

Creating Synergy between Restorative Customary Law Values and the Retributive National Legal System

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Abstract. Indonesia, as a pluralistic country, has two legal systems that operate side by side: customary law and national law. Customary law, which is restorative in nature, grows from local values and traditions, emphasizing deliberation, restoration, and social harmony. On the other hand, national law, which is retributive in nature, emphasizes legal certainty, strict sanctions, and the protection of individual rights. The objective of this study is to analyze the differences in the characteristics of customary law and national law and to examine the opportunities and mechanisms for creating synergy between the two. This study employs a normative legal method based on literature review to obtain secondary data and legal materials categorized according to specific criteria. Constitutional recognition of customary law communities and the application of restorative justice principles in several regulations indicate opportunities for the formalization of customary law within the national legal framework. The results of the study indicate that synergy between customary law and national law can be achieved through formal recognition, the adaptation of customary law principles within the judicial system, and a contextual and participatory approach. This synergy is important for creating a legal system that is not only legalistic but also reflects the social and cultural values of Indonesian society. Proper integration will strengthen the legitimacy of the law, enhance the effectiveness of conflict resolution, and maintain social harmony amid the challenges of modernization.

Keywords: Customary Law; National Law; Restorative Justice; Retributive Justice.

1 Introduction

Indonesia is a country that adheres to a system of legal pluralism, where various forms of legal systems coexist, including national law and customary law. Customary law is a normative system that has grown and developed organically from the lives of local communities, rich in local wisdom and restorative principles. Customary law does not solely focus on punishment but places greater emphasis on restoration, consultation, and

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reconciliation among conflicting parties. This approach reflects a form of justice that is participatory and contextual, highly relevant in communal societies such as those found in many regions of Indonesia.

Customary law is a set of values that are alive and evolving within a community. Although most customary laws are unwritten, they have a strong binding force within the community. There are specific sanctions imposed by the community for violating customary law. Customary law that is deeply rooted in a community with a strong traditional culture is particularly significant [1]. Customary law is the law that governs how individuals behave, as well as the relationships, customs, or manners that are truly present in community life, and which establishes penalties for violations committed by the traditional government [2].

The existence of customary law constitutes a unified body of legal substance. Customary law itself must be given a proper place in the study and development of legal materials that are consistent with the diversity of ethnic groups and cultures in Indonesia. Customary law, philosophically speaking, is the fundamental values of indigenous communities that are recognized as true and serve as guidelines in the lives of the indigenous communities concerned [3]. Customary law grows and develops within communities, and is passed down from generation to generation by the descendants of those communities [4].

One of the main characteristics of customary law is its flexibility and adaptability to changing times without abandoning its basic principles. Values such as deliberation, mutual cooperation, and respect for collective rights are the main pillars in resolving various social issues. The concept of family dispute resolution, for example, aims not only to uphold justice but also to restore relations between the disputing parties. Thus, customary law not only regulates but also strengthens social bonds and regulates behavior in society [5].

The existence of customary law also reflects respect for cultural diversity in Indonesia. Each region has its own unique customary law, tailored to local social, geographical, and cultural conditions. Customary law has unique elements, characteristics, and scope of application [6]. Although they differ, universal values such as justice, wisdom, and respect for humans and nature remain the common thread that unites them. This shows that customary law is not only a set of rules but also a guardian of harmony in a pluralistic society. With the challenges of modernization and globalization, preserving the values of customary law has become increasingly important in the modern world. Customary law can evolve in line with the needs and developments of the times [7], but positive law still functions as a complement, especially in resolving conflicts and preserving cultural identity.

On the other hand, Indonesia's national legal system is based on positive law, which is retributive in nature. In this approach, justice is achieved through the imposition of appropriate punishment for violations of the law, with strict and formal procedures. This approach emphasizes legal certainty and the protection of victims' rights and social order. However, in practice, the retributive approach is not always effective in resolving relational or socio-cultural conflicts, especially in communities that still uphold the values of family and deliberation.

The fundamental differences between the restorative approach in customary law and the retributive approach in the national legal system raise important questions about the possibility and means of synergizing the two. On the one hand, it is important to preserve the noble values of customary law, which have proven capable of creating social harmony. On the other hand, the national legal system must continue to guarantee justice and the protection of universally applicable human rights. The greatest challenge is how to create a healthy space for interaction between the two systems without negating each other.

The research gap arises because previous studies tend to discuss only one system separately, either customary law or positive law, without examining in depth the mechanisms for integrating the two within the framework of Indonesian legal pluralism. There is still a lack of research that outlines an effective model of synergy between customary law and

national law, particularly in handling cases with socio-cultural dimensions. Therefore, this study aims to fill this gap by comprehensively analyzing the potential, challenges, and formulation of the integration of customary law and national law that can run harmoniously without negating each other.

2 Methods

This study uses a normative legal research method or literature research, which is research based on the study of legal materials as primary data. According to Soerjono Soekanto, normative legal research is conducted by examining literature or secondary data, which includes primary legal materials, secondary legal materials, and tertiary legal materials [8]. Primary legal materials consist of relevant legislation and court decisions, while secondary legal materials include literature, books, scientific articles, and previous research results. Tertiary legal materials are legal dictionaries, encyclopedias, and indexes that provide guidance or explanations on primary and secondary legal materials. The approaches used include the statute approach to examine positive legal provisions, the conceptual approach to examine legal doctrines and theories, and the case approach to analyze relevant court decisions. The collection of legal materials is carried out through literature review by inventorying, classifying, and categorizing materials according to the research problem, then analyzed qualitatively through grammatical, systematic, and teleological interpretation to produce logical, consistent, and scientifically accountable conclusions.

3 Results and discussions

3.1 Fundamental Differences between Customary Law and National Law

As a pluralistic country governed by the rule of law, Indonesia faces unique challenges in integrating two legal systems with different characteristics. Customary law, which has grown out of the communal values of local communities, offers a restorative approach based on local wisdom, while national law, which is retributive in nature, emphasizes the enforcement of norms through standardized sanctions.

The application of customary law is recognized by various legal instruments, such as Article 18B paragraph (2) of the 1945 Constitution, Article 5 paragraph (3) of the Emergency Law of the Republic of Indonesia Number 1 of 1951. This recognition ensures that indigenous communities have the right to preserve their culture and the right to a fair trial in accordance with the law, as stated in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) [9]

The settlement of criminal cases through customary law is generally family-based and focuses on restoring social relations within the community [10]. Customary law and customary justice play a very important role in maintaining social balance in indigenous communities. Unfortunately, to date, customary justice is only recognized materially, not formally. This means that the values of customary law can still be taken into consideration by judges in deciding a case, but there are no formal regulations that specifically govern the mechanisms and procedures of customary justice within the national legal system [11].

The application of restorative justice is evident when the resolution involves the perpetrator and victim as competent parties in the case. The parties involved strive to engage in dialogue and hold meetings to resolve the matter through deliberation and consensus, thereby reaching an agreement. The resolution of customary offenses varies among different tribes in terms of mechanisms and methods, but generally shares the same objective: to restore the disrupted cosmic order and reestablish harmony and balance in community life [12].

The application of restorative justice in customary law allows for faster conflict resolution and reduces pressure on the formal judicial system. Customary law offers flexibility that allows for compromise between the parties involved, especially in cases involving families and minor conflicts in the community.

According to I Made Widnyana, the philosophy of customary law is to restore balance in society, distortions, conflicts, and tensions, thereby creating a peaceful and harmonious atmosphere in community life and removing the stain caused by criminal acts. Apologizing is a customary obligation that can be imposed on someone who has committed a certain wrongdoing with the aim of bringing about peace between the perpetrator and the victim in order to reduce or avoid prolonged hostility, thereby ensuring a peaceful and harmonious life in society.

Meanwhile, national law adheres to retributive justice, where the approach to punishment focuses on imposing penalties commensurate with the severity of the crime. This approach emphasizes the importance of justice and equality in the application of the law. The main objective of retributive justice is to deter offenders and prevent future crimes.

According to Jeremy Bentham, retributive justice is an essential concept in law. He argued that the main purpose of punishment is to provide an appropriate response to a person's criminal actions. In his view, punishment must be proportional to the level of crime committed, so that the perpetrator can feel the negative impact of their actions. Bentham also emphasized that in the application of retributive justice, the principle of legal certainty is very important. This means that punishment must be clear and predictable, so that everyone can understand the consequences of their criminal actions. This is considered a step to prevent crime by deterring perpetrators.

Appropriate punishment can deter perpetrators, causing them to think twice before committing similar acts in the future. In this case, retributive justice acts as a crime prevention tool by imposing serious consequences on perpetrators. This provides legal certainty and sends a message to the public that the national criminal justice system is committed to protecting them from crime.

3.2 Synergy Between Customary Law and National Law

The legal system in Indonesia reflects the cultural diversity and long history of this nation. Indonesia has two main legal systems, namely customary law and positive law. The relationship between customary law and positive law is not only relevant in an academic context, but also has a significant practical impact on various aspects of life, including public policy-making.

In terms of its sources, law in Indonesia originates from two sources, namely law from colonial law (Dutch), such as the Criminal Code, the Civil Code, and other colonial regulations that are still in force today. In addition, there is law that has developed in Indonesia itself, namely customary law and laws and regulations formed after independence. These laws, whether from the colonial era or those established after independence, are applied to all citizens of the Indonesian State and classified as National Law. In the current reality of the Indonesian State, both National Law and customary law are applied to Indonesian society [13].

Customary law is an unwritten and uncoded set of rules that are nevertheless obeyed within a community because they carry specific sanctions for non-compliance. In a legal state, however, the principle of legality applies, which states that there is no law except that which is written in the law, in order to ensure legal certainty. However, law and customary law essentially have the same purpose, namely as norms that regulate human behavior and conduct, namely the creation of order in the social order.

As demonstrated in the case of Aceh, a restorative approach is employed in resolving conflicts based on local values. This dispute resolution is highly influenced by the local wisdom long upheld by the Acehnese community, reflecting existing traditions and norms. Furthermore, Adat Sitohap refers to the traditions of the Batak community, which emphasizes dialogue to resolve disputes. The term "sitohap" means prioritizing deliberation and mutual understanding as the basis for problem solving. Meanwhile, the application of restorative justice in Yogyakarta, there is the practice of "neighborly harmony" that involves community leader community members in conflict mediation. Values such as mutual assistance, consultation, and consensus, which form the foundation of restorative justice, are highly relevant to Indonesian culture that prioritizes harmony and togetherness. These practices demonstrate that Indonesian society has great potential to integrate restorative justice into the formal criminal justice system. When a dispute arises, the parties involved are usually invited to gather in a deliberative forum. This process involves open dialogue in which each party can express their views and feelings.

Restorative justice in Aceh customary law is a conflict resolution mechanism that prioritizes the restoration of social relations through deliberation and peace, involving perpetrators, victims, families, and the community in a dialogue process at the village level. This process is led by the Keuchik together with traditional and religious leaders, referring to Qanun Aceh No. 9 of 2008 and Qanun No. 10 of 2008, and based on Islamic principles such as tahkim (arbitration) which emphasizes justice ('adl) and wisdom (hikmah). Minor cases, such as theft by children, are resolved through deliberation at the village hall or community center, with agreements that may include compensation, traditional apologies (peusijuek), or educational sanctions such as community service, while serious cases remain the jurisdiction of formal courts. Despite its advantages in terms of speed, low cost, and maintenance of social harmony, this approach faces challenges such as the limited capacity of village heads (keuchik), potential unfairness in deliberations, and the need for synchronization with national law to avoid overlapping authority. A practical example is the resolution of a chicken theft case involving a child through a deliberation process that resulted in the return of losses, an apology, and educational sanctions, demonstrating how Aceh's customary restorative justice not only resolves legal issues but also restores social relationships and protects the future of children, while reflecting a unique blend of Islamic values, local wisdom, and restorative justice oriented toward healing.

Unlike the oral traditions of the Dayak Kanayatn, customs are also part of their way of life. These customs cover all aspects of life and influence the community. They regulate how people interact with each other. When the Dayak Kanayatn violate customary law, they feel more ashamed than when they violate government regulations. This is because customs are universal and binding rules inherited from their ancestors. Disrespecting customs is considered "uncivilized." If the Dayak Kanayatn people are uncivilized, they are no longer considered Dayak. This is why oral traditions and customs are highly respected and upheld in their society. The customary procedures for punishment and sanctions for mistakes committed by an individual or group of people in the relevant customary community. For example, there are *customs such as bata api and balaki-babini sakamarkapala*. Punishments or sanctions are imposed in the form of goods (plates, machetes, gongs) and animals, especially chickens and pigs. However, this has begun to change with the use of money to replace goods. Legal matters in society can be resolved through customary law as long as there is agreement between both parties. They prefer to resolve disputes or legal issues through customary law by conducting customary ceremonies and imposing customary fines, which vary depending on the severity of the offense and the consequences of the legal incident.

Compared to customary law in other countries, such as South Africa, they also recognize customary law through the 1996 Constitution. Article 211 of the 1996 Constitution

recognizes customary law and requires South African courts to "*apply customary law where it is applicable, subject to the Constitution and any legislation that specifically regulates customary law.*" Through the 1996 Constitution as part of the country's legal system, there are several interesting aspects of customary law in South Africa. Customary law has gained formal recognition. This is evident from the fact that customary law is recognized as equal to national law, provided it does not conflict with constitutional principles, such as human rights. Additionally, it is integrated into the court system. Customary Law in Canada (*First Nations*), Canada recognizes the customary law of *First Nations* (Indigenous Peoples) as part of their special rights. Its characteristics include that the customary law of *First Nations* is often associated with their rights to land and natural resources. There are special provisions that allow indigenous communities to exercise legal autonomy within certain limits. Although recognized, the application of customary law often conflicts with federal law, particularly regarding the management of natural resources, similar to issues in Indonesia.

Customary law in New Zealand (Maori), known as *Tikanga Maori*, has strong recognition within the New Zealand legal system. In many cases, Maori customary law is used as the basis for court decisions, particularly in land and cultural disputes. The Treaty of Waitangi, which serves as the legal foundation between the New Zealand government and the Maori people, provides a legal framework protecting customary rights. Maori customary law is directly integrated into national legislation. This differs from Indonesia, where customary law is often subordinate to national law. Unlike customary law in Indonesia, Japan does not have formally recognized customary law, but traditional values such as *Giri* (moral obligation) and *On* (debt of gratitude) continue to influence legal and cultural practices. Customary traditions in Japan function more as social norms than formal legal norms. This means that customary traditions do not conflict with state law, but rather complement it. In the state constitution, the 1945 Constitution (Article 18B Paragraph (2)) explicitly recognizes and respects the existence of customary law communities and their traditional rights. This demonstrates that customary law has obtained constitutional legitimacy within national law. However, this recognition is also based on criteria of relevance to societal development and the principles of the Unitary State of the Republic of Indonesia, indicating an effort to ensure that Customary Law remains contemporary and aligned with the broader national legal framework.

Law No. 27 of 2007 Jo. Law No. 1 of 2014 Article 1 Paragraph (33) provides an official definition of Customary Law Communities as a group of people who have a strong bond with their ancestors and have customary governance structures. Thus, this recognition is not limited to customary norms but also encompasses more complex governance structures and social relationships.

Customary law dynamically interacts with other legal systems. Efforts to formalize customary law in the form of state law and state recognition of customary law through various regulations [14] are examples of this, such as Article 2 of the National Criminal Code, which will come into effect in 2026, recognizing the laws that exist within society.

The integration of customary law into Indonesia's national law reflects respect for the cultural diversity and traditions of the nation. Furthermore, through various legal sources and historical interpretations, we can see how customary law, despite its deep roots in local traditions, must be aligned with national legal principles to remain relevant and in line with the times. This integration demonstrates how Indonesia, as a nation with rich cultural diversity, strives to unite tradition and modernity within a coherent legal framework.

Customary law is a resource used to build national law, with the caveat that this does not mean that the integrity of customary law is preserved in national law. In customary law and national law, there are different binding forces because, in reality, there are differences in form and aspects, even though they are constitutionally the same. National law that is not

based on customary law does not have a strong social foundation and will therefore be ineffective, resulting in a decline in the authority of the law, including its enforcers.

Synergy between customary law and national law is crucial in the context of Indonesia's pluralistic society [15]. Customary law serves as a living, flexible, and responsive social mechanism that aligns with local values and socio-cultural conditions. Meanwhile, national law, with its formal legal approach, provides legal certainty and protection of human rights. Both have strategic positions that can complement each other, especially in achieving substantive justice rooted in the local context. Ultimately, the synergy between customary law and national law is not merely a legal compromise but a fundamental necessity for creating a legal system that truly reflects the nation's identity. By adopting an approach that respects cultural complexity while adhering to principles of justice, Indonesia can create a unique and effective model of legal integration. This synergy will not only enrich the national legal heritage but also strengthen Indonesia's legal identity amid the globalizing currents.

4 Conclusion

The synergy between the restorative values of customary law and the retributive national legal system is a necessity in the context of legal pluralism in Indonesia. Customary law, with its consultative, restorative, and socially harmonious approach, is capable of providing contextual and participatory solutions to social conflicts, while national law guarantees legal certainty, formal justice, and the protection of human rights. The differences in their characteristics are not meant to be opposed but rather integrated into a more inclusive national legal framework through constitutional recognition, the establishment of regulations accommodating customary courts, and the integration of local values into legal policies. Thus, this integration constitutes a strategic step toward strengthening Indonesia's legal system to be just, culturally sensitive, and responsive to the evolving social dynamics. The findings highlight that integrating the restorative values of customary law with the retributive national legal system is essential for strengthening Indonesia's legal pluralism. While customary law offers consultative, restorative, and socially harmonious approaches to conflict resolution, national law ensures legal certainty, formal justice, and human rights protection; thus, their synergy must be seen as complementary rather than conflicting. Future research should focus on developing locally grounded legal integration models supported by academic inquiry and the active participation of indigenous communities. Practically, policymakers should advance constitutional recognition of customary law, establish operational regulations to accommodate customary courts, and provide training for law enforcement on restorative justice principles. By ensuring this synergy is substantive rather than symbolic, Indonesia can create a legal system that is inclusive, culturally sensitive, and responsive to evolving social dynamics, while promoting justice, harmony, and democratic rule of law.

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