



Friedrich Carl Von Savigny's Thoughts on The Existence of Annual Sale and Purchase Customary Love Establishment

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Abstract. *This research aims to reveal stability Friedrich Carl Von Savigny's thoughts on the existence of annual sale and purchase customary love establishment. This research uses legal research methods, namely research carried out on legal norms that develop in society. The approach used is a conceptual and historical approach. The types and sources of data used in this research are primary and secondary data. The results of this research show that the teachings of the historical school initiated by Von Savigny emphasize that law is a reflection of the soul of the people that grows together with the people's growth of the people and becomes strong together with the people's strength. Furthermore, in the end, it dies if the nation loses its nationality. Thus, adherents of the historical school reject the view that law is made by an authorized institution, such as by making laws. Meanwhile, customary law that exists in Madurese society as the customary law of the Madurese people in some villages, such as "annual purchase and sale," as the customary law of the community is maintained in the practice of annual purchase and sale of a plot of land that is perhaps not found in other areas in Indonesia. It is similar to the historical school, namely that law grows together with the growth of society and becomes strong together with the strength of society. Furthermore, in the end, it dies if the nation loses its nationality. This condition is recognized as existing by the constitution of the Indonesian legal state as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.*

Keywords: *Friedrich Carl Von Savigny's; Thoughts; Existence; Annual Sale; Purchase Customary Love Establishment*

1. INTRODUCTION

The birth of law cannot be separated from the birth of humans themselves. Humans or human souls since birth and growth are always accompanied by ways of life in human relationships. In human relationships, humans are equipped with norms to regulate themselves. These rules clearly grow and arise from humans themselves. Therefore, the instinct for orderly life is indeed in the human soul. Friedrich Carl Von Savigny later developed this concept, and there was much criticism from other figures who did not share the same views or did not agree with him.

The philosophy of historical law emerged due to three things: first, 18th-century rationalism, where natural law at that time only prioritized reason, which denied historical facts, the specifics, and the national conditions of a nation. The universal and eternal nature of natural law influences the way of thinking that everything in this universe is the will of God (taken for granted). At that time, discussions of justice, equality between people, ethics, and morality found momentum, so famous philosophers emerged, including Plato, Aristotle, Augustine, and others. (Indra Rahmatullah, 2021).

However, recently, this school of thought was criticized by the next school of thought, namely Legal Positivism, because the natural school of thought did not have legal certainty. Legal positivism emphasizes human rational logic so that the law must be written, systematic, and created (by design) by the state. At that time, there was a prohibition for judges from interpreting the law because the law was considered to be able to solve all legal problems. One of the schools of thought in the study of legal philosophy is the School of History or History. Furthermore, one of the influential figures in this school is Friedrich Karl von Savigny. Savigny views law as a cultural product that flows with time and history. For him, law continues to develop with society and the nation. (Syahla Ailani Pramana, 2022).

Friedrich Karl von Savigny is an influential figure in the historical school of legal philosophy. According to Savigny, law is a cultural product that follows the flow of time and history, always developing with society and the nation. The understanding of the historical school guarantees the empirical validity of a law, where the law is formed naturally by cultural values embedded in people's communal consciousness or the nation's soul (*Volksgeist*), which has been maintained for a long time and has become a historical fact. (Syahla Ailani Pramana, 2022).

Research results from Sandy Firmansyah showed: (1) Savigny's main criticism of the codification of law, which was carried out without considering the historical and cultural context. Law is not merely a rule set by authority. Law has a social dimension that is inseparable from the history of the development of society. (2) Savigny's famous contribution to thought was *Volksgeist* or "people's soul." Its core is the teaching of law formed based on national character and identity. Savigny's thoughts in the historical school provide a new perspective in understanding and developing law that is more adaptive and responsive to social and cultural change. (Sandy Firmansyah, 2024).

2. METHODS

This research used a legal research method, namely a study conducted on legal norms that develop in society. The approach consisted of conceptual and historical approaches. The data types and sources were primary and secondary data. The technique of collecting primary and secondary data was done by analyzing library materials, legislation, and data from electronic media that were closely related to the main problem. Meanwhile, the data analysis technique of this research was qualitative descriptive, which

described data for careful measurement of certain social phenomena. Their results were presented in qualitative descriptive form.

3. RESULTS AND DISCUSSION

The Reality of Customary Law in the Reality of Social Life in Society

The diversity of laws in the modern world is inevitable. Likewise, every country has its laws and builds its system, which Rene David calls a “legal system.” As a legal concept, the legal system also has a dual meaning. On the one hand, it is “the concept of law.” On the other hand, as “the legal concept. The concept of law refers to the meaning of the concept that contains the meaning of the term itself, referring to its definition. In contrast, the legal concept refers to legal institutions and terms that Meusen specifically uses in the field of law, which are called “legal figures” (such as property rights, contracts, unlawful acts, and basic rights).(I Dewa Gede Atmaja, 2006).

In fact, customary law community units have existed and lived in Indonesia, such as Nagari in Minangkabau, Marga in South Sumatra, and Tiuh in Lampung. Meanwhile, customary law community units in Maluku, such as “*Negeri*” (*negroij*) in parts of Ambon Island, Lease Islands, and Seram Island, as well as “*Ratschap*,” “*Ohoy*” in the Southeast Maluku Islands, *Regenchap* on Buru Island and other customary law community units in parts of the Southwest Maluku Islands (MTB), Aru Islands and Southwest Maluku, which are the characteristics and identities of customary law community units in Maluku.(Jenny Kristiana Matuankotta, 2020).

Recognition of the existence of indigenous peoples has actually been stated in the 1945 Constitution, Article 18, and its explanation of “*zelfbestuurende landschappen*” (autonomous regions) and “*volksgemeenschappen*” (Indigenous communities), where the state is obliged to respect the ancestral rights of the regions concerned. The amendment to the 1945 Constitution places the issue of indigenous peoples in Article 18 B paragraph (2). In the formation of unwritten law and written law, legal ideals play a role in different ways. First, legal ideals directly influence individual morality and, in turn, societal morality in producing general methods and morality in forming habits, behavior, customs, and laws. Second, legal ideals influence individuals and society indirectly. In other words, in the formation of unwritten law, the stages range from customary methods to customary rules of conduct, from rules of conduct to customary rules, and customary rules to law. All take place through graded sedimentation of values, occurring under the guidance of moral ideals and legal ideals that exist in society. Whereas in the formation of written law, the stages

that form this sedimentation of values do not occur and, therefore, are not found.(Oetojo Oesman, 1991).

Legal ideals do not directly supervise the formation of law, especially moral ideals. In the case of the formation of unwritten law, the relationship between legal ideals and the legal norm system does not disintegrate because the legal norm system is formed from sediments of values that the behavior of society itself has filtered through the acceptance of individuals in families, families to families in tribes, and tribes in clans, and clans in the State. It is different from the formation of written law. Laws and legal norm systems are formed by individuals or groups of individuals, both as officials and as representatives of the people. The relationship between legal ideals and the legal norm system depends on the awareness and appreciation of the officials and representatives of the people towards the legal ideals that exist in society, which have constitutive and regulative functions in the formation of the law. Then, the formation of written law does not take place through stages of value sedimentation. The possibility of disintegration between legal ideals and the legal norm system is very large. (Oetojo Oesman, 1991).

The improvement of realization of a society that has a high legal awareness continues to be improved by providing more access to all information needed by the community and access to the community to involvement in various decision-making processes for implementing national development so that every member of society is aware of and lives their rights and obligations as citizens. As a result, the behavior of Indonesian citizens will be formed. Then, they will have a sense of belonging and obey the law. The improvement of the realization of a society that has a high legal awareness must be supported by legal services and assistance at affordable costs, a process that is not complicated, and the determination of decisions that reflect a sense of justice. Under normal circumstances, it can generally be said that community life takes place in a relatively orderly manner (there are no situations of “*anomia*” or “*bellum omnium contra omnes*” order in society is caused by the existence and operation of human reason, and conscience, various values and rules. Based on the content, character, and purpose of the rules that are in place in society, The law aims to realize justice that guarantees the implementation of certainty and predictability in society. Its obedience is not entirely left to the free will of each citizen. However, it can be enforced by society in an organized manner in accordance with the legal rules that regulate law enforcement. At present, the largest part of the legal rules is determined by the authorized power (public authority, government, state), which the government implements and enforces, if necessary, by using state power tools in

accordance with the applicable procedural rules formulated in the form of legal rules as well. (Bernard Arief Sidharta, 2013).

Satjipto Rahardjo states that legal science includes and discusses everything related to law. (Satjipto Rahardjo, 2000). Like other branches of science, Legal Science also has an object, namely law. Satjipto Rahardjo (2000) has compiled a list of problems that can be included in the objectives of studying it, namely: (i) Studying basic legal principles, (ii) Studying the legal formal system, (iii) Studying legal conceptions and their functional meaning in society; (iv) Studying what social interests are protected by law; (v) Want to know what the law really is, where it comes/appears from, what it does and by what methods/means it does it; (vi) Studying what justice is and how it is manifested in law; (vii) Studying the development of law: has the law been the same as what we know nowadays? How does the law actually change from time to time? (viii) Study thoughts about law throughout time, and (ix) Study the true position of law in society. What is the relationship or connection between law and other sub-systems in society, such as politics, economics, and so on? (x) Can legal science indeed be called a science? Furthermore, what are the properties or characteristics of its science? Modern law is something new for Indonesian society, and it originated in Europe. Law has a close relationship with the government system because both aim to integrate and direct the people's lives according to legal idealism. Social change has displaced the autonomy of local communities and, at the same time, is also a symbol of the displacement of local order. Satjipto Rahardjo states that: "This modern state emerged by absorbing the autonomies that originally existed in local communities into state power (Satjipto Rahardjo, 1999).

Friedrich Carl Von Savigny's Thoughts on the Existence of the Annual Sale and Purchase Customary Law Establishment

The historical school is a school of thought in the philosophy of law that is very important in the development of the philosophy of law. Its concept emphasizes the soul of the nation (*volkgeis*), with the expression put forward by Von Savigny, "*das recht wird nicht gemacht, est ist und wird mit dem volke,*" which means "law is not made, but grows and develops with society." His idea is that law is formed outside of legislation, meaning that formal institutions do not make law but grow and develop in society naturally. (Iwan Darmawan, 2022).

Talking about the history of law and its development, surely it will not be separated from the development of humans as legal subjects and Roman law, which is a legal system

that has a phenomenal position in the history of modern law in this world. It is due to the following legal historical facts. (Munir Fuady, 2003).

- a. The very real influence of Roman law on every modern legal system today, both directly and through the influence of the laws of other countries that have been influenced by Roman law;
- b. The fact that Roman law abandoned its very mature rules;
- c. Roman law was very original, almost sterile from the influence of foreign laws at that time. If there was, there was very little influence from Greek law or Semitic law on Roman law;
- d. Although there were written laws during the Roman era, the Romans made very little use of them because they were constantly developing their laws to find new laws.

If ancient Greece was spectacular with metaphysical thinkers such as Socrates, Plato, or Aristotle, then in Roman times, it was spectacular with the development of its legal systems and rules, even though it had been for thousands of years. Until now, there have still been many influences on Roman law in this world, especially for countries that adopted the continental European legal system or civil law system. The emphasis of the historical teaching is that law is a reflection of the soul of the people, which Savigny's student, G. Puchta, named "*Volkgeist*." the law grows together with the growth of the people and becomes strong together with people's strength. Then, in the end, it dies if the nation loses its nationality. Savigny's famous statement is: "*des Recht wird nicht gemacht, es ist und wird mit dem volke*".(Achmad Ali, 1996).

Let us look closely at Savigny's view of legal awareness and the people's soul. It is indeed very abstract because it does not show what is meant by the people's soul, whether it is the spirit of the nation's struggle to establish a country so that in that country, there is law resulting from the struggle itself. The view of the historical school of law is that awareness of society is not a rational consideration but develops and is influenced by various factors such as economics, politics, society, culture, and even religious values for a nation. This view is always changing; therefore, the law is always different. Consequently, there is no measure of the content of the law that applies objectively and can be accepted by everyone scientifically. Hence, the teachings of the Savigny historical school of thought regarding the function and development of law related to the concept of the soul of society in this madhhab cannot clearly show what its content and scope are.

Therefore, adherents of the historical school reject the view that law is made. For them, law is not made but is found in society. They clearly glorify the past. There is an

organic relationship between law and the soul of the people. The only law that is truly alive is customary law. Their characteristic is their disbelief in the making of laws and their disbelief in codification. It rejects and does not give place to all laws and regulations made by the State that has the authority for that (state law).

Based on the view of the Historical school of distrust in the making of laws and codification, the conception of the Historical school with its distinctiveness is the unwritten customs that live in the midst of society as the embodiment of the values that exist in their community. Thus, the only source of law, according to this school of thought, is the legal awareness of society. The concretization of this legal awareness as a norm that binds its society is seen in unwritten rules.

In the context of a modern society with the complexity of its problems, it is very unlikely to regulate social order with unwritten rules, especially in large numbers. If modern society uses unwritten rules to regulate needs and interests in its social order, then it can be imagined that legal uncertainty will be created. Therefore, as in the view of the Historical school, the process of concretizing general awareness of legal awareness as a guideline in carrying out legal actions requires legal experts who are loyal servants of general/legal awareness. The legal expert then formulated the general awareness/legal awareness that he observed into unwritten rules so that what the legal expert conveyed where the unwritten law grew and developed was assumed to be the soul and awareness of the customary law community itself.

Likewise with Muhamad Erwin and Amrullah Arpan's opinion, the historical school with its main figure Friederich Carl Von Savigny, who, in essence, argued that the concept of law is the spirit of a nation.(Muhamad Erwin, 2008). Therefore, Savigny's assertion states that good law is derived from the people's soul, but in another of his writings, which discusses Roman Law. He says that Roman Law is the best law. Savigny's in-depth study of Roman Law explains to him that the development of Roman Law is an example of a wise legal guide who forms law through gradual adaptation for the times before the "*corpus juris*" formed a final codification. The only source of law, according to the historical school or school of thought, is the legal consciousness of the people that exists and also serves as the basis for the birth of customary law. Given that the soul of the people, also often referred to as legal consciousness, differs between one human being and another, the law also differs from one place to another. With such a view, it is clear that the view of the historical school is very different from the view of the natural law school, which teaches the existence of a law that can naturally apply universally, both in terms of where it applies

and its time which does not recognize time and place limits. As the author explained at the beginning, adherents of the historical school reject the view that law is made. For the historical school, law is not made but is found in society. They clearly glorify the past. There is an organic relationship between the law of the people's soul. The only law that truly lives is customary law. Their characteristic is their disbelief in the making of laws and their disbelief in codification. They reject and do not give place to all laws and regulations made by the State that has the authority for that (state law).

In fact, what happens in Indonesia is that state law and customary law both live and grow and coexist in Indonesia until now. The influence of the historical school in Indonesia is extraordinary in emphasizing the existence of customary law in Indonesia, which was pioneered by Van Vollenhoven, Ter Haar, and other customary law figures. Likewise, for sociologists, the historical school emphasizes their belief that there is a reciprocal relationship between the legal system and other social systems that influence each other. Such a belief will produce a legal product that will have sociological validity.

Customary law is the values that live and develop in the society of a region. Although most customary laws are unwritten, they are a strong, binding force in society. There are separate sanctions from society if they violate the rules of customary law. Customary Laws that live in this society for people who still have a strong original culture will be very pronounced. Customary law is also often applied in daily life by the community. Even a judge, if he faces a case and cannot find it in written law, must be able to find the law in the rules that live in society. This means that judges must also understand customary law. Customary Law can be said to be the civil law of the Indonesian people. (M. Saleh, 2013).

The growth of law is basically an unconscious and organic process; therefore, legislation is less important than customs. There are even authors who mention the advantages of legal thinking from the historical school of thought, which is the firm attitude that states that law is a derivation of values adopted by a society. In this regard, it can be assumed that such a law will have sociological validity. Therefore, the law must be in accordance with society's legal awareness.

Mochtar Kusumaatmadja stated that for Indonesia, the thoughts and attitudes of this historical school of thought towards law had played an important role in maintaining customary law as a reflection of the original cultural values of the indigenous population and preventing the occurrence of "westernization" that is too rapid, if not to say successful in preventing it at all, except for a small number of indigenous groups.

In the context of Indonesia, especially customary law in Pamekasan Madura, it is very much in line with and has similarities with the concept built by the historical school of Von Savigny that law grows together with the growth of the people and becomes strong with people's strength. In the end, it dies if the nation loses its nationality.

Savigny's thoughts on law began with his reflection on the development of law in civilized nations, which states that law grows naturally in society and is not made intentionally by certain (political) powers. Law is a part of social life that can be seen in the form of behavior and awareness of society, such as language and manners. Law and other social aspects are a unity, which emerges and at the same time reflects the soul of the people or nation (*volksgeist*). (M. Zulfa Aulia, 2020).

Von Savigny's historical school in the Indonesian context actually refers to customary law that lives in a society in a region that still lives in accordance with Indonesian society. Thus, customary law is still strong in some Indonesian societies. In this connection, Satjipto Rahardjo put forward the existence of a law in a nation, where, according to him, the law of a nation is actually a reflection of the social life of the nation concerned. (Satjipto Rahardjo in the Artidjo Alkostar, 1986). Even in the 1928 Youth Congress, Moh. Koesnoe emphasizes that customary law has become the soul and content of the national legal order. Customary law has this balancing function. In customary law, there is a principle that if a dispute or conflict occurs, then every component in society moves and adapts. This adaptation is carried out so that harmony and balance in society are maintained in accordance with the reflection of the Indonesian nation's *volksgeist*. Therefore, whenever there is an influence from outside, customary law can provide a solution to justice for a dispute or conflict with the principle of balance so that the decision made regarding a legal problem cannot be separated from the Indonesian nation's values and character. With this principle, the law not only reflects abstract things and is deductive and rational with a logical character but is also a reflection of justice without eliminating the character of a nation. To realize this, customary law does not only rely on sanctions (punishment) in resolving every conflict that occurs in society but can be in the form of other solutions, such as harmonizing conflicts that are just with the principle of balance to achieve certain values that are considered good in society. (M. Yazid Fathoni, 2021).

For example, in Madura, the custom of "annual sale and purchase" of land is still embedded in the community, where landowner X sells a piece of rice field land to Y "annually" for Rp. 10,000,000.00 (ten million rupiah) for 3 (three) years. Y, as the "annual" buyer, has the right to cultivate and enjoy the results of his land purchased annually from

X for 3 (three) years, so during those 3 (three) years, Y also enjoys the results of cultivating the land. After 3 (three) years, the land is returned to X as the landowner with the consequence that the money distributed of Rp. 10,000,000.00 (ten million rupiah) is not returned to Y, which is the difference between annual sales and pawning, which some people in Madura also do. Conditions such as those mentioned above still exist in the Madurese community. That is the customary law of the Madurese people in some villages that still maintain the existence of “annual sale” as the customary law of the community and is maintained in the practice of the annual sale of a plot of land that may not be found in other areas in Indonesia. It is similar to the historical flow. The law grows together with the growth of the people and becomes strong together with the people’s strength. Then, in the end, it dies if the nation loses its nationality.

Although its existence has begun to be displaced by the modern legal system, customary law still has an important meaning in the lives of the Indonesian people, especially those who form laws. It can be seen from various laws and regulations that use customary law as a basis for their formation.

The implementers and shapers and the power of law lie in the people themselves, who have diverse complexities in their social life. The community has social ties and social life as well as spiritual ties with each other so that they become a unified nation and a complete soul. Law is part of their inner self, which is manifested in their social life, and it also influences their behavior.

Along with that, the custom that has become customary law regarding the “annual sale” of a plot of land mentioned above is recognized as existing by the constitution of the Indonesian rule of law as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that “The State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.”

The recognition of the existence of customary law and traditional rights by the 1945 Constitution of the Republic of Indonesia shows that the original law of Indonesia is customary law that did exist and existed before the colonizers or foreign nations entered the Indonesian archipelago. However, along with the development of modern law and social life and the development of technology today, it demands the existence of written law as state law made by legislative/parliamentary institutions to be prioritized compared

to unwritten customary law, when in fact the written law is incomplete and cannot be complete. Hence, it needs to be elaborated on in written and unwritten law.

4. CONCLUSION

The teachings of the historical school initiated by Von Savigny emphasize that law is a reflection of the soul of the people that grows together with the people's growth of the people and becomes strong together with the people's strength. Furthermore, in the end, it dies if the nation loses its nationality. Thus, adherents of the historical school reject the view that law is made by an authorized institution, such as by making laws. Meanwhile, customary law that exists in Madurese society as the customary law of the Madurese people in some villages, such as "annual purchase and sale," as the customary law of the community is maintained in the practice of annual purchase and sale of a plot of land that is perhaps not found in other areas in Indonesia. It is similar to the historical school, namely that law grows together with the growth of society and becomes strong together with the strength of society. Furthermore, in the end, it dies if the nation loses its nationality. This condition is recognized as existing by the constitution of the Indonesian legal state as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

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