a legal source has been regulated.

Adat Law is another existing legal system in Indonesia. *Adat* law is a type of customary laws practiced by many MHA in Indonesia. This terminology had been introduced by Christian Snouck Hurgronje in his book *De Aceher's* in 1894. He described the meaning of *adat* law as social control that had been equipped with sanction [3]. Based on this definition, it is clear that for people bound by its system, *adat* law has the same legal binding effect as written legal norms.

As the biggest Moslem country in the world, many Indonesian are obeyed to sharia law. The word of sharia literally means a road to the spring water, or a place passed by the river. In *Quran* it is defined as a road to a victory [4]. Sharia law is applied as a code of living that all Moslem should comply to, including prayers, fasting, donation for the poor, offering and Hajj pilgrimage. More specific ways of life related to criminal law (*jinayat*), transactional law (*muamalat*), family law (*munakahat*), inheritance law (*faraidh*) and law of war *(jihad)* are ruled in Quran. Sharia law aims to direct Moslems to perform every aspect of their lives according to God's wishes.

Since those three legal systems are affecting the way of life of Indonesian, then it will be very important to understand how the application of those legal systems could create inharmonic result. It happens especially when one specific matter is regulated differently by each system. This following part will discuss how that contradiction can happen.

As it has been described previously, national law, *sharia* law and *adat* law have different legal systems. Therefore, collision between legal systems potentially may happen. This part will show some examples of collision among national law, *adat* law and *sharia* law.

Indonesia is the 5th most populous country in the world [5]. It is so reasonable if the government wants to control its population growth. Article 11 paragraph (2) of Government Decree No. 87 year 2014 regarding Population Growth and Family Development, Family Planned and Family Information System determines that birth control is one of some methods to control population quantity. Some scholars like Shaikh Muhammad Abu Zahrah have stated that the above verse also encompassed birth control. Children are indeed a great blessing from Allah and they should be viewed in this manner. Couples should not view 'having children' as being a burden upon them. Each child is born with his own sustenance and Allah uses his parents to reach this sustenance to Him. Just as Allah provides for the parents, so too, He will provide for the children. Hence, Islam has discouraged parents from 'not wanting to have children' on account of poverty [6]. This is indeed rather a contradiction with article 1 point 8 of Government Decree No, 87 year 2014, which indicates the aim of family planning program, i.e. to control child births, to manage between births period, to manage pregnancy, via promotion, protection and assistance in line with right to reproduction to achieve quality family. A quality family in Indonesia will not be accomplished when that family is in poverty.

We can also see a fit example to the legal collision between national law and *adat* law at Padumaan and Sipituhuta vs Toba Pulp Lestari case in North Sumatra [7]. In this case TPL had been granted by the government a right to use the forest by Ministry of Forestry Decree No. 58 year 2011. In order to exercise this right, TPL cutted *kemenyan* tree (a raw material for making incense or aromatic stuffs), and planted eucalyptus tree. Based on the people's tradition, Kemenyan tree has been considered as the sister of the people because they do believe that its rag is a symbol of tears of a woman who sacrificed herself and had changed into a *kemenyan* tree in order to eradicate poverty in that community.

Furthermore, they were also angry because when *kemenyan* tree disappeared, birds were also gone. *Etet's* voices indicated the lunch time, while *ernga's* voices indicated the late afternoon time. When those birds were gone, the people had lost track of time. They also lost many income, since their harvest from *kemenyan* tree decreased drastically. Because of those extreme changes in their *tombak hamijon*, how the people called their indigenous land, conflicted with TPL occurred. The right of MHA to use their *tombak hamijon* had been suppressed by the government via Minister of Manpower and Transmigration Decree No 171/Men.2002 regarding Working Announcement for Reoperation of PT. TPL. Based on that decision, activity that had been suspended before 2002 had been reactivated in 2002. Since then, conflicts between people and TPL continuously happened. The people tried to stop the company's activities, but since the company considered that the company had an operational permit to run the pulp industry in that area, they used police force to help them to safeguard the territory, which is considered as *tombak hamijon* by the community. Therefore, many indigenous leaders had been arrested by the police. It is still an unsettled conflict until recently.

The problem above shows very big gap between national law and *adat* law regarding land possession right. Legal protection for the right to possess customary land is getting

better since Constitutional Court Decision No. 35/PUU-X/2012. The Constitutional Court decided to cancel the original article 5 paragraph (1) Law No. 41 year 1999 concerning Forestry that previously covered all forest as the state forest and the new article exclude customary forest as part of the forest law. It means that as long as a community can proof that they have land possession, their right over the customary land will be recognized. Nevertheless, in order to have a land possession over customary land, based on article 4 of Minister of Interior Decree No. 52/2014 regarding Guidance to Recognize and to Protect MHA, requirements to make an indigenous people to be recognized as MHA are: they are existing MHA and must be identified as MHA, be verified and validated as MHA and be registered MHA. When a status of MHA has been granted to a certain community, then that community will possess the right of customary land (*tanah ulayat*).

That system creates more legal certainty to the rights of MHA. Nevertheless, there is a clash between national law and *adat* law regarding this issue and it will potentially create other legal problems:

The system had been created based on the national law system, in which an active registration system must be done by indigenous people, in order be recognized as a MHA. Such the system is not known by them and it is not familiar for MHA. As a traditional and communal community, they have never considered registration as a MHA is important for them. They just lived together from decades and for many generations, they had intensive connection with the land where they lived. They did not need any formal recognition, since their factual intensive engagement to the land is their way to claim their possession to the land. Nevertheless, as a legalistic institution, the government imposed a new recognition regime, which will make the MHA getting difficult to maintain their existence; many MHAs lived in remote areas, sometimes they were living in a jungle. Many of them were nomads. Without any intensive mitigation to help them, they will barely understand the active registration system imposed by national law. They will hardly anticipate this new system and be difficult to do something accordingly. Therefore, it would be very unfair if a MHA lost their land possession because of their insufficient understanding to the national law.

We face a long-lasting debate regarding what should be adopted as the applicable law, when there is collision between two legal systems. Speaking of legal positivism, it is usually taken that its basic tenet pursues the principle of legal certainty that showcased in a closed logical system of rules. The spirit that underlies the positivistic concept of law view is a sort of anti-natural law, thereby it separates the importance of morals and ethical judgment. Therefore, the resolution to the conflicting claim between the principle of legal certainty and fairness also founded in such unified image of community.

The positivistic concept of law in Indonesian experience related to the view of how people in the society is transforming. It is already articulated that the practice of legal positivism in time of non-revolutionary transformation of culture cannot be sustained [8]. In one of Dworkin's last lecture, we can find the idea of how the concept of law should be understood and administered as a moral integrity [9]. Thereby, the judge's legal reasoning in judicial court should flow coherently from the morality of a pluralistic community. In a certain legal case, the essence of law was a triumph of fundamental individual human rights discovered by the judges. Yet, it is not just a kind of pure liberalist conception of jurisprudence, because like Dworkin said, "those rights is the result of a sound public deliberation, where public here signified respect of the other in the spirit of fraternal obligation" [10]. If we understood "law as integrity" in Dworkin's legal theory, we could notice that there were normative layers of social life where moral principles had their root.

So, the problem of conflicting plural-syncretic legal tradition in Indonesia experience can be grasped by considering at least these three following points: there is a peculiar positivistic concept of law which exclusively has been built by the top elites (coming from academia, military, and bureaucracy) to be obeyed by the society; that sort of positivistic concept of law exists precisely in plural-syncretic Indonesian culture. It means the harmonization between legal certainty principle and fairness, especially in Indonesia judicial field, should be back to its cultural root. If the effort to go back to Indonesian's cultural root fails, then Indonesia will fall into a declining comprehension of legal analysis and legal enforcement. It would bring Indonesia to either-or corrosive options: (a) either the process to comprehend legal analysis and legal enforcement does not achieve anything, since the principles of legal certainty and fairness were originated from Western cultural and political context (controversy over natural law tradition versus legal positivism); or (b) the process would, in the end, merely a contingent matter because it had always been up to the government political expediency; as an evaluation it can be said that it is necessary to approach the law from ethical judgments, not just from legal texts. Consideration must involve our communal culture, so that it would be bridge the gap between people's sense of justice and state policies.

III. CONCLUSION

After identifying the positivistic conception of law in Indonesia plural-legal context, we found that it is necessary to evaluate it. We follow Dworkin's theory of "law as integrity" to bring back the concept law to its cultural-moral roots. But how do we do that? Still following Dworkin, we could do that by interpreting the moral principles. Thus, the legal decisions is not only made according to the authoritative written legal sources (or to the instruction performed by the government). It should be justified by the underlying principles which reflect the real living values of plural community. That idea of interpretation, in fact, has already embodied in the so called Indonesia fundamental principles of nation and state, Pancasila. It is said embodied because Pancasila is a result of historical wisdom, from the Indonesia struggling for modern nation-state formation, to the emergence of democratization todays.

A very suitable example of the application of morality in the legal interpretation can be seen in the Judges

argumentation at the Constitutional Court Decision No. 35/PUU-X/2012. This decision determined whether Law No. 41 year 1999 regarding Forestry violated Indonesia Constitution 1945. Former article 1 point 6 mentioned "customary forest is a state forest that is located in the territory of MHA". The word "state" was considered against Constitution, and Constitutional Court decided to eliminate the word state and the new provision became "customary forest is a forest that is located in the territory of MHA". From the new provision we could understand that a customary forest would not be above a state forest anymore. This change is very important for MHA, because when a forest has been registered as a customary forest, the government cannot grant the right to use or right to possess the land to any third party. It will maximize ability of MHA to maintain their rights over customary forest.

The most important analysis goes to the argumentation of the Judges to rationalize that decision. In order to determine the best status of customary forest, the judges went back to the cultural root of the customary forest. The judges took the objective to regulate Forestry Law into consideration. They emphasized that the Law had been issued by the government in order to achieve prosperity in the community, which meant general prosperity, as it was specifically mentioned at fundamental principles of Indonesia, i.e. to accomplish social justice for all Indonesian people, all people who had gathered to become a one nation. The judges highlighted that that objective could also be found in the state symbol, Garuda Pancasila and *Bhineka Tunggal Ika*, it meant that "people" should cover diversity of groups, ethnicities, religions, *adat* and custom, but they had been united to be bound as a nation, in order to establish a new independent country, to protect and to create their welfare.

Those arguments had shown how the judges had applied legal interpretation using morals and ethics for taking the decision. This court decision is a perfect example of the application of "law as integrity" introduced by Dworkin.

It has already been universally acknowledged that the state has the legitimate power to regulate how acts that have a particular religious law [and also customary law] are to be carried out [11]. Consequently, the state may create a guidance to determine what law should be applied, if national law collides with *adat* law or sharia law. Nevertheless, since Indonesian people is a pluralistic community, so far legal unification to non – neutral matters, i.e. which are influenced by custom, tradition or religion, is not a good option. Therefore, it will be important to provide a guidance, which will create legal certainty on one hand, yet will safeguard fairness on the other hand. As it has been explored in the conclusion, application of "law as integrity", which will be done by interpreting a legal provision using morals or ethics, or its cultural root will potentially create a better settlement than a positivistic approach. This legal interpretation will still rely on the content of the provision (in order to defend legal certainty), but the provision shall be interpreted using fundamental values that lay down behind the norm, in order to find the most justified meaning of that provision.

REFERENCES

[1] Unpresented Nations and Peoples Organization (UNPO), Human Rights Violation in Indonesia: An expert panel discussion on Aceh, South Mollucas, and West Papua. Geneva, March 2014.

[2] Lukito, Ratno, The Enigma of National Law in Indonesia: The Supreme Court's Decisions on Gender-Neutral Inheritance. Journal of Legal Pluralism, 2006 – Nr 52.

[3] Fathurokhman, Ferry, *Hukum Adat Baduy dan Relevansinya dalam Pembaharuan Hukum Pidana*. *Jurnal* Law Reform, April 2010, Vol. 5 No. 1.

[4] Mustaghfirin, H., *Sistem Hukum Islam, Sistem Hukum Adat, dan Sistem Hukum Islam Menuju Sebagai Sistem Hukum Nasional Sebuah Ide yang Harmoni. Jurnal Dinamika Hukum*, Vol. 11 *Edisi Khusus Februari* 2011.

[5] Central Intelligent Agency, "The World Factbook", July 2016. Available online at: https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html, accessed on 13 October 2016

[6] IslamQA, "Birth Control and Contraception in Islam". Available online at: http://islamqa.org/hanafi/darululoomtt/52272, accessed on 12 October 2016.

[7] National Commission on Human Rights, *Konflik Agraria Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan – Sumatra, Jawa, Kalimantan, Sulawesi, Maluku, Bali, Nusa Tenggara, Papua*. National Commission on Human Rights, Jakarta, 2016.

[8] Marek Zirk-Sadowski, "Legal Epistemology and Transformation of Legal Cultures," in Epistemology and Methodology of Comparative Law, Mark van Hoecke, Ed. Oxford and Portland, Oregon: Hart Publishing, 2004, p. 31.

[9] Dworkin, Ronald, From Justice in Robes to Justice for Hedgehogs. Lecture delivered at the Instituto de Investigaciones Jurídicas of Universidad Nacional Autónoma de México. Problema. Anuario de Filosofia y Teoria del Derecho, núm. 9, 2015.

[10] Davies, Howard and Holdcroft, David, Jurisprudence. Texts and Commentary, London, Dublin, Edinburgh: Buterworths, 1991.

[11] Bowen, John R., Islam, Law and Equality in Indonesia, An Anthropology of Public Reasoning. Cambridge University Press, 2003.