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Political Differences between Western Land Law and National Land Law

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ABSTRACT

Based on the State's territory, ethnicity, religion, culture, and other factors, the differences in the politics of western land law and national land law are clearly shown. The domein verklaring principle is used in western land law, whereas the communal religious concept is used in national land law, which permits individual land tenure with private land rights and includes components of togetherness. Given that it is a political product, the two land laws discussed contain human rights, legal certainty, and justice, along with other components. However, if adopted, it causes undesirable consequences, such as when domein verklaring is used and customary land becomes State land. In this case, it is not the domein norm that is wrong, but rather the domein norm user is used as a tool to achieve the colonial State's goals, because the domein's media is not fully translated. Similarly, if the requirements for the recognition of customary rights are not understood properly and honestly, it may be assumed that there is still a dualism of land law in Indonesia; customary land law and national land law.

Keywords: *Politics, law, domein, customary rights.*

I. INTRODUCTION

A society's legal system is reflected in its culture. Individualistic and capitalist Western culture is well-known in Western society. Eastern societies or customary law communities, on the other hand, are religious cumulus. These two factors are also reflected in each country's legal system.

The western legal system is based on an individualistic, written legal system, whereas the customary law system is based on a communalistic, religious, and unwritten legal system (habitual law = customary law). Even the pattern of application and settlement of each legal problem differs, with the western legal system employing deductive-inductive logic and the customary law community employing the opposite approach.

Prior to Indonesia's independence (August 17, 1945), two opposing conditions had collided in

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Indonesia, particularly during the Dutch East Indies' colonial rule, when dualistic civil land laws existed. First, there was a status of western lands (*eigendom* rights, *opstal*, and so on), which was governed by written law found in the *Burgerlijk Wetbook*, as well as proof of ownership (certificate) and proof of tax payment (*vervonding*). Second, there were customary lands that were governed by unwritten law known as customary law, with taxpayers paying taxes using various customary terms, such as *girik* for Jakarta and West Java, *petuk* for Javanese customs, *pipil* for Balinese customs, and so on.

In the field of administrative land law, the Dutch East Indies government, which began with the existence of *Agrarische Wet*, S.1870-55 and was followed up with one of the implemented regulations based on the *Koninklijk Besluit*, called *Agrarisch Besluit*, S.1870 - 118, began to apply the "*domein* principle" in ownership of plots of land by the Dutch East Indies government, by enforcing the provisions of Article 1 of *Agrarisch Besluit*, which states that "…all land which other parties cannot prove as *eigendom* rights is the *domein* (possession) of the State*".*

In that case, the proof of ownership for western land parcels was individualistic and recorded in the form of a certificate, whereas it did not exist for customary land parcels, and so they instantly became the property of the State. It posed a significant challenge for the people of the Dutch East Indies, particularly the Bumiputra tribe (natives).

In the Republic of Indonesia's land politics, however, the principle of customary rights of customary law communities, which uses a communal religious concept that permits individual land tenure with private land rights while also incorporating components of togetherness, is the total opposite. The preamble of the Basic Agrarian Law (BAL) states unequivocally that the BAL's primary components must be founded on customary land law. BAL raises the concept of communal religious rights in Articles 1 and 2, but the law nevertheless recognizes customary rights in Article 3, giving the impression that Indonesia still has a dualistic land law, namely customary and national land law.

Apart from that, and in light of the above-mentioned contradictions between the two principles of western land law in use in Indonesia and national land law, it is deemed necessary to examine the problem from a comparative perspective, namely "How is western land law politics compared to national land law politics?" The results of this study are expected to be valuable to science, particularly land law and land politics, in determining what is not in line with humanity, whether it is found in normative laws or enforcers of those rules. This study is classified as a descriptive study because it examines two variables that are similar but

contradictory, namely the politics of western land law, which employs the *domein verklaring* principle, and the politics of national land law, which employs religious communal.

The researcher carried out a normative approach to the problem being studied. The provisions of the norms referred to in this case are the norms of western land law, especially administrative land law which contains the domain principle and national land law norms originating from customary land law, which uses the communal religious principle contained in customary rights.

This analytical descriptive study made extensive use of secondary data. As a result, doing library research, which began with personal libraries and libraries on various campuses (where the researcher also taught), is the method of data collection. The results were presented as secondary data on primary materials (laws) and secondary data on secondary materials (expert opinions outlined in various book forms). After the data had been obtained, the processing and in-depth meaning of the phenomena revealed through the respective data were carried out. Then, the data was descriptively and qualitatively examined. After processing and analysis, the results of the study were reported in Indonesian in a descriptive systematic fashion (exposure) in quite long words.

II. THEORETICAL BASES

Changes in attitudes toward legislation necessitate a balance between the desire to modify the law through legislation on the one hand, and the awareness that such attempts must take into account the values and reality that exist in society on the other. Eugen Ehrlich advocates such an attitude in the area of legal philosophy, stating that positive and hence successful law is law that is in harmony with living law (*Sociological Jurisprudence*), which as the inner order of society reflects the values that live within it.

How can it be determined whether a legal provision is consistent with the community's legal awareness (sense of community justice), and who will reveal it? That question must be resolved, because both the historical schools of Von Savigny and *Sociological Jurisprudence* are unable to adequately explain what is meant by *volkgeist* or societal values.

The House of Representatives of the Republic of Indonesia as people's representatives in the process of formulating laws, according to Mocthar Kusumaatmadja (2006: 81), can disclose legal awareness that lives in society. Public legal awareness can also be disclosed through research, jurisprudence, and doctrine, and even ordinary members of the community have the right to share their opinions, because, after all, the law is made for the community. This concept is comparable to Roscoe Pound's view of law as an instrument of social engineering, which

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was popularized in Western countries by the *Pragmatic Legal Realism* movement.

The development of the legal conception as a means of reforming society in Indonesia is broader in scope, because first, it emphasizes the law in the process of changing the law in Indonesia. In contrast to the United States, where Pound's theory is aimed primarily at the role of court decisions, particularly the decisions of the Supreme Court as the highest court; second, the attitude of the public rejecting the application of the concept of law as a tool of social engineering, because the word tool is considered no different from the application of legism, which according to the history of Indonesian law, has been strongly opposed.

Furthermore, Moctar Kusumaatmadja explained that the role of law in national development can be described as "a means of reform," because development or renewal is something that is desired and even required, and law can serve as a tool (regulator) or means of development by channeling human activity in the direction of development or renewal. Both roles, in addition to other duties to provide certainty and order, can be carried out by law. Change can also be forced or accomplished quickly (revolution), but if not managed properly, it is likely to result in chaos, which may negate the benefits of the changes made.

The Theory of Development Law – Mazab Unpad is the name given to Mochtar Kusumaatmaja's viewpoint. The (extended) understanding of law as an instrument of social engineering can be utilized to investigate the politics of western and national land law using this theory. It's merely that the administration of the Dutch East Indies was driven by colonial interests, but the government of the Unitary State of the Republic of Indonesia was motivated by the people's greatest prosperity.

III. WESTERN LAND LAW POLITICS

(A) Civil Land Law

The Dutch East Indies government's political guidelines are outlined in Article 131 IS (previously 75 *Regeringsreglement*), which essentially states the following:

a. Civil and commercial law (as well as criminal law, civil and criminal procedural law) must be placed in relation to the law, which are codified;

b. For the European group, the legislation in force in the Netherlands (the principle of concordance) is adopted;

c. For native Indonesians and foreigners (Chinese, Arab and so on), if it turns out that their social needs demand that the regulations for Europeans be declared to apply to them, either in full or with changes and are also allowed to make a new regulation together. In addition,

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the regulations that apply to them must be obeyed and deviations may be made if requested by their public interest or social needs;

d. Indigenous Indonesians and foreigners as long as they have not been subject to a common regulation with Europe, are allowed to comply (*onderwerper*) to the laws that apply to Europeans. This submission may be done either in general or only regarding a certain act;

e. Before the law for the Indonesian people was written in law, for them the law that now applies to them, namely "Customary Law" (Subekti, 1985: 12) still applies.

The Dutch East Indies government enforced a dualism of civil law, meaning that western land law was based on Book II of the Civil Code, while Indonesian land law was known as customary law, based on the aforementioned description and population group.

(B) Administrative Land Law

1. Agrarische Wet

Prior to the issuance of the Dutch East Indies land law political statement contained in Agrarische Wet 1870, in the Dutch East Indies, the provisions of Article 62 Regerings Reglement, which consisted of 3 paragraphs, were as follows:

- The Governor General must not sell lands;
- The above prohibition does not include lands that are not large, which is intended for the expansion of cities and villages as well as the development of handicraft business activities;
- The Governor General may lease land according to the provisions stipulated by the ordinance. The ones which may be leased excluded are lands belonging to indigenous people from forest clearing, as well as lands which serve as public grazing areas or on other grounds constitute belong to the village.
- According to the provisions stipulated by the ordinance, land with *erfpacht* rights is granted for a period of not more than seventy-five years;
- The Governor General prevents giving land that violates the rights of the people.
- The Governor General must not take land belonging to the people from the origin of forest clearing which is used for his own purposes, as well as land which is a place for public grazing or on other grounds that belong to the village, except for the public interest based on Article 133 or for planting purposes. Plants that are organized by the order of the authorities according to the regulations concerned, must all be with the

provision of appropriate compensation.

- Land owned by indigenous people with hereditary personal usufructuary rights (customary property rights) at the request of the rightful owner can be granted to him with *eigendom* rights, with the necessary restrictions as stipulated by an ordinance and stated in its *eigendom* letter, namely regarding its obligations to the State and the village concerned, as well as regarding its authority to sell it to non-natives;
- Leasing or handing over of land by indigenous people to non-natives is carried out according to the provisions regulated by an ordinance (The Engelbrecht Collection, 1960 p. 145 in Harsono, 1997: 33);

The Purpose of Agrarische Wet

The major goal of Agrarische Wet (AW) was to provide opportunities and legal protection to private entrepreneurs in the Dutch East Indies so that they could grow. For the first 75 years, land that was still in the form of forest was provided to be exploited as a big plantation with erfpacht rights. Article 62 paragraph 4 demonstrates the government's dedication and sincerity in providing the erfpacht rights required for the development of private businesses in the large plantation industry. It could also be encumbered with a mortgage, giving the owner the option of obtaining credit by appointing the land (erfpacht rights) as collateral.

2. Agraisch Besluit

One of the implemented regulations of *Agrarische Wet* 1870 was *Agrarich Besluit* which was contained in *Koninklijk Besluit*, which was promulgated in S.1870-118. Article 1 of *Agrarich Besluit* (AB) contains a basic statement which is very important in the development and implementation of the Administrative Land Law of the Dutch East Indies Government. The article states that: *"Behoudens opvolging van de tweede en derde bepaling der voormelde wet, blijft het begensel gehandhaafd, dat alle grond, waarop niet door anderen regt van eigendom wordt bewezen, domein van de staat is".*

When translated:

"Without reducing the validity of the provisions to the application in Articles 2 and 3 of *Agrarische Wet*, the principle is maintained, that all land which other parties cannot prove as *eigendom* rights, is the *domein* (possession) of the State*."* (Boedi Harsono, 1997: 40).

The statement above had initially been applied to Java and Madura, but was later applied to direct government areas outside Java and Madura with an ordinance promulgated in S.1875-119a. It can also be found that the *domein* statement in the Sultanate of Yogyakarta was

published in the *Rijksblad* Yogyakarta in 1918 No. 16 whose contents are generally the same as Article 1 AB in Javanese "*Sakabehe bumi kang ora ana tanda yektine kadarbe ing liya mawawawenang eigendom, dadi bumi kagungan kraton ingsun Ngayugyakarta (Pasal 1)".*

The Function *of Domein Principle*

As a legal basis for the government representing the State, as the owner of the land to provide land with western rights regulated in the Criminal Code such as *erfpacht* rights, *opstal* rights and others to applicants (such as large Dutch entrepreneurs), carried out by transferring property rights the State to the land recipient.

As proof of ownership, that what is given by the government belongs to the State, not to another person or entity. Regarding *domein verklaring* contained in Article 1 AB, it is not a new problem, because previously there was a principle namely "*nemo plus juris*" which means that people cannot do more than what is their right, then that principle is realized in Articles 519 & 520 BW, whose contents read "*every parcel of land always has an owner, if not an individual, an entity is the owner*".

There was a belief at the time that only the owner (eigenaar) had the authority to give land rights. As a result, it was judged necessary to establish that the lands in question were *eigendon*/ owned by the State in order to carry out the AW's order to provide *erfpacht* rights to entrepreneurs. As a result, when the State granted these rights, it was acting as a civil owner rather than a ruler. Similarly, when an *eigendom* right was requested, the State did not grant the eigendom right to the applicant, but rather transferred the State *eigendom* right to the party requesting it in exchange for a fee.

3. The Impact of the Domein Principle Implementation

According to the government's view of the *domein verklaring*, lands belonging to people with customary property rights and customary lands belonging to customary law communities become State *domein* lands. Customary property rights, the strongest in customary law, are not equated with property rights in BW, which are known as *eigendom* rights, except that they are only considered as rights to use land in the State *domein*, and are referred to as *erfelijk individueel gebruiksrecht* in the legislation (the right to use the individual hereditary and the owner is considered to have control (*bezitter*) over the State *domein*'s land. However, the legal relation with the land in question is still recognized and protected as stated in Article 1 AB, in the sense that the State is not free to give the land to other parties, because it is burdened with the rights of the people. Customary land rights are referred to as *onvrij* lands *domein* in land administration (non-free State land). However, the land is labeled as "lands *domein*" on the

cadastral registration map, with no mention of the existence of legally recognized and protected people's rights. It is a common misinterpretation, as though there are no burdensome people's rights.

In contrast, customary law communities' customary rights, which do exist and apply in the sense that their provisions are followed by members of their legal communities and are also taken into account in court decisions, do not receive recognition of their existence in the context of *verklaring domein*, as a legal relationship that must be respected. *Vrij* lands *domein* is the classification for customary lands (free State land). The taking of people's land must follow the procedures outlined in Article 133 IS, with adequate compensation known as *regognitie* as an acknowledgement of indigenous and tribal peoples' rights.

IV. NATIONAL LAND LAW POLITICS

(A) The Proclamation and the 1945 Constitution

Indonesia's land policy dates back to the State's foundation as an independent and sovereign State. It is declared in the sacred proclamation of Indonesian independence, which reads, "... Matters concerning the transfer of power and others will be conducted in the shortest time possible." Power transfer means the transfer of State power (Dutch East Indies) to Indonesian state power (which had just become independent).

Thus, in this case, there has never been a legal vacuum in Indonesia, including the law governing lands on Indonesian territory. Because the policy of regulating lands in a State's territory comprises national land law politics, the 1945 Constitution shows the direction of power for a short period of time, especially the next day of independence (August 18, 1945). For the first time, the Republic of Indonesia's political direction is stated explicitly in Article 33 paragraph 3 of the 1945 Constitution, which asserts that "*Earth and water, and the natural resources contained therein, are controlled by the state and used for the people's greatest prosperity*".

(B) The Establishment of Basic Agrarian Law

With the abolition of the dualism of land law by the Basic Agrarian Law (BAL), a question arises, what is the state of customary law after the BAL? The answer is contained in the BAL itself in the form of statements, both contained in the preamble, body and explanation, which indicate a functional relationship between customary law and national land law. In the preamble it is stated that "…the need for a national agrarian law based on customary law."

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(C) Religious Communal

According to one of the BAL's drafters, Boedi Harsono (1997: 91), the words based on the above must be derived from customary law on land as the main source in the establishment of the BAL, which comprises the conception, system, principles, and legal institutions. The focus of this study is on the concept of communal religious law, which allows individual land tenure with private land rights while also incorporating togetherness. As stated in Articles 1 and 2 of the BAL, this conception has been designated as a right of the Indonesian people.[2]

(D) The Requirements of Customary Rights Validity

Despite the fact that the BAL explicitly declares customary rights to be the rights of the Indonesian people, it still acknowledges their existence in Article 3 of the law, which states: "In light of the provisions in Articles 1 and 2, the implementation of customary rights and similar rights by the community "customary law communities, as long as they still exist, must be in accordance with the national and state interests based on national unity and must..." The following is an explanation of the circumstances mentioned:

1. Bound by Articles 1 and 2 of the BAL

The provisions of Articles 1 and 2 of the BAL apply to the recognition of customary rights referred to in Article 3. It means that the provisions of Article 3 are a conscious acknowledgment that their status is no longer the highest right in a legal society since that right has blended with the highest right of the Indonesian people. With this view, the customary rights of the customary law communities referred to in Article 3 are within the rights of the nation, and if the following requirements are met, namely that they do not clash with national interests, the customary rights are within the rights of the nation.[3]

2. In Reality, there is Still

For many customary law communities, the existence of customary rights is acknowledged as long as they exist in reality. It can be seen, for example, in the daily activities of the customary head and traditional elders, who are the bearers of the task of authority to regulate, control, and lead the use of customary land, which is jointly owned by the indigenous peoples concerned. An example of the act of recognizing the existence of customary rights is the fact that if in an effort to acquire a portion of customary land for development purposes, an approach is made

[2] Article 1 of the BAL reads: The entire territory of Indonesia is the unitary homeland of all the Indonesian people, who are united as the Indonesian nation. Article 2 of the BAL: “The whole earth, water and space are the earth, water and space of the Indonesian nation belong to the nation’s property”.

[3] Even in the chart, the recognized customary rights are placed lower than the rights of the Indonesian people.

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to the customary rulers and the members of the customary law community concerned, which are local customs, which in essence implies the acknowledgment of the existence of customary rights. On the other hand, if government agencies/entrepreneurs seek to acquire customary land solely based on the official decree given to them, they will surely face difficulties.

There will be no revival of customary rights that no longer exist, and no new customary rights will be formed. The Republic of Indonesia's authority serves as the nation's power and officer, according to national land law.

As previously stated, that the nature of customary rights can weaken and/or strengthen. In fact, the power of customary rights tends to decrease or weaken with the strengthening of the personal rights of the citizens to the parts of the land they control. Therefore, customary rights will not be regulated and the BAL also does not order it to be regulated, because this arrangement will result in its continued existence (Boedi Harsono, 1997: 252).

3. Not against the National Interest

Although customary rights do exist, as seen in the example above, their recognition is conditional. In other words, it is limited in its application, in the sense that it must be done in accordance with national and state interests, which are based on national unity, and must not contradict with higher laws and regulations (General Explanation of the BAL).

V. CONCLUSION

It can be concluded based on the discussion presented above:

Western land law, specifically the administrative land law of the Dutch East Indies government, was originally based on *Agrarische Wet* 1870 and one of its implemented regulations was *Agrarisch Besluit,* which Article 1 states: without reducing the provisions of Articles 2 and 3 of *Agrarische Wet*, the principle is maintained that all lands which other parties cannot prove their *eigendom* rights are the State's *domein*. By omitting the initial sentence, the indigenous people's property rights become usufructuary rights and customary lands become free state land. It is the translation of the political authorities, not the normative provisions.

The politics of national land law based on customary rights which uses a religious communal conception that allows control over individual lands with land rights that are private and incorporate togetherness. Even though customary rights have been appointed as the rights of the nation, in article 3, these rights are still recognized. Even this acknowledgment, if the conditions are misunderstood, will also lead to a misunderstanding of its existence, so that it seems that there is still a dualism of land law in Indonesia, but in the sense of customary land

law and national land law.

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VI. REFERENCES

- Haar B. T. Terjemahan Schiller, A.A. & E.A. Hoebel, *Adat Law in Indonesia*. Jakarta: Bharatara.
- Harsono, B. *Hukum Agraria Indonesia. Sejarah Pembentukan Undang-Undang Pokok Agraria Isi dan Pelaksanaan Jilid 1 Hukum Tanah Nasional.* Jakarta: Djambatan (Edisi Revisi), 1997.
- *Menuju Penyempurnaan Hukum Tanah*. Jakarta: Universitas trisakti, 2007.
- Kusumaatmadja, Mochtar. *Konsep-konsep Hukum dalam Pembangunan. Cetakan ke-2.* Bandung: PT Alumni, 2006.
- Vollenhoven, C. van. *Penemuaqn Hukum Adtat*. Diterjemahkan oleh LIPI. Jakarta: Djambatan, 1987.
- Setiawan, I Ketut. *Hukum Perorangan dan Kebendaan.* Jakarta: Sinar Grafika, 2016.
- "Dinamika Perubahan Hak Penguasaan atas Tanah Adat dan Akibatnya Terhadap Peranan Desa". Disertasi Doktor Universitas Indonesia, 2002.
- Sumardjono, Maria S.W. *Alternatif Kebijakan Pengaturan hak atas Tanah Beserta Bamgunan.* Jakarta: Kompas, 2007.
- Soepomo, R. *Bab-Bab Tentang Hukum Adat*. Jakarta: Pradnyaparamita, 1993. Subekti. Pokok-pokok Hukum Perdata. Jakarta: PT. Intermasa, 1987.

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