



Harmonization of Modern Law and Local Law in South Barito District an Overview of Comparison Legal Studies

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Abstract

Customary law in Indonesia has characteristics and patterns that are different from other laws. Customary law is pragmatism-realism which means that customary law is able to meet the needs of the community which is functionally religious so that customary law fulfills a social function/social justice. The emergence of modern law has completely changed the map of the old social order, this is due to the hegemonic character of the modern law, it does not allow any other form of order except those created and issued by the state. It is different and interesting when local law fights with modern law, where Modern Law is eroded in its implementation by local law. Local law views the implementation of the "Wara" traditional ceremony with the traditional ritual "Kaleker Diau" in the Dayak indigenous people of Central Kalimantan, South Barito Regency as a culture or custom that must be preserved, while modern law views the activities in these traditional rituals as a form of gambling, and has a large effect can cause conflict in indigenous peoples. The study of comparative law considers that the cultural values or customs, habits and enforcement of Dayak customary law in the area of Central Kalimantan Province, South Barito Regency, which are very sacred, need to be updated in their implementation with the aim of building and implementing traditions or customs that are in line with the national legal system.

Keywords: *Harmonization of Local Law with Modern Law; Study of Comparative Law*

I. Introduction

Each country has its own national legal system, even a country in the form of a federation, in which there is more than one legal system. Likewise, a plural country has legal pluralism, where the country has more than one legal system in it, such as Indonesia in the field of civil law, there are Western law, customary law, and Islamic law. The national legal systems of countries in the world are grouped or classified into large legal systems that display the same characteristics as a certain type of legal system.

The contributions of legal thinkers and writers are usually the result of their comparative approach. Jurisprudence as a science of law, the essence of its specialty lies in the special methods of study, not on the law of one country only, but on the great ideas of the law itself, namely the law that comes from almost all countries in the world. Lawyers and legal philosophers have presented their own points of opinion on the study of law, its philosophy, functions and establishments after conducting extensive studies of their respective legal systems and systems of various other countries in the world, by comparing them with one another.

This approach in the field of law has developed a new branch of legal studies called "Comparative Law" using a method based on research on the laws of various countries with comparative techniques. Various matters relating to the creation, application and administration of law are also found in this method as a guideline, tool in employability and a design in a situation where the system can be built on their respective fields of activity by comparing the laws of their country. with other legal systems by changing, modifying and adding whatever is needed within the scope of further interest in the scope of international law, legal studies, trade and commerce.

Comparison is one of the most important sources of knowledge. Comparison can be said as a technique, discipline, practice and method by which the values of human life, relationships and activities are recognized and evaluated. The importance of comparison has been rewarded in every section by anyone in the field of study and research. This importance is reflected in the work and writings produced by scientists, historians, economists, politicians, jurists and those associated with investigative and research activities. Whatever the ideas, ideas, principles and theories, all of them can be formulated and can be said to be the result of comparative study methods. This is what is called the true law.

II. Opinions about Comparative Law

According to **Adolf F. Schnitzer** in his book *Vergleichende Rechtslehre* (1945): *Die Vergleichung hat sich als besonderer Zweig in Rechtswissenschaft ers im XIX jahrhundert entwickelt* (Comparison was only developed in the 19th century as a special branch of jurisprudence).¹ Furthermore, he also mentioned that in order to achieve this, a certain level must be achieved first in thinking in general and in thinking in the field of law in particular.²

Rudolf B. Schlesinger in his book *Comparative Law* (1959) states that: Comparative Law is a method of investigation with the aim of obtaining deeper knowledge about certain legal materials.³ Furthermore, he said that: "Comparative Law" is not a device and legal principles, not a branch of law (is not a body of rules and principle). It is further said that: Comparative Law is the technique of dealing with actual foreign law elements of a legal problem (a way of dealing with actual foreign elements in a legal problem).⁴ In his book "Comparative Law" (1949), **Gutteridge** states that: comparative law is nothing but a method, namely a comparative method that can be used in all branches of law (constitutional law, criminal law and civil law).⁵

Another opinion on Comparative Law was put forward by **Ole Lando** in his book "The Contribution of Comparative Law to Law Reform by International Organizations," (1977) as quoted

¹ Soedarto, *Perbandingan Hukum Pidana (Hukum Pidana Inggris)*, catatan kuliah, dikeluarkan oleh Badan Penyediaan Bahan Kuliah Fakultas Hukum Universitas Diponegoro, Semarang, 1981, hal. 1.

² *Ibid*

³ *Ibid*

⁴ *Ibid*

⁵ Romli Atmasasmita, *Comparative Principles of Criminal Law*, Indonesian Legal Aid Foundation Foundation, Jakarta, 1989, p. 20.

Soerjono Soekanto which states that: “Comparative Law is the national legal system and their comparison.”⁶Elsewhere in his writing, Ole Lando says that comparative law includes "analysis and a comparison of the law."⁷

Sudarto argued that based on the opinion **Adolf F. Schnitzer** and **Rudolf D. Schlesinger** As mentioned above, according to him, the most appropriate term to use is comparative law and not comparative law.⁸In another part of his writing,**Soedarto** reaffirms that comparative law is a branch of jurisprudence, and therefore it is more appropriate to use the term "Comparative Law" rather than the term "Comparative Law."⁹

In his book entitled "Comparative Law" (1979), **Soerjono Soekanto** explains the division of legal science as a plural science, which consists of the science of reality (“taatsachenwissenschaft” or “seinwissenschaft”) and the science of rules and understanding (“normwissenschaft” or “sollenwissenschaft”). The science of reality includes the sociology of law, legal anthropology, legal psychology, legal history, and comparative law.¹⁰

According to **Sunaryati Hartono** in his book "Capita Selecta Comparative Law" (1982), states: "Comparative law is a method of investigation, not a branch of legal science, as is often assumed by some people."¹¹However, in another part of his writing he explains:¹²From my experience since 1960, it turns out that Comparative Law is primarily a research method, which can be used for practical purposes, but also for theoretical development of Legal Science. However, as with other research methods, Comparative Law must be carried out in certain ways and with certain rationale, so that in the end, an independent legal discipline emerges. Furthermore **Sunaryati Hartono** explained that:¹³"If we have used the comparative law method for a long time, namely in the field of Inter-Class Law. But now comparative law is not only used in the fields of law that involve more than one legal system, such as International Civil Law and Intergroup Law. Because now the comparative law method is also used in the discussion of criminal law, constitutional law, labor law, land law, international law; In short, the comparative law method has now been used in all fields of law to expand our legal knowledge."

Satjipto Rahardjo in his book "Legal Science" (1986) describes the use of comparative studies in legal anthropology, legal sociology, and comparative law. According to Satjipto Rahardjo, comparative law is an activity in the sense of comparing the positive legal systems of one nation with another.¹⁴He further said that in addition to legal comparisons that can be made to legal systems originating from different countries, comparisons can also be made within one country, especially a country whose laws are plural. In fact, according to him, comparisons can also be made to legal systems that have different levels of positivity, such as between state law and law in the private sector (in a corporate environment).¹⁵

III. Legal Comparison present Time

⁶ Soerjono Soekanto, *Legal Comparison*, Alumni, Bandung, 1979, p. 26.

⁷ *Ibid*

⁸ Soedarto, *Loc.Cit.*.

⁹ Romli Atmasasmita, *Op.Cit.*, hal. 21

¹⁰ Soerjono Soekanto, *Op.Cit.*, hal.9.

¹¹ Sunaryati Hartono, *Capita Selecta Perbandingan Hukum*, Alumni, Bandung, 1982, hal.1.

¹² *Ibid.*, Hal. 26.

¹³ *Ibid.*, Hal. 2-3.

¹⁴ Satjipto Rahardjo, *Ilmu Hukum*, Alumni, Bandung, 1986, hal. 330.

¹⁵ *Ibid.*, Hal. 131-132.

At present, comparative law is seen from a functional approach. The functional approach puts the various legal systems can only be compared as long as the legal systems function to solve the same social problems or meet the same legal needs. The functional approach is carried out using a critical, realistic, and not dogmatic method.¹⁶ According to **Tahir Tungadi**: "critical because comparative law is now not concerned with the differences or similarities of various legal orders (legal orders) solely as facts, but what is important is "the fitness, the practicability, the justice, and the why of legal" solutions to given problems." Realistic because comparative law examines not only legislation, court decisions and doctrine, but also "All the real motives, which rule the world: the ethical, the psychological, the economic, and those of legislative policy." It is not dogmatic, because comparative law does not want to be constrained in the rigidity of dogmas as is often the case in every legal system. Although dogma has a systematizing function, it can obscure and distort views in finding "better legal solutions."¹⁷

IV. The Birth of Customary Law

The meaning of a process, means relating to the sequence of changes in the development of something in space and time, without reducing the substance of the value that becomes the modifier. Likewise, the birth of customary law before its existence was recognized by the community both juridically, normatively, philosophically and sociologically, of course, cannot be separated from a cycle that became the basis/source of its formation so that something known as customary law was born.

Briefly, the process of the birth of customary law, can be described with a scheme, as follows:



God created humans to be equipped with a nature in the form of reason in behaving. Behavior that is continuously carried out for the individual concerned will form a personal habit where the habit can be accepted spontaneously because it is seen as appropriate. Humans as social beings cannot be separated from the consequences of social interaction which of course will need each other between individuals with each other. Adat is a habit of society that was born from the existence of these social interactions and over time it becomes a habit that is transformed into the feelings of the community itself. Certain community groups make custom as a custom that must be obeyed and applies to all members of their community and make it a law.

The stages of development of customary law in Indonesia are in a dilemma for continuity. As a country that is undergoing a legal transformation towards a statutory law system, Indonesia is currently pursuing a process of unification of its various unwritten legal systems that exist and apply in several parts of society in Indonesia. One of the main concerns in the process is the existence of customary law, especially in sensitive areas. The areas of customary law that are still alive today in the patterns of legal relations in society in Indonesia, their existence is very dependent on the culture and beliefs of the people.

Customary law in Indonesia has characteristics and characteristics that are different from other laws. Customary law is pragmatism-realism which means that customary law is able to meet the needs of the community that is functionally religious so that customary law fulfills a social function/social justice. According to FD Holleman in his book *De Commune Trek in het Indonesische ven*, there are four general characteristics of indigenous peoples, namely religious magic, communal, concrete, and contain.¹⁸

1. Religious Magic (Magisch-Religieus)

¹⁶ Tahir Tungadi, "Apakah Pentingnya Mempelajari Perbandingan Hukum," makalah tanpa tahun

¹⁷ *Ibid*

¹⁸ A. Suriyaman Mustari Pide, *Hukum Adat, Dulu, Kini dan Akan Datang* (Jakarta : Kencana, 2014), hlm.11

Customary law is religious magical, meaning that customary law is basically related to magical issues and spiritualism (belief in supernatural things). This trait is defined as a mindset based on religiosity, namely people's beliefs about the existence of something sacred. Before the customary law community came into contact with religious law, the customary law community proved the existence of this religiosity by way of thinking that was prelogical, animistic, and believed in the supernatural that inhabited an object. In addition, there is an opinion that says that the magical nature of religion also means the belief of the people that does not recognize the separation between the external world (the facts) and the two occults (the hidden meanings behind the facts) both of which must be balanced.

2. Communal (Commuun)

The principle of communion in customary law means prioritizing one's own interests. Customary law communities have the idea that every individual, member of the community is an integral part of the community as a whole. In addition, it is also believed that every individual's interests should be adjusted to the interests of the community because no individual is separated from the community.

3. Concrete

The nature of concrete is defined as the pattern of customary law communities that are completely clear or real, indicating that every legal relationship that occurs in society is not carried out secretly or vaguely, in other words it is open.

4. Contan

The nature of this cash contains the meaning of participation, especially in the fulfillment of achievements. The nature of cash gives the understanding that an action in the form of a real act, a symbolic act or an utterance will immediately complete a legal action simultaneously with the time when he acts according to customary law.

V. Modern Law

Roberto Mangabeira Unger makes a very interesting reference to when we want to know the journey of modern law so that it gets its current form, comprehensively. What is meant by comprehensive here is to see the journey not only from one form to another, but also in a more complete way, by involving its social roots or origins. Unger sees that the birth of a new legal form begins with the collapse of the old society or social system. Thus, the old society's bankruptcy is a kind of *precondition* for the emergence of new forms of law. This gives us perspective on how to see and understand the birth of a new law. Law turns out to have a very important function in relation to *community arrangement*. An agricultural-based society (agricultural society) must first go bankrupt before an industrial-based society emerges. The bankruptcy of the agricultural society paved the way for the birth of an industrial society. Likewise, the bankruptcy of a labor-based society gave way to the emergence of an agricultural society. The bankruptcy gave rise to new ways of social arrangement which in this case was carried out by law. From this we understand that the law is not (just) a formal document, but a social document. The law does not only run "*legal rulings*", but more than that do it "*social rule*". For this reason, the idea was put forward to speak of law as (part of) a great order.¹⁹

Legal thought that is considered dissatisfied (critical and even rebellious) against the liberal and well-established modern legal paradigm which is categorized as postmodernism thought. the meaning

¹⁹ Satjipto Rahardjo, *Ilmu Hukum, Pencarian, Pembebasan dan Pencerahan* (Yogyakarta : Genta Publishing, 2019), hlm.55

of critical legal studies known as Critical Legal Study (CLS).²⁰ Critical Legal Theory with its characters, among others, Roberto Mangauer Unger, Duncan Kennedy, David Keirys stated that the law as a means of criticism and dismantling of the hierarchical system arising from political domination. The law is negotiable/subjective and the result of a process that is full of content and political interests. Feminist Legal Theory-Feminist Jurisprudence, that legal reform with a women's perspective, law as a means of breaking patriarchy domination in society and its radical branches are influenced by the proletarian approach of marxian analysis. Legal Hermeneutics, Law is plural and plastic, interpretation of legal texts is contextual, contextual & decontextual. Law is a product of human interaction (hermeneun), with studies of Pluralism, local & ethnocentrism, interdisciplinary, radical & critical. Critical and Postmodern Legal Studies gave rise to a continental social theory which includes Legal Structuralism, Critical Legal Theory, Critical Race Theory, Feminist Legal Theory, Legal Constructivism and Legal Hermeneutics.²¹

VI. Writing method

In writing this article, the author uses sociological normative legal research which focuses on individual or community behavior in relation to law. The approach taken in this paper includes a case approach. Primary legal materials are the results of literature/document studies, namely searches and searches from the literature including related laws and regulations, in its application to every particular legal event that occurs in a society and proceeds in the community (living law) which is then harmonized with the effectiveness of the applicable law in Indonesia.

VII. Results and Discussion

A. Modern Law as Positive law

The emergence of modern law completely changes the old social order map, this is due to the character of *hegemonial* of the modern law, it does not allow any other form of order except that which is created and issued by *country*. Modern law has become synonymous with state law. All pre-existing orders, such as customary law, were annihilated. The clear clearing started from the autonomous powers that previously existed in society. The autonomous and spontaneous or sociological organization is subordinated to the new emerging "organizational giant", namely the state. All the original organizations and their structures must be submerged under the domination or hegemony of the state. Since then, all existing institutions must be of state quality (*state based*), such as state courts and state police. In subsequent developments, we see that the original organization did not disappear completely, but remained latent. Therefore, in fact, the original organization and order still exist side by side with modern law. In certain conditions where the state's legal power is in a weak state, the organization will emerge.

The birth of modern law as well as placing it in the quite difficult side, which is being at a crossroads (*bifurcation*). Since thousands of years before the emergence of modern law, the law only deals with the hunt for justice (searching *for justice*). At that time there was no state law or positive law, but natural law. But with the birth of the modern state and modern law, there has been a demand for the law to be positive and public. The so-called law must be made by a special agency, formulated in writing, and announced to the public. As a result that which does not meet the requirements can not be called a law. End of order *customary law, interaction law, dan non-formal law*.²²

²⁰ Absori, *Ilmu Transendental dan Pengembangan Ilmu (Hukum), Bahan Kuliah pada Program PDIH, Sekolah Pascasarjana UMS, 2021*

²¹ Kelik Wardiono, *CRITICAL & POST MODERN LEGAL STUDIES, Bahan Kuliah pada Program PDIH, Sekolah Pascasarjana UMS, 2021*

²² Satjipto Rahardjo, *Ibid*, hal.60

B. Legal Basis for the Applicability of Customary Law Now

Stipulation of Law Number 19 of 1964 concerning Basic provisions of the Judiciary, then the provisions in the 1945 Constitution Article 24 paragraph (1) reads: "Judicial power is exercised by a Supreme Court and other judicial bodies" has been implemented constitutionally according to Article 3 of the Basic Law The judiciary in question and its explanation, therefore the law used is the law based on Pancasila, namely the law whose characteristics are rooted in the personality of the nation.

However, even though lam article 3 above is not called customary law. According to Article 17 paragraph (2) of the Basic Law of Justice referred to and in accordance with the explanation of its Article 10, it is stated that there is an unwritten and written law.

So the question arises, what is meant by unwritten law is customary law or does it include other unwritten laws such as unwritten commercial law, unwritten constitutional law.²³ This question is then answered in the General Elucidation of Law no. 19 of 1964 which affirmed as follows:

"That the judiciary is a state court. Thus, there is no place for Swapraja Courts and Customary Courts. If the courts still exist, they will be abolished as soon as possible as has been gradually implemented."

Law Number 19 of 1964 concerning Basic Provisions of the Judiciary because the contents of the provisions in Article 19 are contrary to the spirit of the 1945 Constitution, namely, authority to the president in matters of justice, then on December 17, 1970 the law was revoked and since then it has been replaced with Law No. 19 of 1964.

The basis for the Basic Provisions of the Judiciary in Law Number 14 of 1970 which underlies the application of customary law, among others:

- a. Article 23 paragraph (1) whose contents are almost the same as Article 17 of Law no. 19 of 1964 which reads as follows:

"...all court decisions in addition to containing the reasons and grounds for the decision, must also contain certain articles of the relevant regulations or unwritten sources of law that are used as the basis for adjudicating."

- b. Article 27 paragraph (1) whose contents are almost the same as Article 20 paragraph (1) of Law no. 19 of 1964 which reads as follows:

"...Judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that live in society."

In the general explanation of Law Number 14 of 1970 section 7 has provided an explanation of unwritten law that what is meant by "unwritten law" in this law is customary law. The general explanation but reads as follows:

"The assertion that the judiciary is a state court is intended to close all possibilities for the existence or re-establishment of a Swapraja or Customary Court conducted by a non-state court, this provision in no way intends to deny unwritten law, but will only divert developments and understand living legal values with full assurance that the development and application of unwritten law will proceed naturally."

²³ A. Suriyaman Mustari Pide, *Op.Cit*, hal.83

The unwritten law implemented by the autonomous courts and customary courts *iscustomary law*. So it can be concluded that the legal basis for the enactment of customary law as unwritten law at this time, namely:²⁴:

1. Presidential Decree of 5 July 1959.
2. Article 24 of the 1945 Constitution and Article 23 paragraph (1) of the Law on Basic Judicial Provisions.
3. Law Number 14 of 1970.

It should be understood that this provision does not intend to eliminate or shift the existence of unwritten law (customary law), but to transfer the development and application of the law to state courts. With the intention that judges are obliged to explore, follow and understand the values of living law by integrating themselves into society, implementing them so that they actively participate in realizing the unification and unity of law throughout Indonesia. In order to create justice for all Indonesian people.²⁵

Thus, state courts are able to apply unwritten law called customary law. In the paragraph of the general explanation of the Law Number 19 of 1964 referred to above, linked to Article 17 paragraph (2) and Article 3 of the law, found unwritten law. And, with the promulgation of this Law on the Basic Provisions of Judicial Power, the colonial legislation (Article 131 IS paragraph (6)) was invalidated as the legal basis for the application of customary law.

C. Comparative Law as a Science

Legal discipline, which is defined as a system of teaching about law, views law as a norm in the sense of seeing law as something aspired to, and view the law as a reality (behavior or attitude of action) in the sense of seeing the law as a reality.²⁶ One aspect of the legal discipline includes the science of law, which according to **Soerjono Soekanto** has three varieties in it, namely the science of law about the rule of law, the science of the basic understanding of law, which is included in the Dogmatics of Law, and the science of legal reality. The science of rules and knowledge is included in the scope called "normwissenschaft" or "sollenwissenschaft" while the science of reality ("tatsachenwissenschaft" or "seinwissenschaft") consists of, sociology of law, legal anthropology, legal psychology, legal history, and comparative law.²⁷ **Sardjono** divide the scope of legal comparison over:

1. Comparative General Law and Comparative Special Law.²⁸

Comparison of General Law: comparing one legal system (as a whole) with another legal system (as a whole); Comparison of Special Laws: comparing legal institutions from one legal system with more or less the same legal institutions from other legal systems.

2. Comparison of Horizontal Laws and Comparison of Vertical Laws.²⁹

Horizontal Legal Comparison: comparing the legal system (as a whole) or legal institutions from one legal system with the legal system (as a whole) or legal institutions from other legal systems in the same period of time; Vertical Legal Comparison: comparing the state of the legal system or certain legal institutions at a certain time with the state of the legal system or legal institution at another time (in a different period of time).

²⁴ *Ibid*, hal 85

²⁵ *Ibid*, hal 85

²⁶ Soerjono Soekanto, *Penelitian Hukum Normatif*, Rajawali, Jakarta, 1985, hal. 2.

²⁷ *Ibid*

²⁸ Sardjono, *Loc. Cit.*

²⁹ *Ibid.*, hal. 2.

3. Descriptive Comparative Law and Applied Comparative Law.³⁰

Descriptive Comparative Law: collects and straightens or provides descriptive illustrations of data about legal systems or legal institutions being compared, looking for similarities and differences without analyzing them further; Applied Comparative Law: collect and describe data about legal systems or legal institutions being compared, look for similarities and differences and further analyze the results of this descriptive comparison to achieve a particular goal or interest in solving a problem at hand .

D. Harmonization of Positive Law and Customary Law in terms of Studies Comparative Law

Modern law whose formation is euro-centric also has its own cultural character. One of the reasons for saying this is when one observes how the development of social arrangements and forms of modern law "coupled" with developments in the European cultural world. The development of social arrangement stretches from the feudal period (VII century) to the constitutional state (XIX century) while on the other hand the cultural development starts from the dark ages, the Middle Ages, the Age of Enlightenment, and finally the modern age. From the range of developments it can be read that the long journey of Europe has its own meaning, namely a journey from "darkness" to "light". The Enlightenment period opens the veil of meaning for this cultural development as a journey from a period of attachment to individual liberation. The XIX century is also famous for its creed "*laissez faire laissezpass*", let the individual be free and not hindered. This cultural background will later be projected into the form or type of modern law, namely the type of law *liberal*.

From the discovery of this meaning, it can be understood why modern law is conditional on and installation of "signs" to protect individuals or individual freedoms. The safeguarding and guaranteeing of individual freedom is carried out through the provision of various legal principles and procedures that must be followed in the legal process.³¹

The erosion of signs to protect individuals or individual freedoms that can occur with the application of customary law or unwritten law that applies to indigenous peoples. Legal battles can occur, where local laws or unwritten laws fight with modern laws which can cause conflicts and stumbling blocks for law enforcement officers, especially the Police.

Study on South Barito Regency in particular is one part of the Central Kalimantan Province with the majority of the Dayak people consisting of the Taboyan Dayak Tribe, Bayan Dayak Tribe, Maanyan Dayak Tribe, Dusun Dayak Tribe, Dusun Bayan Dayak Tribe, Ngaju Dayak Tribe, Bakumpai Dayak Tribe, Lawangan Dayak and Bawo Dayak tribes.³² Religions and beliefs are also diverse, such as Islam, Christianity, Catholicism, Buddhism, and Hinduism/Kaharingan. In addition to the religion and beliefs held by the Dayak Tribe, there are also customs adopted by the Dayak Tribe of South Barito Regency, namely the Wadian Custom and the Hindu/Kaharingan Death Pillars. Wadian custom is a treatment ceremony for the Bawo Dayak Tribe, Dusun Dayak Tribe, Maanyan Dayak Tribe and Lawangan Dayak Tribe,³³ while the Hindu/Kaharingan Pillars of Death are funeral ceremonies which include the traditional ceremonies of Ngalangkang, Nambak, Ngatet Panuk, Wara, Wara Myalimbat, Ijambe, Bontang, Kedaton,

³⁰ *Ibid.*, hal. 8.

³¹ Satjipto Rahardjo, *Ibid*, hal.68

³² Wikipedia Indonesia, Kabupaten Barito Selatan, diakses dari https://id.wikipedia.org/wiki/Kabupaten_Barito_Selatan (diakses tanggal 15 Januari 2022)

³³ Wikipedia Indonesia, Wadian, diakses dari <https://id.wikipedia.org/wiki/Wadian>

Manenga Lewu and Marabia.³⁴This series of traditional ceremonies can only be carried out by the Taboyan Dayak Tribe, Dusun Bayan Dayak Tribe, Maanyan Dayak Tribe, Ngaju Dayak Tribe who adhere to Hinduism/Kaharingan religion. One of the Hindu/Kaharingan Pillars of Death that is still often carried out by the Taboyan Dayak and Bayan Dayak tribes in South Barito is the Wara Traditional Ceremony which is a sacred ceremony for the Hindu/Kaharingan adherents because it comes from the teachings of the religion itself.

This Wara Traditional Ceremony is a traditional death ceremony carried out by Hindu/Kaharingan adherents to deliver the ancestral spirits to the last place called Lewu Tatau (heaven),³⁵in order to distribute "treasures" to the spirits of grandfathers, grandmothers or parents or relatives of the families who held this traditional ceremony. The division of property is symbolized in the form of offerings (a type of offering) in the form of food and drink, in accordance with the food and drink habits of the spirits of the people being ceremonyd. In addition to food and drink, there are also animals that are sacrificed in this traditional ceremony according to the instructions of Kandong/Wadian Wara. Kandong/Wadian Wara is a Hindu/Kaharingan religious clergyman who acts as a guide for traditional ceremonies and a conductor of prayers to God to deliver the spirits of the people being ceremonious. The traditional ceremony is carried out only once by the family who organizes it with a series of traditional rituals that lasts for 7 (seven) days/night.³⁶with a date determined by the family who carries out this traditional ceremony. During the traditional ceremony, various series of traditional rituals are presented in this Wara Traditional Ceremony, one of which is the Kaleker Diau Traditional Ritual.

"Kaleker Diau is a game where the party organizing the traditional ritual provides 4 (four) stalls used for the dice game, then the community around the place where the traditional ceremony takes place can play by risking some money to guess the dice numbers that will come out".³⁷

The problem that occurs in the Kaleker Diau traditional ritual is the existence of the Gurak Dice game which contains elements of gambling. As is known in general, gambling is a game using money as a bet and according to Article 303 every game where in general the possibility of making a profit depends on sheer luck.

The game method of the Gurak Dice itself uses 2 (two) dice and is placed in a closed container and then shaken by someone who acts as a dealer. Before the container containing 2 (two) dice is opened, players who are members of the community around the location of the traditional ceremony take place and participate in the Dice Gurak game by participating in betting money and then placing an unlimited amount of money on the stall according to the picture of the guessed dice. will come out. Then the dealer will open the dice container after being shaken to see the number of the dice that comes out. If the player bets money on the image of the dice that comes out, then the player is considered to have won and the bet money is returned 2 (two) times to the player.

Judging from the explanation of the definition of ordinary gambling in general and then comparing it with the way of playing the Dice Gurak game, it results in difficulties in separating the game of Dice Gurak in the actual Kaleker Diau ritual and the usual gambling game because it is closely related to the Wara Traditional Ceremony and the community considers it a tradition. . This will then give rise to different views between local culture which has become a tradition and modern law in the form of positive law currently in force. When viewed from beliefs, customs and religions,

³⁴ Wikipedia Indonesia, Adat Rukun Kematian Kaharingan, diakses dari https://id.wikipedia.org/wiki/Adat_rukun_kematian_Kaharingan (diakses tanggal 15 Januari 2022)

³⁵ Dayak Barito, Wara Upacara Sakral DAYak Dusun, diakses dari <http://dayakbarito.blogspot.co.id/2012/05/wara-upacara-sakral-dayak-dusun.html> (diakses tanggal 15 Januari 2022)

³⁶ Hasil Musyawarah Daerah Bidang Upacara Ritual Agama Hindu Kaharingan Kabupaten Barito Selatan tahun 2013, hal.2.

³⁷*Ibid.*, hal.3.

Although gambling is prohibited and threatened with criminal penalties, in this Wara Traditional Ceremony there are traditional rituals that contain elements of gambling. This is because indigenous peoples consider that the dice game in Kaleker Diau is not a gambling game but one of the requirements for traditional rituals (rukun) that must be carried out so that the Wara Traditional Ceremony is perfect in accordance with traditions that have existed since ancient times or since the emergence of Hindu religious beliefs. Kaharingan.

Referring to Article 303 of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Control of Gambling and Article 303 bis of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Gambling Control, the Kaleker Diau Ritual has fulfilled the formulation of the offense in Article 303 of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Control of Gambling and Article 303 bis of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Gambling Control so that this ritual is said to have fulfilled the element of being against the law formally. In relation to being against the law formally, Andi Hamzah said that being against the law formally is defined as being against the law, where an act has complied with the formulation of the delict, then it is said to have violated the law formally.³⁸

But in fact in law enforcement there are obstacles that become a dilemma in positive law enforcement against this series of traditional ceremonies.

The sacred customary activities of the Kaleker Diau ritual are asymmetrical with positive law or the provisions of Indonesian criminal law.

Differences in perception of a view between local culture which has become a sacred custom and accompanied by an understanding of the Dayak Hindu/Kaharingan adherents who strongly adhere to religious beliefs and customs, then if the Kaleker Diau ritual is not carried out or abolished then the family those who carry out the traditional Wara ceremony consider that the requirements of the traditional ritual of the traditional ceremony are not fulfilled. As a result of not fulfilling these conditions, there will be a disaster borne by the family holding the traditional ceremony, because when this traditional ritual is not carried out it is considered a debt to the spirit being ceremonious.

With the belief believed by the indigenous Dayak community related to the implementation of the Hindu/Kaharingan religion, no party dares to be responsible for the disaster that occurs if the Kaleker Diau Traditional Ritual is abolished or abolished, so that the Police law enforcement agencies refrain from doing so. act decisively to avoid conflicts with indigenous peoples resulting in regional instability.

The grinding of signs in positive law with the application of customary law or unwritten law that applies to indigenous peoples in South Barito Regency creates a legal battle, where local law or unwritten law fights with modern law or positive law which can cause conflict. and a stumbling block for law enforcement officers, especially the PoliceSouth Barito Regional Government in enforcing positive laws that apply in the State of Indonesia.

Study of Comparative Lawaim maccording to **Romli Atmasasmita**, can be distinguished based on their origin and development.³⁹Viewed from the point of view of natural law theory, the purpose of comparative law is to compare legal systems to be able to see their similarities and differences in order to develop natural law itself. However, when viewed from a pragmatic point of view, the purpose of comparative law is not merely to seek similarities and differences, but rather to carry out legal reforms. In

³⁸ Andi Hamzah, *Asas – Asas Hukum Pidana di Indonesia & Perkembangannya*, PT. Sofmedia, Jakarta, 2012, hlm.177.

³⁹ Romli Atmasasmita, *Op.Cit.*, h. 28.

addition, from a functional point of view, comparative law aims to find answers to real and the same legal problems.⁴⁰

In this case the author wants to bring us to think on another dimension, namely how we think so that this comparative study of Laws used to understand, criticize, develop, and apply customary law which also has many weaknesses in its application throughout the territory of Indonesia. As is the case with the implementation of the Wara Traditional Ceremony in Central Kalimantan with the Kaleker Diau ritual when viewed from a positive legal perspective, it is a criminal act as contained in Article 303 of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Control of Gambling and Article 303 bis of the Criminal Code Jo. Article 2 of Law Number 7 of 1974 concerning Gambling Control. However, it is different from the perspective of customary law in Central Kalimantan that indigenous peoples in Central Kalimantan view that the traditional Kaleker Diau ritual in the Wara ceremony is purely a traditional ritual and does not contain an element of gambling because this ritual is a perfection of the Wara Traditional Ceremony.

The implementation of the Wara Traditional Ceremony will always be carried out by the Indigenous Peoples in Central Kalimantan who adhere to Hindu religious belief / Kaharingan to deliver ancestral spirits to the last place called Lewu Tatau (heaven). For indigenous peoples this ceremony is of course very sacred and has a very high cultural value, so of course the indigenous people will maintain their cultural values.

Here comes the p . study Comparative law considers that cultural values or customs, customs and enforcement of Dayak customary law in the very sacred area of Central Kalimantan Province need to be updated in their implementation with the aim of developing and implementing customary law that does not conflict with the interests of national law. The renewal of the implementation of this kind of Traditional Ceremony in its application will certainly reap pros and cons among the indigenous peoples themselves, but how can a customary institution which is an extension of the hands of indigenous peoples and also represents the wishes of the State with positive law be able to create a system of habits, customs that avoid their implementation are contrary to the interests of national law

E. Dayak Customary Council (DAD) as a Dayak Customary Institution in Its Existence between Indigenous Peoples and the State

Dayak Customary Institutions in Central Kalimantan Province are regulated in Regional Regulation Number 16 of 2008 concerning Institutions Indigenous Dayak in Central Kalimantan, which are community organizations, either intentionally formed or which have naturally grown and developed along with the history of the Dayak Indigenous Peoples with their customary law areas, and have the right and authority to regulate, manage and resolve various life problems with reference to Customs, Customs and Customary Law of the Dayak.

The Dayak Indigenous People are all people from the descendants of the Dayak tribe who come together and live and cultured as reflected in all their local wisdom by relying on customs, customs and customary law.⁴¹

Customary law is a law that actually lives in the conscience of the community and is reflected in their patterns of action in accordance with their customs and socio-cultural patterns that do not conflict with national interests.⁴²

⁴⁰ *Ibid.*, Hal. 28-29

⁴¹ Peraturan Daerah Provinsi Kalimantan Tengah Nomor 16 Tahun 2008 tentang Kelembagaan Adat Dayak di Kalimantan Tengah, file:///C:/Users/ACER/AppData/Local/Temp/Perda%2016%20tahun%202008-1.PDF, diakses tanggal 20 Januari 2022

ExistenceThe Dayak Customary Institution intends to encourage efforts to empower the Dayak Customary Institution so that it is able to build the character of the Dayak Indigenous Community through efforts to preserve, develop and empower customs, habits and enforce customary law in the community in order to support efforts to improve the welfare of the local community, support the smooth running of government and continuity of development and increase National Resilience within the framework of the Unitary State of the Republic of Indonesia. As well as having the aim that efforts to empower Dayak Indigenous Institutions are able to encourage, support and increase the participation of the Dayak Indigenous Peoples for the smooth administration of government, implementation of development, and community development in the regions.

The national level Dayak customary institution is the National Dayak Customary Council which is the highest Dayak Customary Institution, which carries out the task of coordinating, synchronizing, communicating, serving, reviewing and accommodating institutions and following up on the aspirations of the community and all levels of the Dayak Customary Institution.

The National Dayak Customary Council (MADN) as the parent organization of customary institutions mandatesand the Dayak Customary Council (DAD) to carry out coordination in stages starting in the Province, Regency, District to Village in Central Kalimantan Province, in order to help smooth the duties of the Customary Head Damang in the fields of empowerment, preservation, development, customs, habits and enforcement Dayak customary law in the province of Central Kalimantan.

The Dayak Customary Council as an Indigenous Dayak institution listed in the Regional Regulation on Dayak Indigenous Institutions in Central Kalimantan has a central role as a Dayak Indigenous community organization and can participate in resolving conflicts that exist or arise from the implementationA series of traditional ceremonies from various Dayak sub-tribes who adhere to the Hindu/Kaharingan religionso that it does not conflict with the interests of national law.

Wara Traditional Ceremony as one of the ceremoniesThe adat of the Dayak sub-tribe in Central Kalimantan is aa traditional death ceremony carried out by Hindu/Kaharingan adherents to deliver the ancestral spirits to the last place called Lewu Tatau (heaven). During the traditional ceremony, various series of traditional rituals are presented in this Wara Traditional Ceremony, one of which is the Kaleker Diau Traditional Ritual. The problem that occurs in the Kaleker Diau traditional ritual is the existence of the Gurak Dice game which contains elements of gambling. Although gambling is prohibited and threatened with criminal penalties, in this Wara Traditional Ceremony there are traditional rituals that contain elements of gambling.

Daya Customary Councilk In carrying out the duties it carries out, it can coordinate and supervise all parties related to the implementation of the Wara Traditional Ceremony with the Kaleker Diau traditional ritual from the customary law community who carries out the ceremony and the Police Institution that enforces positive law in Indonesia with the main study being how to implement the Adat. Wara with Kaleker Diaunya still achieves perfection according to tradition but does not conflict with the implementation of positive law in Indonesia

Conclusion

Customary law in Indonesia has characteristics and characteristics that are different from other laws. Customary law is pragmatism-realism which means that customary law is able to meet the needs of the community which is functionally religious so that customary law fulfills a social function/social

⁴² *Ibid*

justice. The emergence of modern law completely changes the old social order map, this is due to the character of *hegemonial* of the modern law, it does not allow any other form of order except that which is created and issued by *country*. Modern law has become synonymous with state law. All pre-existing orders, such as customary law, were annihilated. The clear clearing started from the autonomous powers that previously existed in society. The autonomous and spontaneous or sociological organization is subordinated to the new emerging “organizational giant”, namely the state.

The Presidential Decree dated July 5, 1959, the 1945 Constitution in Article 24 and Article 23 paragraph (1) of the Law on Basic Provisions of the Judiciary Number 14 of 1970 are the basis for the application of unwritten law (Customary Law in Indonesia).

The battle of local law with modern law will always cause conflict in its implementation and what is usually modern law is to clear local law, but what if the opposite happens where Modern Law is eroded by implementation by local law, and has a greater effect, it can cause conflict in indigenous peoples. This situation occurs in the Dayak community in Central Kalimantan, South Barito Regency during the Wara traditional ceremony with the Kaleker Diau traditional ritual which is considered to contain elements of gambling according to positive law, but the ritual cannot be avoided considering the sacred elements of the ritual as a tradition and not a gamble.

Comparative Studies of Law views that the cultural values or customs, customs and enforcement of Dayak customary law in the area of Central Kalimantan Province, South Barito Regency, which are very sacred, need to be updated in their implementation with the aim of building, and implementing traditions or customs that are in line with the national legal system.

The renewal of the implementation of this kind of Traditional Ceremony in its application will certainly reap pros and cons among the indigenous peoples themselves, but how can a customary institution which is an extension of the hands of indigenous peoples and also represents the wishes of the State with positive law is able to create a system of habits, customs that avoid their implementation are contrary to the interests of national law

The Dayak Customary Council as an Indigenous Dayak institution listed in the Regional Regulation on Dayak Indigenous Institutions in Central Kalimantan has a central role as a Dayak Indigenous community organization and can participate in resolving conflicts that exist or arise from the implementation. A series of traditional ceremonies from various Dayak sub-tribes who adhere to the Hindu/Kaharingan religion so that it does not conflict with the interests of national law.

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