



The Relationship Between Customary Law And National Law on Marriage in Indonesia

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ABSTRACT

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Indonesia is an archipelagic country that has a pluralistic society consisting of diverse ethnicities, customs and cultures. Each group lives by using rules nor established good norms written or unwritten and originating from habit Indonesian society or the customs in which it is used to regulate life behavior society, which is often referred to as "customary" or "customary law". As a country in the form of a republic, Indonesia is regulated by law in statutory regulations, where these statutory regulations are written laws. To carry out a marriage, for a country and nation like Indonesia it is absolute that there is a National Marriage Law that also accommodates principles and provide a legal basis for marriage which has been the guideline and has been applied to various groups in society us . But marriage in Indonesia can also be carried out with the customary law of certain indigenous communities in accordance with the rules or norms that bind them hereditary.

1. Introduction

Marriage according to Article 1 of Law Number 1 of 1974 concerning Marriage is a birth bond inside between a man with a women as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in Almighty God. Marriage is valid if it is carried out according to the laws of each religion and belief.¹ Every marriage is recorded according to applicable laws and ²regulations.

¹ Constitution Number 1 of 1974 concerning Marriage . State Gazette of the Republic of Indonesia 1974 Number 1 , Supplement State Gazette of the Republic of Indonesia Number 3019. Article 2 paragraph (1).

² *Ibid* . Article 2 paragraph (2).

In Indonesia, marriage according to customary law generally does not only mean an agreement civil but also at the same time engagement neighborliness and kinship. So that if a marriage bond occurs, it will not only bring consequences for relationships civil law, such as the rights and obligations of husband and wife, joint property, the position of children, the rights and obligations of parents, but also regarding customary relationships inheritance, kinship, kinship and neighbourhood as well as regarding traditional and religious ceremonies. It also concerns the obligation to obey commands and prohibitions religious, good in relationships man with God (worship) as well as connection human beings among humans (mu'amalah) in relationships live to be safe in this world and safe in the afterlife.³

Marriage in the sense of traditional marriage is a marriage that has legal consequences of customary law that applies in society concerned. These legal consequences have existed since before the marriage occurred, for example with the existence of a relationship application which is 'rasan sanak' (children's relationship, single girl) and 'rasan tuha' (relationship between the parents of the families of the prospective husband and wife). After the marriage bond occurs then arise the rights and obligations of parents (including family members/relatives) according to local customary law, namely in the implementation traditional ceremonies and then in roles as well as build and maintain harmony, wholeness and permanence from the lives of their children bound by marriage.⁴

In accordance with base the philosophy of Pancasila and the 1945 Constitution, then Constitution on the one hand, it must be able to make it happen principles contained in Pancasila and the 1945 Constitution, while on the other hand it must also be able to accommodate all the realities that live in society nowadays. This Marriage Law has accommodated it contains the elements and provisions of the religious law and beliefs of the person concerned.

For certain tribes, marriage is carried out traditionally is a necessity. The customs that are carried out from generation to generation it still is maintained and carried out from the colonial period until the present. Then what There is linkages between marriage using customary law and marriage using national marriage law (Law No. 1 of 1974)? And what legal basis should be used in marriage in Indonesia so that the marriage be legal?

2. Methods

³ Aprilianti and Kasmawati. (2022). *Customary Law in Indonesia*. Bandar Lampung: Media Library. Hlm. 43.

⁴ *Ibid* . hlm 44.

This research uses the method descriptive research with literature studies in collecting data, which is sourced from primary legal materials and secondary legal materials. The primary legal material is statutory regulations. Meanwhile, secondary legal materials obtained from legal literature such as papers, books, articles and journals related to the subject matter that is the topic of this research.

3. Results And Analysis

Indonesia has heterogeneous population, therefore Indonesia also has a variety of customs. This heterogeneous society has different cultures, traditions and customs in each region. Customs are part of the cultural wealth of a region or nation. According to *Kamus Besar Bahasa Indonesia*, customs are eternal codes of behavior that are passed down from one generation to another as inheritance, so that they are strongly integrated with the behavior patterns of society.

Customs are part of the cultural richness of a region or nation. Norms are a form of culture that represents the customs, values, traditions and customs of a group. Generally, customs are used to guide the attitudes and behavior of certain citizens. Customary rules are often considered to be the living rules of the people (*living law*). Customary law has values that are claimed to be sacred or sacred.

Marriage is a regular culture that follows the development of human culture in life society. In society simple marriage culture simple, narrow and closed, in advanced (modern) societies the marriage culture is advanced, broad and open.⁵ According to customary law, marriage can be a matter of relatives, family, partnership, dignity, it can be a personal matter, dependent to the arrangement the community concerned.⁶

Customary marriage law is the governing customary law rules about forms of marriage, ways proposals, marriage ceremonies and marriage dissolution in Indonesia. The rules of customary marriage law in various regions in Indonesia are different, due to their nature society, customs, religion and beliefs different societies, because society is different. Apart from that, due to progress over time, apart from customs, marriages have occurred here and there shifts, there have also been many mixed marriages between different ethnicities, customs and religions.⁷

⁵ Hilman Hadikusuma. (1990). *Indonesian Marriage Law*. Bandung: Mandar Maju. Hlm. 1.

⁶ Imam Sudiyat. (1981). *Basic Sketch of Customary Law*. Yogyakarta: Liberty. Hlm. 107.

⁷ Hilman Hadikusuma. (2003). *Introduction Indonesian Customary Law Science*. Bandung: Mandar Maju. Hlm. 182.

3.1. Rraditional Marriage Systems and Forms

There are several traditional marriage systems, namely :⁸

- 1) Endogamous Marriage System is a marriage system that requires looking for a life partner descent (*clan*), forbid somebody entering into marriage with a person from another tribe. Term Endogamy has a relative meaning, so its boundaries need to be clarified. These limitations can be: religious endogamy, tribal endogamy, endogamy economics, endogamy caste and others. For example, religious endogamy which is prohibition on marriage with someone of a different religion. Endogamy caste in the Balinese traditional law community, there are prohibitions marrying someone from outside their caste.
- 2) Exogamous Marriage System is prohibitive marriage system marry within one's own tribe. This system requires intermarrying with other tribes. Along with the development of the exogamous marriage system undergoing a shifting process, there is opportunity allowed marry within one's own family. This system applies to Gayo, Tapanuli, Minangkabau, South Sumatra and other areas. For example, in the Batak customary law community, this is not permitted marry one person in the same clan with the person concerned. If you keep doing it so customary fines will be imposed.
- 3) Eleutherogamy Marriage System is unfamiliar marriage system prohibitions or obligations. This system can be found everywhere Indonesian people, including in Aceh, Java, Kalimantan, and others."

Structure of society in Indonesia is different between patrilineal, matrilineal, parental and mixed, so the forms of marriage that apply are also different, among others. Some forms of traditional marriage are as follows:⁹

- 1) Honest Marriage (*Bridge-Gif Marriage*), generally applies to traditional law communities that maintain the father's or male lineage (Gayo, Batak, Nias , Lampung, Bali, Timor, Maluku).
- 2) Semanda Marriage (*Suitor Service Marriage*), generally applies in the environment matrilineal indigenous communities, in order to maintain the maternal (female) lineage.
- 3) Independent free marriages mostly occur among people 'parental' society as seen in Javanese, Sundanese, Acehnese, Malay, Kalimantan (Dayak) and Sulawesi families or individual modern families, where family or relatives no longer intervene much in household life. This form of marriage is the ideal type of the desired form of household and marriage National legislation Law

⁸Op. Cit., hlm. 103-107.

⁹Hilman Hadikusuma. (2003). *Introduction Indonesian Customary Law Science*. Bandung: Mandar Maju. Hlm. 183.

Number 1 of 1974, which states the position and rights of husband and wife balanced, husband is head of family/household and wife is a housewife/family mother.

- 4) Mixed Marriage, in the sense of customary law, is a marriage that occurs between husband and wife of different ethnicities, cultural traditions or different religious beliefs. The National Marriage Law does not regulate in this case, what is regulated is marriage between husband and wife of different nationalities as regulated in Article 57 of Law No. 1 of 1974.
- 5) Elevated marriages can occur in a Indigenous communities, such as Batak, Lampung, Bali, Bugis, Maluku. In the regions the This is a violation of custom, but there are regulations method the solution. In fact, elopement is not a real form of marriage but system an unusual proposal, from this incident an honest, happy, free/independent marriage can occur, depending on the circumstances and negotiations between both parties."

3.2. Marriage Law

The formulation of Article 2 paragraph (1) of Law no. 1 of 1974 concerning Marriage said that "Marriage is valid, if it is carried out according to the laws of each respective religion and belief." Which means there are no marriages outside the law each of their religions and beliefs, this is in accordance with the Constitution 1945. What is meant by the laws of each religion and belief including statutory provisions that apply to religious groups and such beliefs as long as they do not conflict with or are not otherwise specified in this law . But please note that Wedding ceremonies according to religion, basically constitute part of the entire wedding ceremony. With so before or after the wedding there is a wedding ceremony which is carried out according to local customs. Sometimes the marriage ceremony is held in the middle from wedding ceremony according to local customs.¹⁰

From the explanation above, it can be seen that in our ancestors' period time, before there was a formal law that regulated marriage procedures and ceremonies, all were regulated by customary law that was binding on each tribe. The marriage was carried out customarily becomes legal in the eyes society. When the Dutch colonized Indonesia, the Dutch government implemented marriage laws which were divided according to class citizens of the country and region.

If you look at it from aspect sociological and anthropological, Indonesian society is pluralistic society with diverse cultures, religions, customs. Therefore,

¹⁰Soekanto , Soerjono. (2020). *Indonesian Customary Law*. Depok: Rajawali Pers. Hlm. 232.

there are various laws that exist in Indonesian society, for example customary law and Islamic law. So before Indonesia became independent, Indonesian society already had *The Living Law*. In fact, it has happened legal pluralism where everyone Legal communities have their own laws its own style and characteristics.¹¹

Various marriage laws that were in effect before their enactment Law Number 1 of 1974 for various groups citizens of various countries and regions are as follows:

- 1) native Indonesians who are Muslim, religious law applies which has been adopted into customary law.
- 2) indigenous Indonesian people, customary law applies. For example, for Balinese people who are Hindu, where custom and religion have merged, then implementation his marriage carried out according to a series of customary laws the ceremony with the Hindu-Balinese religious ceremonies he adheres to .
- 3) native Indonesians who are Christians, *Huwelijks* applies *Ordonnantie Christen Indonesia* (HOI) S. 1933 number 74. This rule is now regulated in Law Number 1 of 1974 and is no longer valid.
- 4) For foreign Eastern Chinese, Indonesian citizens of Chinese descent, the provisions in the Civil Code (KUH Perdata) apply with slight changes. This rule is also no longer valid as long as it is regulated in Law no. 1 of 1974.
- 5) For other foreign easterners and other Indonesian citizens of foreign descent their customary laws apply.
- 6) For Europeans and Indonesian citizens of descent Europe (Indo) and equivalent with them, the Civil Code applies i.e *Burgerlijk Wetboek* (BW). "Included in this group are Japanese people or other people who adhere to the same principles of family law as the principles of Dutch family law."¹²

During the Dutch colonial period, if a marriage occurred in Indonesia, the formal rules that applied were marriage laws according to class division mentioned above. But if you look closely the marriage law is mentioned above, can be seen that religious law and customary law also apply role as basic rules in marriage. So that religious law and customary law can be said to have been in effect since ancient times. Marriage law according to the class has been in effect for quite a long time, from the Dutch colonial period until 1974 before the enactment of Law no. 1 of 1974 concerning Marriage. Only since January 2 1974 the Indonesian Government enact Law no. 1 of 1974 concerning Marriage, so

¹¹Hadi, Syofyan. (2017). "Positive Law and The Living Law (Existence and Application in Society)". *DiH Journal Legal Science*. 13(26). hlm. 264.

¹² Hilman Hadikusuma. (2007). *Indonesian Marriage Law (According to: Legislation, Customary Law, Religious Law)*. Bandung: Masdar Maju. Hlm.5 .

that starting from that date all marriages taking place in Indonesia must comply with the applicable laws and regulations.

The birth of Law no. 1 of 1974 did not abolish customary law and religious law that had previously been enforced. This is reflected in Article 2 paragraph 1 which reads "Marriage is valid if it is carried out according to the laws of each respective religion and belief." What is meant with the laws of each religion and belief, including the statutory provisions that apply to the group his religion and beliefs as long as they do not conflict or are not otherwise specified in this law. So that from what is said in Article 2 paragraph 1, conclusions can be drawn that marriage according to religion (by religious law) and according to custom (belief) is valid in the eyes of the law. This is also strengthened in the The 1945 Constitution in Article 18B paragraph 2 which reads "The State recognizes and respects units customary law communities and their traditional rights throughout Still alive and in accordance with the development of society and the principles of the Unitary State Republic of Indonesia, which is regulated by law."

3.3. Civil Registry Institute

However, because Indonesia is a legal country, everything needs to be administratively recorded so that it can be used as valid evidence. In the Civil Code Article 1866 it says that the means of proof is one of them is written evidence. The written evidence referred to here is an authentic deed. In Article 1868 of the Civil Code mentioned that an authentic deed is a deed made in the specified form a law by or before a public official authorized to do so in the place where the deed was made. The authentic deed referred to here is an excerpt from the Marriage Deed, where the deed is issued by the Department of Population and Civil Registration.

In Article 2 paragraph 2 it says that "Every marriage is recorded according to applicable laws and regulations." This means even though the marriage has been carried out religiously and customarily have been recognized as valid in the eyes of the law, they still have to be recorded to ensure order legal administration. Administrative registration of marriages is carried out by the Civil Registry.

Civil Registry (*Burgelijke Stand*) means records regarding civil events experienced by a person or to ensure a person's civil status. There are five legal events in human life that need to be recorded, namely:

- 1) "Birth determines a person's legal status as a legal subject supporting rights and obligations.

- 2) Marriage determines a person's legal status as husband or wife in a marriage according to law.
- 3) Divorce determines a person's legal status as a widow or widower who is free from the ties of marriage.
- 4) Death determines a person's legal status as an heir, as the widow or widower of the deceased.
- 5) Changing a name determines the legal status of a person with a certain identity in civil law."

In Article 68 of Law no. 23 of 2006 concerning Administration Population said that " Civil Registration Deed Excerpts consist of deed excerpts: birth; death; marriage; divorce; and child recognition."

According to Subekti and Tjitrosoedibio, Civil Registry (*Burgelijke Stand*) is an institution tasked with maintaining lists or records to prove status or important events for citizens, such as birth, marriage and death.

According to Vollmar, civil registration is an institution established by the authorities which aims to prove as completely as possible and therefore provide maximum certainty about all events that are important for a person's civil status regarding birth, recognition, marriage, divorce and death. These events are recorded, so that both those interested and third parties have evidence of this at all times.

Meanwhile, according to Nico Ngani and I Nyoman Budi Jaya, the civil registry is an institution whose job is to record or register every event experienced by members of the community, for example births, marriages, deaths and so on. The aim is to obtain as complete data as possible so that the status of community members can be known .

According to Victor M. Situmorang and Cormentyna Sitanggang , civil registration is an institution deliberately established by the government whose task is to record, register and record as completely as possible every important event for a person's civil status, for example marriage, birth, recognition/legitimation of children, divorce. and death and name change.

From the opinions above, it can be concluded that civil registration or civil registration is an institution deliberately established by the government with the task of carrying out recording, publishing, storing and maintaining a person's personal data, such as birth, marriage, divorce, death, recognition and legalization of children, as well as succession. Name.

The actual Civil Registry Institution that exists in Indonesia today is a continuation, transition, takeover from the Netherlands called *the Burgerlijke Stand* (BS). In the Dutch era, *Burgerlijke This stand* is an institution held by the authorities with a purpose record as completely as possible and provide maximum legal certainty regarding all important events or happenings, for example births, death, divorce and recognition of children. Each event is recorded as evidence that can be used by both interested parties or for third parties.

The Burgerlijke Stand in the Netherlands itself actually originates from France. This is proven from history that in the 18th century, the Netherlands was being a French colony and institutions of this kind have existed since French Revolution. At that time it was the priests who organized and provides registers regarding marriages, births, deaths and etc. This situation then changed after the enactment of the Law on September 20, 1772. The task of the pastor was replaced by the Municipal Government in maintaining registers that had to be recorded, namely regarding marriages, deaths and births of township residents, while other bodies or people were prohibited from carrying out this work. Since then, the government took over the implementation of civil registration from the clergy as the task of government institutions and henceforth the Civil Registry Institution in France was implemented in the Netherlands and in its colonies, including the Dutch East Indies. This gives the impression of discrimination among the community, which can result in obstacles to the implementation of civil registration in Indonesia .

According to article 163 of *the Indische Staatsregeling* , the Indonesian population is divided into 3 (three) large groups, namely : European Group, Foreign Eastern Group - Chinese - Not Chinese and Bumi Putera Group. As a consequence, the regulations in the field of civil registration that apply to each population group are not the same. Or in other words, each population group has its own civil registration regulations.

Broadly speaking, the rules regarding Civil Registration can be divided into two The period is the period before independence and after the independence of the Republic Indonesia. In the period before Indonesia's independence, colonial rules applied Netherlands, namely:

- 1) "For Europeans it is regulated in S.1849 No. 25 and the changes.
- 2) For the Chinese nation, it is regulated according to S.1917 No.130 jo. S. 1919 No. 81 and its changes.
- 3) For the Indonesian people, the Bumi Putera of Java and Madura are regulated according to S. 1920 No. 751 jo. S. 1927 No.564 and its amendments.

- 4) For the Indonesian people, Bumi Putera Kristen in Java, Madura and Minahasa is regulated according to S. 1933 No. 75 and its amendments.
- 5) Mixed Marriage Regulations are regulated in S. 1886 No. 23 jo. S. 1898 No. 158 and its amendments."

In the period after the independence of the Republic of Indonesia until now:

- 1) "Cabinet Presidium Instruction No. 31/U/In/12/1966.
- 2) Law Number 4 of 1961 concerning Changes in Family Names .
- 3) Cabinet Presidium Decree No. 127/4/Kep/12/1966 concerning Changing the Names of Indonesian Citizens who wear Chinese name.
- 4) Minister of Home Affairs Regulation no. 28 of 2005 concerning Guidelines Implementation of Population Registration and Civil Registration.
- 5) Law no. 23 of 2006 concerning Administration Population."

Since Indonesia became independent in 1945, it was only in 2006 that the country had Civil Registration regulations that were national, that is with promulgation Law Number 23 of 2006 concerning Administration Population. With Thus before 2006, Indonesia still using Dutch colonial rules, even though it is in accordance with the considerations contained in Cabinet Presidium Instruction No. 31/U/In/12/1966, already planned arrangement regarding civil registration national law.

The registration institution had existed in the pre-independence period since 1848 (concordance principle), but was only promulgated in 1849. This institution was intended primarily for groups Europe in Indonesia, through Stb.1849 No.25. For the Eastern and Foreign Chinese group, the Civil Registry Regulations were published in Stb.1917 No.130 jo.Stb . 1919 No.81 concerning Civil Registration Regulations for Classes Chinese, which took effect in Java and Madura as well as several other areas on May 1 1919. Meanwhile, for the Bumi Putera group, regulations were issued which were published in Stb.1920 No.751 jo.Stb . 1927 No.564 which came into effect January 1 1928. Meanwhile with Ordonantie 1923 No.75 jo.Stb . 1936 No.607, enforced Civil Registry Regulations for the Bumi Putera Christian Group in Java and Madura, former residents of Manado (better known with Name Minahasa) as well as in the regions Ambonia, Saparua and Banda.

Presence legal subjects in civil law traffic, have at least 3 (three) important meanings namely first, moment birth; second, at the time of marriage, and third, at death. Third the legal act must have proof shown with the existence of a deed referred to with a civil registration deed (*burgerlijkestand*).

Civil registration is a legal institution that carries out registration, recording and bookkeeping that is as complete and clear as possible to provide order and legal certainty incident birth, marriage, divorce and death someone.

Maintenance Administration Population registration carried out by the Civil Registry, aims for:

- 1) "Provides legitimacy identity and legal certainty of resident documents for each incident population and important events experienced by the population;
- 2) Provides protection of civil rights status population;
- 3) Providing population data and information in a way national regarding Population Registration and Civil Registration on sharing level in a way accurate, complete, up-to-date and easily accessible so it becomes reference for policy formulation and development in general;
- 4) Realize orderly Administration Population in a way national and integrated; And
- 5) Providing existing population data _ basic reference for related sectors in implementation every activity governance, development and society (Law Administration Population)."

4. Conclusion

Before it takes effect Law no. 1 of 1974 concerning marriage, the applicable marriage law is marriage law based on class citizens of the country and its various regions. But if you look closely, the marriage law is based on class It can be seen that religious law and customary law hold role as basic rules in marriage.

W even though it has already come into force Law no. 1 of 1974 concerning marriage in nature national law which applies to all of Indonesia, but in various regions and various groups public customary marriage law still applies. Law no. 1 of 1974 only regulates just the basic things and not the rules local specific matters.

Law Number 1 of 1974 which consists of Chapter XIV and 67 Articles arrange about the basics of marriage, conditions of marriage, marriage agreements, rights and obligations of husband and wife, property in marriage, dissolution of marriage and consequences, position of children, guardianship, other provisions, transitional provisions and closing provisions. In the law national It does not regulate the forms of marriage, methods proposals are carried out, marriage ceremonies and others, all of which are still within the scope of customary law.

The marriage was carried out religiously with religious law and in his trust by using customary law, it remains valid in the eyes of the law, as stated in Article 2 paragraph 1 of Law no. 1 of 1974. This indicates that *The living law* still recognized in the Indonesian legal system. In fact, *The living law* is a source of material law from formation of positive law in Indonesia.

But to provide legitimacy identity and legal certainty of resident documents for each incident Population and important events experienced by residents provide protection for civil rights status population, and realize orderly administration of population in a way national and integrated, needs to be done maintenance administration of population. One of the means of proof is written evidence, ie in the form of an authentic deed . In marriage, the authentic certificate is meant is an Excerpt from the Marriage Certificate, where the certificate is issued by the Department of Population and Civil Registration .

Actual recording agency had existed in the pre-independence period since 1848 (concordance principle), but was only promulgated in 1849. Implementation of Civil Registry during the Government era The Dutch East Indies were handled by the " *Burgerlijk Stand* " Institute or abbreviated as "BS" which means Population Records / Civil Registry Institute. Since Indonesia became independent in 1945, it was only in 2006 that the country had Civil Registration regulations that were national, that is with promulgation Law Number 23 of 2006 concerning administration of population.

So to do orderly actual legal administration it's not become something new for the Indonesian people, because In fact, it has been introduced since the Dutch colonial era about orderly legal administration. But since the issuance of Law no. 1 of 1974 further strengthens the legal basis regarding the validity of an event, in this case a marriage. And with he took it out Law Number 23 of 2006 concerning Administration Population, position of Civil Registry become confirmed as an institution deliberately established by the government with the task of carrying out recording, publishing, storing and maintaining a person's civil data, such as birth, marriage, divorce, death, recognition and validation of children, as well as name changes. And with its publication of Law Number 23 of 2006 concerning administration of population, then civil registration procedures become uniform or the same for all Indonesian people, without distinction groups as happened during the Dutch colonial period. So that there is no longer the impression of discrimination among the community, which could result in obstacles to the implementation of civil registration in Indonesia.

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