

The Urgency of Reconstructing Indonesia's Justice System Towards Recognition of Customary Justice Institutions

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ABSTRACT

The 1945 Constitution acknowledges and protects the existence of indigenous communities. However, the existence of customary court has been abolished through Emergency Law No. 1/1951, and its legal authority is still not recognized to this day. This creates ambiguity in the administration of the justice system. Therefore, an assessment of the urgency of reconstructing Indonesia's justice system to achieve recognition of customary justice institutions is needed. In addressing this, there is a need to answer the issues concerning customary court and how the state can reconstruct the justice system. The author employs a normative legal research method with a qualitative and case study approach through literature review. Through this method, it is found that non-binding legal force of customary court decisions leads to negative consequences for indigenous people and customary law itself. Therefore, a strong legal framework is required through the enactment of the Indigenous Community Bill. Collaboration between law enforcement and indigenous people is also essential in resolving indigenous cases.

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1. INTRODUCTION

Indonesia, as a nation characterized by rich cultural and ethnic diversity, hosts a diverse indigenous population across its archipelago. These communities live in accordance with age-old traditions, values, and customary legal systems. These values are commonly referred to as "indigenous values." The existence of indigenous communities has been officially recognized by the state, as stipulated in Article 18B, paragraph (2) of the 1945 Constitution, which declares the state's recognition and respect for the unity of indigenous legal communities and their traditional rights, provided they

remain relevant and in line with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law. Consequently, it is incumbent upon the state to safeguard the traditions and values that thrive within indigenous communities. However, the values upheld by indigenous communities do not always align with the values enshrined in Indonesia's positive law, giving rise to a system for enforcing customary law in the form of customary courts [1].

The presence of customary courts fulfills the need for pluralistic and multicultural justice, offering an alternative to conventional

legal proceedings that can better align with the requirements of local communities. According to Bagir Manan, the evaluation of a country's judicial system can be approached from various aspects. Firstly, it encompasses all aspects of justice administration, encompassing institutions, resources, procedures, infrastructure, and related components. Secondly, it pertains to the process of adjudication, involving the examination and resolution of legal cases.

The judicial system of a nation is intricately linked to its legal framework, constituting a subordinate component within this legal structure. Given that Indonesia's legal framework is rooted in the principles of Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD Negara RI Tahun 1945), it naturally follows that the Indonesian judicial system must be firmly anchored in the principles of Pancasila and the legal provisions outlined in the 1945 Constitution [2].

Article 24, paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as amended by the Third Amendment in 2001, specifies that judicial authority is exercised by a Supreme Court and the subordinate judicial bodies within the broader scope of the general judiciary, religious judiciary, military judiciary, administrative judiciary, and by a Constitutional Court [2].

As previously explained, the Indonesian constitution has also recognized and protected the existence of indigenous communities. The assurance of respecting the rights of traditional communities is also outlined in Article 28I, Paragraph (3) of the 1945 Constitution, which states that cultural identity and the rights of traditional communities are respected in line with the progress of time and civilization [3]. Therefore, considering the existence of customary courts that can better serve the legal needs of indigenous communities, the recognition of customary courts in Indonesia is both logical and necessary.

The presence of a customary justice system aligns with the fifth precept of Pancasila, "Social justice for all the people of

Indonesia." However, it cannot be denied that, in current reality, the rights of indigenous and traditional communities are not fully protected, often resulting in their marginalization and the emergence of various conflicts in indigenous territories. In this regard, there is a clear need for comprehensive recognition, protection, and empowerment of indigenous communities[4]. The first step that can be taken is to explicitly acknowledge customary courts on par with other judicial institutions, thereby fostering social justice for indigenous communities who have struggled for years to uphold their rights.

The explicit inclusion of the term and a detailed explication of customary justice can be found in Law Number 21 of 2001, On Special Autonomy for the Papua Province. This legislation serves to underline the state's acknowledgment and reverence for the practice of customary justice in the region of Papua. According to Article 51, paragraph (1) of this law, customary justice encompasses a mechanism for resolving conflicts within the indigenous legal community, endowed with the authority to investigate and adjudicate civil disputes and criminal cases among the members of the respective indigenous legal community. Furthermore, paragraphs (2) and (3) stipulate that Customary Courts are structured in alignment with the customary norms of the relevant indigenous legal community and are vested with the authority to examine and adjudicate civil disputes and criminal cases in accordance with the conventions of the respective indigenous legal community.

Additionally, aside from its reference in Law Number 21 of 2001, the term "customary justice" also surfaces in the elucidation of Article 9, paragraph (1) of Law Number 18 of 2004 concerning Plantations. This elucidation emphasizes that the existence of customary justice serves as an indicator affirming the continued existence of an indigenous legal community in practice [5]

Based on the above considerations, a more in-depth examination of this matter is essential. However, in scrutinizing a judicial

system and the necessary changes, a comprehensive understanding of the urgency of such an investigation is required. Therefore, research is needed to explore the urgency of reconstructing Indonesia's judicial system to achieve recognition of customary justice institutions. The primary focus of this research is to address the issues surrounding the existence of customary justice in Indonesia, which necessitates a reconstruction of the judicial system, and to determine the actions the state should take to integrate customary justice within the existing judicial framework.

2. LITERATURE REVIEW

The existence of customary courts has been recognized under Article 103 of Law Number 6 of 2014 concerning Villages, which stipulates that the authority of indigenous villages includes conducting peace hearings in customary courts. The state provides constitutional legitimacy to the status of customary law, stating that alongside the Constitution, unwritten laws that arise and are preserved in the practice of state governance are also valid, as articulated in the General Explanation of the 1945 Constitution [6].

However, there is an issue regarding the legal certainty of judgments rendered by customary courts, as evident from the provisions of Emergency Law Number 1 of 1951 on Temporary Measures for Organizing Unity of Power and Events of Civil Courts. In essence, Article 1, paragraphs (1) and (2) of said law essentially abolished all regional autonomy court (*Zelfbestuursrechtspraak*) and Customary Courts (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*) [7]. Consequently, this law established that formal judicial authority should only be exercised by state courts [8].

However, in paragraph (3) of the same article, it is further stipulated that these provisions do not diminish the authority granted to village conciliatory judges thus far [7]. This formulation still applies today through Law Number 48 of 2009 concerning

Judicial Power, in which Article 18 of that law explicitly states that judicial authority is exercised by the Supreme Court and its subordinate judicial bodies within the general judicial system, religious judicial system, military judicial system, administrative judicial system, and by the Constitutional Court, in which customary courts are not included [9].

From the analysis of these legal sources, it can be concluded that the state does not prohibit the resolution of customary cases through customary or peace courts. Nevertheless, the decisions made by customary court lack legal binding force [10]. The absence of this binding force results in a lack of clarity regarding the principle of legal certainty, which is one of the fundamental goals of law itself.

As Sudikno Mertokusumo emphasizes, legal certainty acts as a guarantee that laws can be effectively enforced [11]. The lack of legal certainty within the customary judicial system, in turn, results in ineffective application of customary law. An example case in this context is a case of rubber theft by Ibnu owned by Hamdani, which took place in the Alue le Itam Village, Indra Makmu District, East Aceh Regency. Initially, it was resolved through customary court, which determined that Ibnu had to pay compensation for the rubber amounting to IDR 2,200,000 (two million two hundred thousand Indonesian Rupiah). However, Hamdani, unsatisfied with the compensation amount, filed a report on the case to the Indra Makmu Police Station to be processed in a conventional trial [12].

This case is just one among many that exemplify the legal uncertainty prevalent within customary law. Consequently, this results in a repetitive bureaucracy as such cases must be reevaluated by law enforcement from conventional courts. Moreover, the rulings emerging from customary court proceedings are non-binding on judges in mainstream courts, serving merely as legal references for consideration. This situation thwarts one of the principles of judicial power, namely, "the judiciary is carried out in

a simple, fast, and cost-effective manner," as stipulated in Article 2, paragraph (4) of the Law on Judicial Power, from coming to fruition [9].

In light of these circumstances, and based on the legal source aspects as mentioned earlier, it can be deduced that there exists an issue regarding customary justice not being integrated into the overall judicial system in Indonesia. This non-integration leads to ambiguity in its implementation, consequently leaving the rights of indigenous communities unfulfilled.

3. METHODS

This article is examined based on a normative legal research method, complemented by a qualitative approach that primarily focuses on a literature review, resulting in secondary data. Additionally, this study adopts a case approach, employing a qualitative descriptive analysis method to gain an understanding of the cases derived from the literature study and their relevance to phenomena related to the urgency of reconstructing Indonesia's judicial system towards the recognition of customary justice institutions.

4. RESULTS AND DISCUSSION

Customary law reflects the characteristics, nature, way of life, and worldviews of the Indonesian society. This has been further emphasized in MPRS Decree No. II/MPRS/1960 Attachment A Paragraph 402, which underscores the role of customary law as the foundation for national legal development. The contribution of customary law to the development of Indonesia's national legal system is highly significant as it embodies local wisdom and the spirit of the Indonesian nation. The values of Pancasila, rooted in the principles of customary law, serve as the foundation of the state, the national philosophy, and the basic norms.

Customary law provides the fundamental elements and legal aspects integrated into the ongoing development of national law [13]. One example of implementing local wisdom is the application

of restorative justice through the Decision of the Director-General of Badilum, Supreme Court of the Republic of Indonesia, Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Restorative Justice, further regulated in the National Police Regulation Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice. Therefore, it is crucial for the state to protect and preserve customary law, as mandated by the constitution [14].

4.1. Issues and Urgency

Although there are regulations related to the elimination of customary courts, there are still few overlapping laws governing this matter. In fact, Article 50A of the Government Regulation in Lieu of Law (Perpu) Number 2 of 2022 on Job Creation indirectly acknowledges the binding power of customary court decisions by stating that a person who commits prohibited acts but has resided within or around a forest area for at least five years and has been subjected to social sanctions or customary sanctions will not be subject to administrative penalties [10].

Furthermore, referring to several Supreme Court jurisprudences on customary cases that have occurred in various regions, individuals who have undergone criminal customary law proceedings by customary institutions are no longer required to go through prosecution or additional punishment by the regular courts. However, even though Law Number 1 of 2023 (the latest Criminal Code) grants the authority to review customary criminal cases related to the Criminal Code, the procedures and punishments applied by customary courts are used as a basis to reduce sentences, not to entirely eliminate criminal sanctions, as established by the Supreme Court's legal decisions when integrating customary criminal law into the legal system in concreto [15].

In the latest Criminal Code (KUHP), there is a principle of material legality in the form of provisions regarding the fulfillment of customary obligations as one form of additional criminal sanctions [16]. These provisions reaffirm the recognition of

customary law within the national legal system. However, this recognition is limited when the alleged conduct is not regulated by the Criminal Code but is regulated or prohibited by customary law. With the existence of these regulations, there is a concern that in the future, this might obscure the presence of customary courts and relegate customary law to a secondary option, thereby neglecting the constitutional mandate that has declared the equality of customary law and national law. In the long run, this is feared to lead to the process of the state assimilating customary practices [10].

The vague recognition of customary courts in laws and regulations has had an impact on the existence of these courts. The legal politics related to judicial authority that does not acknowledge dispute resolution practices beyond the state's judiciary has made it difficult to find peaceful dispute resolution models typically used by communities through customary courts. Additionally, indigenous communities have become hesitant to use alternative dispute resolution through customary courts due to doubts about the enforceability and coercive power of the decisions made by these courts [17]. A concrete example of the loss of customary court existence has occurred in the Gowa and Bone regions in South Sulawesi. This is due to the lack of legal protection for customary institutions, resulting in disputes between local governments and customary institutions [18].

Customary law and national law are challenging to integrate into a unified system and may lead to the dominance of one over the other, with national law being the prevailing force, as demonstrated by existing cases and government biases embedded in legislation. Therefore, in this matter, clear separation is required, much like the way the state separates General Courts from Religious Courts, Administrative Courts from Military Courts, and so on. A similar approach needs to be implemented for customary courts. A comprehensive review of Indonesia's judicial system, involving the recognition of the

legality of customary court decisions, is necessary.

The foundation of customary courts' existence has been ensured since the colonial Dutch era, as stipulated in Article 130 of the *Indische Staatsregeling*, the basic law governing the state and government of the Dutch East Indies. This article stated that apart from the courts operated by the Dutch government, there were also native courts, both in the form of customary courts in regions directly under Dutch East Indies governance and regional autonomy courts [19].

In the constitution, aside from what has been mentioned, it is further emphasized in Article 24 paragraph (3) of the 1945 Constitution, stating that other bodies whose functions are related to judicial power are regulated by law. Furthermore, there are laws that grant specific authority to customary courts in certain special regions, such as Article 98 paragraph (2) of Law Number 11 of 2006 concerning the Government of Aceh (UUPA), which affirms, "The settlement of social and community problems in accordance with customs is pursued through customary institutions." Thus, it is very possible for Indonesia to accommodate the existence of customary courts within its state system, even though existing laws on judicial authority do not directly recognize customary courts. However, the decision to recognize or not recognize customary courts within the national legal system is a legal matter related to politics, especially within the framework of judicial power politics because the judiciary is a part of the judicial authority [19].

The absence of legally binding force in the decisions of customary courts can result in disadvantages for the indigenous people involved. Firstly, there is a potential drawback for the victims of customary criminal acts. Perpetrators of these acts may refuse to comply with the customary criminal sanctions imposed by customary courts, requiring the victims to file a new report and pursue the perpetrator in state courts. This leads to an inefficient judicial system in achieving its goals. Secondly, there is also a potential disadvantage for the perpetrators of

customary criminal acts. There is a possibility that they could face double punishment, which contradicts the principle of "ne bis in idem," meaning that a person cannot be tried again for a criminal act that has already been decided by a judge [20].

A similar case has indeed occurred involving a perpetrator of a lewd customary criminal act in the Parauna Village, Unaaha Sub-District, Kendari City, Southeast Sulawesi, which was handled by the Tolake Customary Chief. Referring to the jurisprudence of Supreme Court Decision No. 1644 K/Pid/1988, initially, the perpetrator was tried by the customary chief and was given a customary sanction called "Prohala," which required the perpetrator to provide one buffalo and one roll of kaci cloth as compensation. However, despite the case being considered closed by the customary court, it was still processed by the police and ended up in the State Court. In the Kendari State Court, the panel of judges decided that the defendant had indeed committed the crime of rape. The judges also rejected the defendant's argument that the State Court should not have handled the case since it had already been decided by the customary court [21].

However, in this case, there is a disparity in decisions regarding similar cases that occurred at different times, referring to the Supreme Court Decision (MA) No. 984 K/Pid/1996 dated January 30, 1996. In this decision, the panel of judges stated that if the perpetrator of an improper act had been subjected to customary sanctions or had received a response established by the traditional village authority in areas where customary law is still respected and applied, the prosecution's claim should be considered unacceptable. This decision reflects the recognition by the Supreme Court of the existence of customary criminal law and the customary legal system that still applies in Indonesian society [20]. However, the fact that reports against perpetrators who have received customary sanctions can still be processed in conventional courts shows a

legal system that tends to be ambiguous and inefficient.

Jurisprudence that respects customary court decisions, as mentioned above, is often considered and applied by other judges when deciding customary cases. However, this provides only limited strength to the legal certainty in the decisions issued by customary courts, considering that many customary cases in modern times are still processed in state courts. Formally, in a country that follows a civil law legal system like Indonesia, jurisprudence does not have legally binding power for judges; it only holds persuasive power [22].

In addition to jurisprudence, Regional Regulations established in several regions with strong traditions and customs also provide legitimacy to customary court decisions. This is articulated in Regional Regulation of Papua Province No. 5 of 2022 on the Recognition and Protection of Indigenous Communities in Papua Province, Regional Regulation of West Sumatra Province No. 7 of 2018 concerning Nagari, Regional Regulations of Kalimantan Barat Regencies/Cities No. 11 of 2011 on Empowerment, Preservation, and Development of Customs and Traditional Institutions, and many more. However, regional regulations are at the lowest hierarchy in the hierarchy of regulations, as stipulated in Article 7 paragraph (1) of Law No. 12 of 2011 concerning the Formation of Regulations. Therefore, they still need to be supported by national laws.

4.2. Solution

If the government is genuinely committed to preserving and protecting indigenous communities, it needs to reevaluate the substance of the Judicial Power Law regarding courts with judicial authority recognized by the state. The Judicial Power Law should explicitly declare that cases involving indigenous communities are to be resolved in indigenous courts, and the decisions of these courts hold legal force. Furthermore, to reinforce the existence of indigenous courts and safeguard the rights of indigenous communities, there should be a specific law addressing indigenous

communities. In this regard, a draft law on Indigenous Communities' Rights Recognition and Protection was discussed by the Special Committee in 2014, titled "Draft Law on Recognition and Protection of Indigenous Communities' Rights (PPHMHA)." However, these discussions were never concluded [23]. In 2020, the Bill on Indigenous Communities' Rights was once again deliberated and included in the National Legislative Program as a Priority Bill for 2020 [23]. Nevertheless, these discussions were not pursued, and to date, the Bill on Indigenous Communities has not been enacted.

The absence of a specific law addressing indigenous communities seemingly implies that constitutional protection of indigenous customary rights is only guaranteed at a conceptual level and discussed in a general manner. This has resulted in discriminatory treatment of indigenous communities. The current situation indicates that indigenous communities have not received adequate legal protection, as evidenced by the difficulties they face in accessing and securing their ancestral customary rights. Therefore, there is an urgent need to develop more effective laws and formulate new legislation that clearly addresses indigenous customary rights issues. This law should aim to prevent arbitrary government decision-making and ensure the highest level of justice for indigenous communities throughout Indonesia [24].

As the tide of globalization advances, indigenous values become increasingly vulnerable to erosion. For example, a well-known case of crimes against humanity in Mesuji Regency (South Sumatra - Lampung) arose when a plantation company took over indigenous lands without permission. This action sparked protests from local residents and led to confrontations with the company's security forces (PAM Swakarsa). Such conflicts could have been prevented if indigenous customary law was respected. Similar conflicts have occurred in various indigenous regions in Indonesia. The main issue lies in the government's lack of "political

commitment" to respect customary law as an integral part of the national legal system [24].

Therefore, the Indigenous Communities Bill must be promptly enacted to provide more effective legal protection for the existence of indigenous communities and recognition of the existence of customary courts, especially under Article 41 of the Indigenous Communities Bill. In essence, Article 41 states that disputes arising from violations of Customary Law in Indigenous Areas shall be resolved through customary courts by the Customary Institutions. Meanwhile, Article 42 of the Indigenous Communities Bill protects against foreign interference by stipulating that non-member of Indigenous Communities who violate Customary Law in Indigenous Areas must comply with the decisions of the Customary Institutions [25].

The presence of customary courts as recognized institutions within the Indonesian judicial system can also reduce the backlog of cases in state courts. What is needed is the availability of various options for dispute resolution within the community. According to the Supreme Court's website, the case load for the year 2022 reached a total of 3,559,665 cases, consisting of 3,498,355 incoming cases and an additional 61,310 cases carried over from 2021 [26]. With the legal validity of customary court decisions being acknowledged, this will increase the trust of indigenous communities in the legal certainty resulting from these decisions, allowing customary courts to bear the burden of customary cases that were previously handled by conventional courts.

In customary legal systems, there is typically a separation of authority between official law enforcement agencies and indigenous community leaders. This often leads to miscommunication between law enforcement and indigenous community leaders when dealing with customary cases. In some customary cases, there is already a good level of cooperation between the police and indigenous communities, with the police willing to hand over cases to customary courts if the community desires it. However, in other

cases, conflicts arise between law enforcers and indigenous community leaders, resulting in harm to indigenous communities, as seen in the Kendari, Southeast Sulawesi case mentioned earlier, which led to the perpetrator being tried twice, or cases involving foreign parties as in Mesuji Regency.

Therefore, collaboration between law enforcement agencies and indigenous communities in addressing customary cases is necessary. Law enforcement agencies can play a role in developing a harmonious legal system that takes into account principles of justice and legal certainty through recognition and adaptation to customary law. Such recognition can pave the way for an inclusive legal system that respects diversity and meets the needs of all community members [27]. However, despite constitutional recognition of customary law, the practice is not always straightforward, especially when dealing with state law. In practice, law enforcement agencies often overlook the existence of customary law and prioritize the enforcement of state law. Moreover, there are efforts to integrate national law and customary law that are sometimes forced, while law enforcement agencies tend to understand legal regulations in a textual manner, leading to the marginalization of customary law.

A realistic solution is to separate the application of state law and customary law. This approach means that in communities where customary law is still in force, customary law can be applied and prioritized. However, in specific cases where the state court is considered more suitable for making decisions, the case can be referred to the state court [27]. It is essential to create understanding between law enforcement and indigenous communities and cooperate with the police so that when cases that fall under customary jurisdiction are encountered, the perpetrators should be handed over to customary authorities or courts. This will highlight the existence and enhance the effectiveness of customary courts.

To implement this mechanism, firstly, there is a need for socialization among indigenous communities to raise legal awareness about customary law and the importance of preserving it, as well as to increase understanding of positive law in Indonesia. Secondly, comprehensive dialogue and cooperation need to be established between law enforcement agencies and customary institutions in resolving legal cases involving indigenous communities [28]. Thirdly, the participation of indigenous communities in the legal enforcement process is necessary, including in the policy-making process. Fourthly, education should be provided to law enforcement officers about legal pluralism and the importance of embracing legal diversity in upholding justice [29].

In addition, it is necessary to expand access to legal assistance for indigenous communities through cooperation with legal organizations. This has been done by the Association for the Defense of Indigenous People in the Archipelago (Perhimpunan Pembela Masyarakat Adat Nusantara or PPMAN) through the signing of a Memorandum of Understanding (MoU) with the Indonesian Congress of Advocates (Kongres Advokat Indonesia or KAI). The MoU outlines a commitment to enhance the capacity of PPMAN lawyers in defending Indigenous Peoples. This is essential because the majority of Indigenous communities are located in rural areas and villages where there are limitations in access and supporting infrastructure.

The number of lawyers in these areas is still minimal compared to the numerous legal cases involving Indigenous Peoples. Therefore, special training and education are needed for Indigenous community leaders who meet the requirements so that they can assist in fulfilling the legal needs within their customary environments. It is hoped that with these strategies, the criminalization of Indigenous Peoples can be minimized, and the prominence of customary courts can be further established [30].

5. CONCLUSION

Indigenous law in Indonesia plays a crucial role in reflecting the characteristics, local values, and wisdom of the community. However, the recognition of indigenous law within national law remains ambiguous, with the potential for overlaps and a lack of clarity regarding the binding force of indigenous courts in legislation. This results in legal uncertainty about the decisions made by indigenous courts. The legal uncertainty that arises leads to a failure to fulfill the principle of "ne bis in idem," resulting in negative consequences for the existence of indigenous courts in Indonesia. This underscores the urgency of reconstructing the judicial system in Indonesia to prevent the marginalization of indigenous law.

In integrating customary justice into the existing legal system, the government needs to acknowledge customary courts as part of the judiciary system with explicit judicial authority. To protect the legal rights

of indigenous communities, the approval of the Draft Law on Indigenous Communities is necessary. In its implementation, collaboration between law enforcement authorities and indigenous communities is required to resolve customary cases. To achieve this goal, a comprehensive understanding of customary law from both sides is needed, necessitating further socialization and education. Due to the limited access and infrastructure for the majority of indigenous communities, the government's attention is needed to support efforts to expand access to legal assistance provided by Perhimpunan Pembela Masyarakat Adat Nusantara (PPMAN). Indigenous communities should also actively participate in the formation of laws related to customary law.

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