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TRADITIONAL LAW EXISTENCE IN INDONESIA IN REVIEW FROM AGE TO AGE

Michelle Angelika S[1], Yohanes Firmansyah[2], Yana Sylvana[3] dan Hanna Wijaya[4]
Faculty of Health Law, Pembangunan Nasional Veteran Jakarta University, Indonesia
michelleangelika111@gmail.com, yohanesfirmansyah28@gmail.com,
sylvanayana@gmail.com dan hannwijaya@yahoo.com

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Abstract

Introduction: The rules of action are a reflection of the life characteristics of a class of people. Regulations that are timeless and firmly integrated with the citizens' behavior can increase their binding power. As a result, they become customs. In a tradition, there are various rules of the tongue, listed as customary law. Routine or habit is a term commonly used in people's lives. Purpose: to reconnect the role of customary law in the history of legal development in Indonesia. This journal also explains that although customary law is local and difficult to enforce nationally, customary law contains noble values and local culture. Method and Material: This research is in the form of literature search using various search engines such as Google Scholar. Results: The existence of customary law has been legally recognized by the Indonesian authorities, approved by all Indonesian citizens as one of the legal rules. The citizens can lawfully use it on the side of the authorities' use of laws and regulations. Customary law reflects something Indonesian personality as if the result has been claimed to be like original Indonesian law. As if the law is not recorded, currently, the presence of customary law is being questioned. It has been estimated as conventional, outlandish, ancient primitive, ancient compared to the citizens' modern progress. Some people think that customary law is incapable of solving cases during a period.

Keywords: *customary law; Indonesia; traditional law.*

INTRODUCTION

Humans are living beings created by the Almighty who are given privileges compared to other living beings. These luxuries are none other than the mind and physical intellect, making them into something we call individuals. An individual who is growing and developing cannot live alone in fulfilling all the needs he needs. In daily processes, an individual needs other individuals to achieve their primary and secondary markets (Shofiyatul Azmi, 2018).

According to Aristotle (384 - 322 BC), humans create God Almighty, who always wants to mingle and eventually form a group with other humans. Since he was born into the world, he has an instinct to have relationships with other humans. Some of the reasons that justify this statement are that humans have biological stimuli to eat, survive, and have children. Initially, his relationship was limited to parents, and day after day, his association will be more comprehensive. With the widening of the relationship between humans, guidelines are made which constitute the rules for the community.

Some various principles and values guide people's lives. Legal norms are important norms besides religious norms, politeness, and morality. Traditional standards in society vary, including written law and unwritten law (Soekanto, 2000).

Every society around the world has a legal system within the territory of its country. No nation does not have its national legal system. Federal law is a reflection of the culture of the government concerned. Because the law is the nation's mind and grows from the awareness of the nation's direction, the law will be seen from the reflection of the nation's culture (Sumarman, 2003).

In Indonesia, one of the laws that reflects the national personality is customary law, which is the nation's soul's incarnation from century to century. The customs owned by the regions are different, even though they have one basis and character, namely Indonesianness. Therefore, the Indonesian people's traditions are Bhinneka Tunggal Ika, which means distant, but still one. These customs are always developing and always following society's development and are closely related to the people's traditions. This business is sediment (reflection) of morality in society, the truth of which has received general recognition in that community.

This journal specifically discuss the concept of customary law according to scholars? What is the legal basis for the application of customary law in Indonesia? What is the position of customary law in the current national legal system? How to strengthen the preservation of traditional values in jurisprudence

The purpose of this journal is to reconnect the role of customary law in the history of legal development in Indonesia. This journal also explains that although customary law is local and difficult to enforce nationally, customary law contains noble values and local culture.

METHOD AND MATERIAL

This research method examines problems based on jurisdictive normative. In the form of research carried out by way of peeling and concluding guidelines from the various explanations in several secondary data sources that are all relevant to the problems to be discussed, and using three kinds of approaches, namely: statute approach, conceptual approach, and case approach. This research is in the form of literature search using various search engines such as Google Scholar. The search terms used are ["Traditional Law" OR "Customary Law" AND "Implementation" AND "History" AND "Indonesia"]. All literature search results are analyzed and summarized in this journal (Ibrahim, 2006).

RESULTS AND DISCUSSION

1. The Concept of Customary Law according to the Scholars

Customary law is a term given by legal scientists in the past to groups, guidelines, and facts that govern and order the Indonesian people's lives. At that time, scientists saw that the Indonesian people, who lived in remote areas, lived in order and lived in

an orderly manner based on the rules they made themselves (Koesnoe, 1979).

The term customary law is a translation from the Dutch language, namely Adat Recht. This term is contained in the book De Atjehers (People of Aceh), compiled by Snouck Hurgronje in 1893. The name was later used by Van Vollenhoven, who was very intense in researching customary law, and until now, the term customary law has always been used. Is used as a juridical technical term. Currently, customary law is still in development, so it cannot be denied that there are different opinions in understanding and interpreting customary law, both from Western scholars and Indonesian scholars (Bushar, 1994).

According to Van Vollenhoven, customary law is the law that does not originate from the regulations made by the former Dutch East Indies government or other instruments of power which became themselves and were held by the Dutch authorities themselves and applied to natives and Eastern people Foreigners. Furthermore, he argued that to distinguish between adat and adat law is seen from the elements so that not all adat is customary law. The only adat has sanctions, which can be classified as customary law (Wignjodipuro, 1982).

Van Vollenhoven's opinion received responses from other everyday law scholars, mainly because of sanctions as a distinguishing criterion between custom and customary law. Sanctions in the western legal system are the main feature of the law, so if sanctions are used as the only feature to distinguish between the terms adat and adat law, then it is very appropriate.

In customary law, sanctions (in customary law are often referred to as punishment) are not very urgent because, in customary law, discipline is an effort to restore the balance that was disturbed because of a violation committed by someone in the community. The rectification of the law has been violated and restored to its original balance, which means no more problems (Soepomo, 2000).

Indonesian scholars' view in understanding customary law has experienced development with the awareness of having its law encouraging scholars to carry out research to determine new definitions of customary law. One of them was proposed by Supomo; customary law is defined as a law that is not written in legislative regulations, which includes living regulations which, although not stipulated by the authorities, are obeyed and supported by the people based on the belief that these regulations have legal force. This understanding is reinforced by Sukanto's opinion, which states that customary law is a complex of time-honored traditions that are mostly unconfirmed, uncodified, coercive in nature, witnesses, and have legal consequences. From the two opinions above, it can be concluded that customary law is an unwritten law in social life and the constitutional field.

2. Legal Basis of Adat Law in Indonesia

To explain the legal basis for applying customary law in Indonesia, ideally, we know the juridical basics of using customary law, from the colonial era to the next to the present (Hadikusuma, 1992).

In the Dutch colonial period, the first source of direction to look at was article 75 of the new Regerings Reglement (RR), which took effect on January 1, 1920, which stated that European law would apply to European groups and apply to European Laws and Indigenous Indonesians but declared voluntary that he would submit to European law. Whereas in the civil field for other groups of Indonesians, customary law will apply provided that it does not conflict with the principles of justice that are generally recognized. Conversely, suppose the rule of ordinary law conflicts with the principles of justice or a problem that is not regulated in customary law. In that case, the judge must use European civil law's general foundations as a guide. Article 75 RR is

reinforced by article 130 IS, which states that regions are given the freedom to follow their rules.

After Indonesia's independence on August 17, 1945, the following day, on August 18, 1945, the 1945 Constitution was enacted. All existing state agencies and regulations are still valid, as long as a new one has not been established according to the Constitution.

In the early days of independence, an understanding emerged that wanted to fight to realize national law by lifting people's rule, namely customary law, into federal law. The pioneers of this idea are the majority of the old group, an idea put forward by the previous generation of nationalists, which stated that customary law deserves to be appointed as modern national law (Wignjodipuro, 1982).

In the 1945 Constitution, there is no single article explicitly stating the application of customary law in Indonesia. This is different from the Constitution of the United States of Indonesia, which constitutionally can find items that are the legal basis for applying customary law, as stated in article 146 paragraph (1), which states that judicial decisions must contain reasons case of punishment. Must mention statutory rules and customary law rules on which the sentence is based. Article 146 paragraph (1) the Constitution Republic of the United States of Indonesia is reaffirmed in Article 104 (1) of the Provisional Constitution of 1950.

The standard configuration has changed, and customary law is an organic part of state law. This realization is contained in Law Number 4 of 2004 concerning Judicial Power, which is regulated in article 25 paragraph (1), which states that all court decisions other than must state the reasons and basis for a said decision, also contain specific pieces of the relevant laws and regulations or an unwritten source of direction which is used as a basis for judging. This article is strengthened by article 28, which states that judges are obliged to explore, follow and understand traditional values and a sense of justice that lives in society.

From the 2 (two) articles mentioned above, it can be concluded that implicitly customary law can be used as the basis for judges in adjudicating and deciding cases in Court because what is meant by the unwritten source of direction in article 25 paragraph (1) is customary law. And what is meant by traditional values and a sense of justice in society, one of which is established law, assuming that customary law is a law that grows and develops in the community? These two articles give judges the authority to decide cases based on customary law.

3. The existence of customary law in the national law system

Customary law grows from the ideals and thoughts of the Indonesian people. Thus, customary law can be traced chronologically since Indonesia consisted of kingdoms scattered throughout the archipelago. The socio-cultural reality is constructed by one poet, been built by another, and reconstructed by the next poet. Sriwijaya period, ancient Mataram, Majapahit period, several inscriptions (inscriptions) describe the development of applicable law (original law), which has regulated several fields, including 1.Regulations of religious, economic, and mining regulations, contained in the King Sanjaya Inscription in 732 at Kedu, Central Java; 2. Arranging religion and work, contained in the inscription of Raj Dewasimha in 760; 3. The Law of Land and Agriculture is found in the Raja Tulodong Inscription, in Kediri., 784 and the inscription of 919, which contains government positions, the king's right to land, and compensation; 4. The law regulates civil justice, contained in the Bulai Rakai Garung inscription, 860. 5. The King's order to formulate customary rules, in the Darmawangsa inscription in 991; 6. During the Airlangga era, there was the determination of a royal seal emblem in the form of a Garuda bird's head, construction

of trade with special rights, determination of income tax that had to be collected by the central government; 7. The Majapahit period, seen in the administration and state administration of the Majapahit kingdom, the division of government institutions and bodies (Rato, 2011).

After the fall of Majapahit, the Mataram kingdom was heavily influenced by Islam. Hence the name is as Court, which provided consideration for the Sultan to decide cases. The interior is known as a "solid" judiciary, namely the settlement of disputes between individuals by the village court, carried out peacefully. At the same time, Cirebon is known for: the Religious Court deciding cases endangering the general public, the Digrama Court, which decided against customary violations, and other issues that did not enter the religious Court; and Cilaga Court is a court in the fields of economy, trade, buying and selling, and accounts payable.

Some examples mentioned above show that the original legal system has been effective in various regions, which is now known as Indonesia, shows that the law originates from the indigenous people, both in the form of decisions by the authorities and regulations that apply in the local community.

A. Dutch Indies Politics Against Customary Law

Initially, the original community law known as customary law was left as it was. However, the following developments in the VOC era can be noted: 1. Its attitude was not always fixed (depending on the VOC's interests) because it did not interest the original Court; 2. The VOC did not want to be burdened with unnecessary administrative problems concerning native courts; 3. As for the foremost institutions, the VOC depended on needs (political opportunities); 4. The VOC only interfered in criminal matters to uphold public order in society; 5. Against civil law submitted, and let customary law remain in effect. During the Dandelions era, customary criminal law was changed to a European pattern, when: a. The criminal act committed has the effect of disturbing the public interest; b. If prosecuted based on customary criminal law, an illegal act can result in the offender being free (Setiady, n.d.).

The development of customary law during the Daendels period had the same fate as previous times, namely European law's subordination. The exception is civil law. Including civil law and commercial law, Daniel continues to leave it as it is according to their respective customary laws. Apart from that, the VOC considered that customary law was inferior to Dutch law. So during the British colonial period (Raffles), the thing that stood out was the freedom in direction and the judiciary to apply customary law provided that the provisions of ordinary law did not conflict with: the universal and acknowledged principles of natural justice or admitted principles of substantial justice. In further developments, customary law politics appeared in the Dutch colonial government, when the political unification of law and codification of law was initiated through the Scholten Committee, including Algemeene Bepalingen van Wetgeving Voor Nederlands Indie (AB), General Provisions regarding statutory regulations in the Balanda Indies; Burgerlijke Wetboek, Wetboek van Koopenhandel; regimen op Rechtelejke Organisatie en het beleid de justice (RO).

So in its development, a unification was formed in the regulation of criminal law for European, Foreign Eastern, and Indigenous groups, with the formation of Wetboek van Strafrecht (WvS), as an imitation of the Netherlands (1881), which imitated Belgium, applied to European groups with Stb 1866: 55 and applied to the Group Indigenous and Foreign East with Stb 1872: 85 which came into effect on January 1, 1873. The process of codification and unification, then customary law, except about public order with the codification of criminal law, is not concerned

with its regulation so that the reference of customary law is article 11 AB: Except in the case of indigenous people or their equivalents (foreign easterners) voluntarily obeying the rules of European civil and commercial law, or in cases that apply to them such laws, or regulations. Other laws, the applicable laws, and those treated by indigenous judges (Inlandse Recht er) for them it is godsdienstige Wetten, volkintellingen en gebruiken, as long as it does not contradict the generally accepted principles of justice.

Article 11 AB applies the concordance principle, which applies Dutch law to European groups in the Dutch East Indies, concerning customary law, indicating that customary law applies to non-European population groups, except 1. Voluntarily obey civil regulations and commercial laws applicable to European groups; 2. The legal requirement requires compliance with European civil law and commercial law; 3. Their needs require submission to other laws.

At this time, the law was considered to exist if it was regulated in law, as a statutory law which indicated the Austinianism was followed, as stipulated in Article 15 AB (Algeme Bepalingen van Wetgeving), which stated: except existing regulations, for Indonesians genuine and for those who are likened to it, custom can only be called law if the law calls it.

Thus it becomes clear that what makes the criteria and criteria apply and hence the development of customary law is not the community - where the place to produce and enforce the law exists itself - but is another law made by the (colonial) ruler, as evident in article 11 AB and item 15 of the AB.

B. Customary Law in the Period of Independence

Referring to the definition of customary law as stated by Soepomo, the traditional law for formation can be through the Legislative Body, through the Court. Law is a unitary norm that is rooted in values. However, customary law and law in particular according to their character, there are: Customary law has a neutral name, and customary law has a non-neutral character because it is closely related to religious values (Wulansari, 2010).

This distinction is essential to understand the formation or change of laws that will apply in society. Neutral law - traffic law - is a law that is relatively loosely related to the religious values of indigenous peoples' composition. This results in legal changes, including neutral rules that are easy to form, and legal guidance is carried out through the formulation of statutory law (legislation). Whereas customary law is closely related to religious values - because it is relatively not easy to integrate nationally, its guidance and formulation in a positive direction are carried out through jurisprudence.

Customary law by western experts is understood based on two wrong assumptions. First, customary law can be understood through written materials, studied from original records, or based on religious laws. Second, that customary law is systematized in parallel with western laws. As a result of this understanding with the West's paradigm, customary law is misunderstood with all the consequences that accompany it, evident in subsequent developments during the independence era.

C. Customary Law in the Constitution

Our pre-amendment Constitution does not explicitly show us the recognition and use of the term customary law. However, when examined, it can be concluded that the formulations contained in it contain noble values and the soul of customary law. The preamble to the 1945 Constitution, which includes the Pancasila view of life, reflects the national personality, which lives in values, thought patterns, and customary law. Article 29 paragraph (1) The state is based on the One Godhead,

Article 33 paragraph (1) The economy is structured as a joint effort based on the principle of kinship (Sutiyoso, 2010).

At a practical level, based on the 1945 Constitution, the state introduces a right called the State's Ownership Rights (HMN), this is derived from Ulayat Rights, Land Rights, which are traditionally recognized in customary law. In the Constitution of the Republic of the United States of Indonesia, article 146 paragraph 1 states that all judicial decisions must contain the reasons thereof and, in cases, must state the statutory regulations and customary law rules which are used as the legal basis. Furthermore, in the Provisional Basic Law, article 146 paragraph 1 reloaded. Thus the judge must explore and follow the feelings of justice and justice of the always developing people. In article 102 and taking into account Article 25 of the 1950 Provisional Constitution of the Republic of Indonesia, the ruler is ordered to codify the law. So this includes customary law. In his opinion, this codification order also applies to established law. This codification order is the first time mentioned in the Republic of Indonesia's Laws and Regulations, which regulate provisions on customary law's codification. In reality, it cannot be implemented.

With the Presidential decree of July 5, 1959, the 1945 Constitution was reinstated; there were four main points in the preamble of the 1945 Constitution, namely the unity of the entire Indonesian nation. This also includes the field of law, which is called national law. The second principle of thought is that the state wants to achieve social justice. This is different from legal justice. So the principles of human social function and property rights in realizing this become important to be discovered and adjusted to society's demands and development while still deriving their primary values. The third point of thought is that the state realizes its sovereignty based on democracy, deliberation, and representation. This premise is fundamental and essential; there is a unity between the people and their leaders. The leader must understand traditional values and feelings and political feelings and contribute to carrying out public interests through public policymaking. In that connection, this is necessary. A human character who is a public leader who is brave, wise, fair, upholds the truth, has a soft feel, and is humane. The fourth point of thought is: the state is based on One Godhead; this requires that the ideals of law and society must always be linked to human functions, the organization has faith and devotion to God Almighty, and the state recognizes God as the determinant of all things and the direction of the state only. -the eye as a means of carrying humans and society as a function must always be with the vision and intention of obtaining God Almighty's pleasure. However, after the amendment of the Constitution, customary law is recognized as stated in the 1945 Constitution Article 18D paragraph 2 states: The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are still alive and following the development of society and the principles of the Unitary Republic of Indonesia, which is regulated in law.

They understand the formulation of Article 18 d of the 1945 Constitution: 1. The Constitution guarantees the unity of indigenous peoples and their traditional rights; 2. The guarantee of the Constitution as long as the customary law is still alive; 3. Following the development of society; 4. Following the principles of the Unitary State of the Republic of Indonesia; and 5. It is regulated by law.

Therefore, this Constitution guarantees the recognition and respect of customary law if it meets the following requirements: Reality requirements, namely customary law is still alive and following the development of society; Ideality Requirements, namely following the principles of the unitary state of the

Republic of Indonesia, and enforceability is regulated in law.

The statutory law is under the Decree of the People's Consultative Assembly of 2001. The statutory order is the 1945 Constitution; Decree of the People's Consultative Assembly; Law / Peru; Government regulations; Local regulation. This does not provide a proper place for customary law as a source of statutory law, except for customary law in the form of customary law formally recognized in legislation, customs, judges' decisions, or scholars' opinions.

D. Customary Law in Emergency Law Number 1 Of 1951

Customary law in Emergency Law No.1 of 1951, contained in article 1 and article 5. Article 1 is affirmed. Except for the village court, all court bodies which include the governing body of the self-governing Court (Zellbestuurrechtspraak) except for the religious Court if according to living law it is a part of the self-governing Court and customary Court (Inheemse rechtspraak in rechsreeks bestuurd gebied) except for the ecclesiastical Court if the Court according to the living law, it is a separate part of the Customary Court which has been abolished (Manarisip, 2012).

Article 5 paragraph (3) Sub-b Civil material law and for the time being the civil, unlawful material law, which until now applies to self-governing regional subjects and people previously tried by a customary court, continues to apply to traditional residents and people. Those with the meaning: ... an act which according to living law must be considered a criminal act but which has no comparison in the Civil Criminal Code, shall be regarded as punishable by a sentence of not more than 3 (three) months imprisonment and a fine of five hundred, namely as a substitute penalty if the customary punishment imposed is not followed by the convicted party ... Whereas if the customary law passed in the judge's mind exceeds the sentence with imprisonment or a fine, ... then a substitute penalty of as high as 10 (ten) years in prison, with the understanding that customary law according to the judge's performance is no longer in harmony with the times ... According to law, the current is considered a criminal act comparable to the Civil Criminal Code; it is considered to be threatened with the same direction as the comparative law, which is most similar to the show.

This provision seeks to abolish the customary criminal law and its sanctions for natives and foreign easterners with ordinary criminal justice. The general Court only administers it, religious Court and village court (village peace judge). Thus, since the issuance of Emergency Law Number 1 the Year 1951, customary criminal law has no place because it is very limited in the legal politics of the Unitary State of the Republic of Indonesia. In Article 2 of the Regulation of the Minister of Agrarian Affairs / KBPN No. 5/1999 on Guidelines for the Resolution of Customary law communities' layout rights, it is stated: 1. The implementation of layout rights as long as they still exist by the customary law community concerned according to local standard law provisions. 2. The legal rights of everyday law communities still exist if: a. there is a group of people who still feel bound by their ordinary law order as members of a specific legal association, who recognize and apply the association's provisions in their daily life; b. there is certain customary land that becomes the living environment of the legal association members and where they take their daily needs of life, and; c. There is a standard law order regarding the administration of control and use of customary land that is valid and obeyed by the legal association members. d. Customary Law in Law No. 5 of 1960 concerning Basic Agrarian Regulations.

Customary law in Law Number 5 of 1960 is a straightforward arrangement with indigenous peoples. In article 5 of Law Number 5 of 1960, it is emphasized:

the agrarian law that applies to the earth, water, and space is customary law, as long as it does not conflict with national and state interests based on national unity, with Indonesian socialism and the regulations contained in the law. This law and other statutory regulations, everything with due regard to the elements from religious law. In the Elucidation of the Law, it is stated: Customary law which is refined and adjusted to the interests of the community in a modern state and international relations and accordance with Indonesian socialism. This provision realizes the Decree of the People's Consultative Assembly II / MPRS / 1960 Attachment A Paragraph 402.

4. The Position of Customary Law in the Development of Jurisprudence

Justice seekers (justiciable) certainly desire that cases submitted to Court can be decided by judges who are professional and have high moral integrity. They can produce decisions that contain aspects of legal certainty and guarantee justice for everyone. Because justice is the main goal to be achieved from the dispute resolution process in Court (H & Fausan, 2004).

Jurisprudence, derived from the Latin word: yuris prudential, technically means permanent justice or law. Jurisprudence is a judge's decision (judge-made law) followed by other judges in a similar case. The judge's decision becomes permanent so that it becomes a source of direction called jurisprudence. In practice, jurisprudence functions to change, clarify, erase, create or strengthen laws that have lived in a society. Furthermore, according to Fockema Andrea, judicial jurisprudence (in general terms, the meaning of abstract); especially the traditional teachings that are formed and defended by the courts (as opposed to the instructions or doctrines of leading authors), further systematic gathering of Supreme Court decisions and High Court decisions (recorded) which are followed by judges in giving their judgments in similar matters.

In customary law, legal jurisprudence, apart from being a court decision that has become permanent in the field of customary law, is also a means of fostering customary law, according to legal ideals, as well as from the jurisprudence from time to time, developments in customary law can be traced, both those is still local and has been in effect nationally. The result of customary law through jurisprudence will provide knowledge about the shift and growth of customary law, the weakening of local customary law, and customary law, becoming nationally binding and binding. The development of customary law through jurisprudence can be traced in several ways, including: Principles of Customary Law. Customary law, among others, rests on the principle: harmonious, proper; this is confirmed in the jurisprudence of the Supreme Court of the Republic of Indonesia Number: 3328 / Pdt / 1984 dated April 29, 1986. In the Decision of the Supreme Court of the Republic of Indonesia Number 2898 K / Pdt / 1989 dated November 19, 1989, based on a customary dispute that arose at the Kefamenanu Court, East Nusa Tenggara, the Supreme Court emphasized: "In facing a civil lawsuit case whose foundation and penitentiary foundations are based on violations of customary law and the affirmation of customary sanctions; If in Court the plaintiff can prove his claim, the judge must apply the customary law regarding the article which is still valid in the area concerned, after hearing the customary local elders. Other legal principles: "Settlement of violations of customary law, apart from the civil lawsuit mentioned above, can also be pursued through criminal prosecution in article 5 paragraph 3b of Law Number 1 the Year 1951 Emergency".

CONCLUSION

Customary law is an unwritten rule that lives in the orthodox community of an area and will remain alive as long as the community still fulfills the established law passed on to them from their ancestors before them. Therefore, customary law and its position in the national legal system cannot be denied even though customary law is not written. Based on the principle of legality, it is illegitimate. Customary law will always exist and live in society.

Customary law lives in the community's conscience, reflected in their patterns of action following their customs and socio-cultural practices that do not conflict with national interests. The current era can indeed be called the age of the awakening of indigenous peoples, marked by the birth of various policies and decisions. However, what is equally important is that it needs further study and development with its implications in the formulation of national laws and law enforcement efforts that apply in Indonesia.

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