

The Character of Peace in Judges' Customary Criminal Receptions as Restorative Justice

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Abstract

The phrase "restorative justice" originated in Indonesia due to the assumption that it primarily stems from the beliefs of indigenous people, which have been there for a very long period and have evolved with successive generations into customary law. The Judicial Power Law's Article 5 paragraph 1 states that it is the responsibility of the judge to research, uphold, and understand societal norms on justice and the law. In this study, the authors will look at how judges apply restorative

justice while interpreting regional customary law to make sure it does not clash with the law by learning the difficulties judges encountered while recognizing this customary law. Normative juridical in nature, the author's research methodology draws from primary, secondary, and tertiary legal sources. According to research, district court judges can play a major role in bringing restorative justice within the framework of customary criminal law by putting a high value on reconciliation, applying a mediation approach, enforcing restorative sanctions, providing education, and counseling, and having a thorough understanding of customary law. One could argue that victims' interests are not adequately represented by the country's current criminal justice system. Judges' acceptance of customary law in their rulings is hampered by several factors, including their ethnicity, educational background, social background, and the circumstances of the hearing.

Keywords: *Customary, Law, Judges*

Introduction

Almost all countries in the world support the idea of the rule of law, which is a universal concept.¹ One of the characteristics of a rule of law is the constitutional protection of human rights with legal guarantees for their enforcement through a fair process. Judges as enforcers of justice in their decisions must also pay attention to a written and unwritten law, such as customary law, in order to provide protection for the human rights of indigenous peoples to implement respect and protection for human rights as an important characteristic of a democratic State of Law.

Judges are supposed to administer judicial power in line with the prevailing legal principles, and as such, they are constrained by legal principles as specified by state law in their role as law enforcement

¹ Fikri Hadi, "Negara Hukum Dan Hak Asasi Manusia Di Indonesia", *Wijaya Putra Law Review* 1, no 2 (2022), <https://doi.org/10.38156/wplr.v1i2.79>.

authorities in conflict settlement.² The formal, inflexible, and binding nature of procedural law is another way that judges see it; both the parties and the judge are obligated to follow the rules of process in court. Article 130 Herzien Inlandsch Reglement (HIR) / 154 Rechtreglement voor de Buitengewesten stipulates, among other things, that the court is required to settle the dispute between the parties (RBg). Since the concept of peace is particularly governed by Article 130 HIR, the parties in this situation should first resolve their concerns by amicable means. The parties may next ask the judges' panel to include the details of the settlement in a deed called a deed of peace, assuming an agreement is reached. This has been achieved between the two parties in the settlement. When peace returns, the case ends and the backlog of cases in court is reduced, allowing for the achievement of the simple speed and low-cost principle.³

The aim or purpose of conflict reconciliation activities must be peace.⁴ In accordance with Supreme Court Regulation Number 1 of 2016 regarding Mediation, which establishes guidelines for using mediation as a step in the legal procedure to settle civil disputes, mediation is a normatively acceptable means of achieving peace. The judge's judgment is deemed void if the mediator is disregarded or fails to implement the mediation process. As a result, the judge must indicate in his decision-making process that the matter in question has been resolved through mediation and provide the name of the mediator.⁵ In actuality, consensual deliberation to promote peace was the implementation of the noble value of the Basic Philosophy of the State

² Sakirman, "The Law Interpretation Towards the Double Position of Judges in Indonesia", *Jurnal Konstitusi* 14, no. 1 (2017), <https://doi.org/10.31078/jk1419>.

³ Hazar Kusmayanti, Agus Mulya Karsona, and Efa Laela Fakhriah. "Penyelesaian Perselisihan Hubungan Industrial Melalui Putusan Perdamaian di Pengadilan Hubungan Industrial Pengadilan Negeri Padang Kelas I (A)", *Jurnal Adhaper* 6, no. 1 (2020), <https://doi.org/10.36913/jhaper.v6i1.100>.

⁴ Ichsan Malik, *Resolusi Konflik Jembatan Perdamaian*, (Jakarta: Kompas Gramedia, 2017), 46.

⁵ Syahrizal Abbas, *Mediasi Dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional*, (Jakarta: Kencana, 2011), 311.

of Pancasila even before it was codified (win-win solution). This is specifically mentioned in Pancasila's Fourth Precept.⁶

As previously mentioned, peace mechanisms are frequently employed in settlements pertaining to civil cases to facilitate the reconciliation of the involved parties, facilitate a family-style resolution of the conflict, and ultimately result in the payment of compensation to the party who has been wronged. Given the existence of criminal law and its disciplinary methods, which include the death sentence, jail, confinement, and fines, it is safe to say that such a pattern of settlement is unknown in the field of criminal law. Because civil law exists in the first place, it does in fact hint at a pattern of settlement.

Along with civil law, constitutional law, and state administrative law, one component of positive law that primarily serves to preserve and protect the public interest—in this case, society—is criminal law. Given the purpose of the sentence, every crime that is imposed on an individual for the crime he committed must have a rationale to declare that the individual is susceptible to criminal punishment. According to Romli Atmasasmita, the application of criminal procedural law has not taken victims' interests into account and still favors punishing offenders (or those who share their mindset). However, the primary goal of Law Number 8 of 1981 regulating the Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure) is to protect the dignity and dignity of a suspect, accused, or defendant.⁷

The Code of Criminal Procedure's concept of balance states that in addition to the accused's rights and interests, other people who have been damaged by the accused's actions—especially the victim—must also be considered. The Criminal Procedure Code, Sections 98 through 101, thus provides support for the process of merging cases involving compensation claims. A person will choose one law—or combine several—that enables him to obtain resources or further his interests when engaging in legal processes. Reconciliation efforts between the

⁶ Efendi Susanto, "Sila Ke-Empat Pancasila dan Iklim Demokrasi Indonesia Saat Ini, Masalah-Masalah Hukum", *Masalah-Masalah Hukum* 50, no 1, (2021), 10.14710/mmh.50.1.2021.84-93.

⁷ Romli Atmasasmita, *Sistem Peradilan Pidana di Indonesia Setelah Berlakunya Undang-Undang No. 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana*, dalam *Bunga Rampai Hukum Acara Pidana*, (Bandung: Penerbit Binacipta, 1983), 2.

perpetrator and the victim or heir are one type of conflict resolution strategy used in criminal cases.

Customary institutions have a significant and deciding role as an alternative to dispute resolution in communities that still adhere closely to customary standards in daily life. These laws are either written or unwritten, and they apply to both public and private law on a national and regional level⁸, considering that customary law places little value on distinctions between public and private law. This reality is evident in the way that police agencies really operate. For instance, in many Indonesian regions, criminal cases that might otherwise have been prosecuted are dropped in favor of customary institutions because one important possibility for resolving criminal matters is through customary institutions. According to a judge's ruling, Indonesian law should be a constellation of modern and traditional laws, subject to pluralism. The purpose of both laws is fairness, which cannot be completely guaranteed in the drafting process.⁹

This is because a criminal settlement's cash and obvious nature can have an instantaneous effect on all parties involved. For instance, inhabitants of Medan City were taken aback by a dispute between e-parking officials and Central Aceh Regency residents in early May 2022, as the latter threatened to break Bobby's neck (Mayor of Medan). Chief of Police Regulation No. 8 of 2021 concerning Handling Criminal Acts Based on Restorative Justice provides that the official prerequisites for a peaceful settlement have been satisfied to proceed with the judicial process against the threat's perpetrators.

Other customary criminal cases being handled by the Lubuk Pakam District Court Case No. 255/Pid.Sus/2022/PN.Lbp with Soraya Putra alias Mpuh Sembiring as the defendant and the case of Electronic Information and Transaction Law No. 11 of 2008. Soraya Putra is alleged to have committed the crime of hate speech in the form of prohibited words, behavior, writings, or performances that can trigger acts of violence against Hendro Saputro on social media. This hate

⁸ T Raharjo, "Mediasi Pidana Dalam Ketentuan Hukum Pidana Adat," *Jurnal Hukum Ius Quia Iustum* 17, no. 3, (2010), <https://doi.org/10.20885/iustum.vol17.iss3.art8>.

⁹ Laila M Rasyid, "Pengakuan Terhadap Hukum Adat Dalam Kajian Putusan Kasus Tanah Hibah Adat Di Pengadilan Sigli", *Riau Law Journal* 1, no. 1, (2017), <http://dx.doi.org/10.30652/rlj.v1i1.4177>.

speech was eventually reported to the police by Hendro as the caretaker of Mount Sinabung. This case should have been resolved through a restorative justice approach at the police investigation stage and up to the Public Prosecutor, but the handling of this case also went through the trial process. The judge is expected to be able to give the fairest possible decision and pay attention to the customary laws involved in this case. If this verdict does not pay attention to customary law, there will be the potential for conflict to break out because the case is not limited to the dissemination of hate speech content on social media. However, its essence has touched the noble values of the life of indigenous peoples, especially the Karo indigenous people.

Research conducted by researchers on the reception of customary law in court judges' decisions to uphold restorative justice has never been carried out by any researcher. The research that some previous researchers have done includes Nyoman Serikat Putra Jaya, who looked at how Indonesian criminal law developed in an attempt to create the desired Indonesian society by recognizing and upholding customary law in the Criminal Code Bill and creating a comprehensive and integrated legal system.¹⁰ Furthermore, research was conducted by Jefri Eriks Dimalouw to find out what sanctions are imposed by the customary chairman in Salio Village and Selpele Village in Raja Ampat Regency and the process of resolving cases that are included in the crime but resolved by customary law, and what sanctions can provide to the perpetrators of criminal acts in the Kawei Tribe.¹¹ The last research was conducted by David David, Oheo K. Haris, and Handrawan Handrawan, whose research objectives were to analyze the enforceability of customary law in the settlement of customary criminal cases to examine criminal law policy with respect to the court's decision-making respecting customary law.¹²

¹⁰ Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional", *Masalah-masalah Hukum* 45, no. 2 (2016), 10.14710/mmh.45.2.2016.123-130.

¹¹ Jefri Eriks Dimalouw, "Penerapan Sanksi Adat Terhadap Perbuatan Pidana Yang Dilakukan Oleh Masyarakat Suku Kawei Di Kabupaten Raja Ampat", *Jurnal Justitia* 9, no. 2, (2022), <http://dx.doi.org/10.31604/justitia.v9i2.684-693>.

¹² David David, Oheo K. Haris, and Handrawan Handrawan, "Penguatan Putusan Hukum Adat Melalui Penetapan Pengadilan dalam Penyelesaian Perkara Tindak

Of course, these three studies are very different from the research that researchers will analyze. How does the legal system then acknowledge customary law in a decision so that it does not conflict with regional customary law while utilizing this restorative justice approach? What challenges did the trial judge face in this application of customary law? The author of this study will attempt to clarify and evaluate the responses to the first two questions.

By analyzing theories, conceptions, legal principles, laws, and regulations pertaining to this research, the normative juridical approach technique of research is employed. It is based on the primary legal material according to analytical descriptive research guidelines. The methods of collecting data: literature reviews are used to get secondary data, such as legal practitioner and expert opinions, laws and regulations, and jurisprudence while interviewing relevant agencies is used to obtain primary data. To get primary data, the data collecting method employs interviewing procedures with pertinent agencies, such as district court judges and established leaders. Furthermore, this study used literature reviews to gather secondary data from sources such as laws and rules, expert and practitioner legal opinions, and relevant jurisprudence.

How a Judge Comes to Accept Customary Criminal Law in Order to Implement Restorative Justice

Restorative justice in criminal law enforcement is a critique of the current system, known as "*retributive justice*," which views the victim of the crime as having to endure pain. Managing criminal cases from a restorative justice perspective offers an alternate viewpoint for understanding and dealing with criminal offenses. Similar to how criminal law is viewed generally, restorative justice views crime as an attack on individuals, relationships, and society. In the restorative justice approach, the state is not the main victim of crime, in contrast to the present criminal justice system. Therefore, the offense entails an obligation to restore the connection that it damaged.¹³

Pidana Umum”, *Halu Oleo Legal Research* 4, no. 1 (2022), <http://dx.doi.org/10.33772/holresch.v4i1.25163>.

¹³ Lisnawaty W. Badu and Julisa Aprilia Kaluku, “Restorative Justice in The Perspective of Customary Law: A Solution to The Settlement of Narcotics Crimes

Theoretically, criminal activities are defined without regard to their moral, social, or economic implications. The concept of restorative justice is not new; in fact, it may have existed since the inception of criminal law. The primary means of dealing with criminal matters is through the application of restoration justice. Restorative justice is gaining traction in Indonesia as an alternative to traditional court dispute resolution, with a focus on repairing the relationships between victims, offenders, and society.¹⁴

In contrast, the concept of restoration justice originated in Indonesia, where it is believed that restorative justice is essentially derived from the ideals of the indigenous peoples who have long since existed and have been ingrained in customary law through the generations. One idea that is related to restorative justice is the idea of Indonesian customary law serving as a platform for institutions of customary justice. In Indonesia, the features of regional customary law typically provide considerable support for the use of restorative justice. The overall features of Indonesian customary law, its opinions on customary offenses and infractions, and the model of resolution procedures it provides all demonstrate this.

The government recognized customary courts' authority legally. According to Jimly Ashidique, legal protection for customary law societies includes the following: (1) For a community governed by customary law to be recognized, it must uphold its traditional rights; (2) the units of recognized customary law communities in Indonesia are the alliances among these communities; (3). Even yet, communities under customary law have recognized units; (4). The number of indigenous peoples in their Lebensraum is also known.¹⁵

This is evident from the following Indonesian legal sources: According to Article 18 B (2) of the Second Amendment to the 1945

Committed by Children”, *Jambura Law Review* 4, no. 2 (2022), <https://doi.org/10.33756/jlr.v4i2.11664>.

¹⁴ Dina Desvita Pramesti Putri, “Ounding the Justice for Child: Does Restorative Justice Matters?”, *Journal of Law and Legal Reform* 4, no. 3 (2023), <https://doi.org/10.15294/jllr.v4i3.68106>.

¹⁵ Satria Unggul Wicaksana Prakasa, et al., “Forestry Sector Corruption and Oligarchy: Lesson Learn from the Laman Kinipan Indigenous People, Central Kalimantan”, *Unnes Law Journal* 8, no. 1 (2022), <https://doi.org/10.15294/ulj.v8i1.55904>.

Constitution, customary law is recognized by the state if it is still in effect and is still required by the community. This provides legal certainty for all applications of the usual criminal penalties found in customary law. Act No. 1 Drt/1951 Concerning Measurements In the meantime, to coordinate the coherence of the civil courts' procedural framework and power structure. The Criminal Code's formulation of Article 5 paragraph (3) sub-states that customary offenses that are categorized as small crimes and lack regulations face a three-month jail sentence and/or a fine of five hundred rupiah. For serious customary offenses, the criminal threat is ten years instead of the usual punishment, which is not carried out by the offender receiving the term.

An essential function of customary criminal law is to preserve traditional and cultural values in a society. District court judges play a vital role in implementing the restorative justice idea in the customary criminal law system. The legal concept of restorative justice prioritizes rapprochement and reconciliation over punitive measures. In addition to the following: "The Law on the Number of Justice's article 5 paragraph 1 states that judges and constitutional judges have a duty to learn about, observe, and comprehend the legal principles and sense of justice that permeate society. This implies that judges must be familiar with and investigate customary law rules.¹⁶ To accomplish this in the framework of customary criminal law, judges must actively participate in formulating customary criminal law fulfil the following criteria:

1. Comprehensive Knowledge of Customary Criminal Law

Judges in district courts are first and foremost responsible for possessing a thorough understanding of customary criminal law. Scholars of customary law have contended that the decisions made by customary judges and administrators constitute customary law. By applying general customary law rules to specific occurrences, customary judges and officials resolve disputes. The Law on Judicial Power mandates that judges investigate, comprehend, and uphold the legal principles and feeling of justice that exist within the community following the dissolution of customary courts.

¹⁶ Putu Eva Ditayani Antari and I Kadek Budiadinata Satriatama Adnyana, "Kewenangan Dan Kekuatan Hukum Putusan Yang Dikeluarkan Oleh Kerta Desa Adat Di Bali", *Refleksi Hukum Jurnal Ilmu Hukum* 1, no. 2 (2023), <https://doi.org/10.24246/jrh.2023.v7.i2.p187%20-%20210>.

Judges must therefore be familiar with the rules, conventions, and guidelines that define a community's customary criminal law. Understanding what constitutes transgression in customary circumstances and the general procedures followed in traditional conflict resolution are the parts of it.

2. The judge needs to be qualified to facilitate conflict resolution and mediation.

Judges of district courts ought to assist parties involved in disagreements by serving as mediators. In contexts with customary criminal law, mediation is a crucial instrument for achieving restorative justice. Judges can assist disputing parties in getting together, listening to one another, and coming to arrangements that provide compensation for losses resulting from breaking conventional criminal law as discussed in the effectiveness of court mediation as per the Legal Culture theory of Lawrence M. Friedman. It also needs a public understanding of what social peace entails, as opposed to merely being bolstered by a few regulations on professional mediation and its application (restorative justice).¹⁷

3. Utilizing Restorative Sanctions

In addition to that, the court may include restorative consequences in its decision. The guilty parties may be required to participate in initiatives aimed at fostering harmony and balance among indigenous peoples because of these sanctions. Daly clarified that the Umbreit concept, which aims to restore losses and damages brought about by criminal activity, needs to be backed by the idea of restitution, which aims to compensate victims of criminal activity for losses and damages sustained and promote peace.¹⁸ Tony Marshal continued, saying that restorative justice is basically the idea of solving a particular crime that entails all relevant parties cooperating to find solutions as well as finding solutions for handling the circumstances that arise after the crime's

¹⁷ Haeratun and Fatahullah, "Efektivitas Mediasi Sebagai Alternatif Penyelesaian Perkara Perceraian Di Pengadilan Agama", *Batu Tulis Civil Law Review* 3, no.1 (2022), 10.47268/ballrev.v3i1.930.

¹⁸ Rufinus Hotmaulana Hutauruk, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restorative, Sebuah Terobosan Hukum*, (Jakarta: Sinar Grafika 2019), 4.

emergence and how to overcome its implications moving forward.¹⁹ Judges may, for instance, mandate community service or restitution for victims as restorative measures.

4. Customary legal education and counseling are required of judges.

Judges in Indonesia must use the norms and principles of customary law as consideration for their decisions if the legislation as the main source of law has not regulated a particular legal event. The Supreme Court's jurisprudence related to customary law issues is still scattered and covers various aspects of social life. In this regard, it is necessary to provide further education on the study of customary law in Indonesia for court judges.²⁰

The Supreme Court has mandated that district court judges, particularly those who have recently entered the legal profession, participate in special education courses focused on customary law. The goal of these courses is to help judges better comprehend customary norms and the social implications of their decisions. In the process of rehabilitation and repair, this is a crucial stage.

5. Participation in the Community

Communities must be involved in the process of resolving disputes and deciding on customary criminal cases. Judges in district courts ought to make sure that Native American communities are actively involved in choosing how to address their own issues. This involves allowing customs, cultures, and values to be considered during the legal process.

It is essential to include communities in customary criminal rulings and the dispute settlement procedure. District court judges should ensure that indigenous communities are actively involved in making decisions about how to handle their own problems. This entails adjusting the legal system to traditional values, culture, and practices.

¹⁹ Hutauruk.

²⁰ Achmad Caesar Luthful Hakim and Sartika Intaning Pradhani, "Penerapan Pendekatan Formalistik dalam Penemuan Hukum Adat Oleh Hakim: Studi Kasus Sengketa Surat Keterangan Tanah Adat di Kalimantan Tengah", *Bhumi: Jurnal Agraria dan Pertanahan* 7, no. 1 (2021), 96-111. DOI: 10.31292/bhumi.v7i1.482.

In communities governed by customary law, the resolution of cases or conflicts is predicated on the community's adopted way of viewing life (*lebensaacbuung*). According to Koesnoe, the philosophy of human existence is the basis of the indigenous peoples' way of life. The traits of indigenous law communities are a result of the way that indigenous peoples view the world, which is based on values, customs, and conventions. Customary law societies are defined by their religious, communal, democratic, and morally grounded nature.²¹

6. Reconciliation

District court judges should prioritize rapprochement and the mending of links between the parties to the dispute when making decisions in matters involving customary criminal law. This could entail traditional mediation or other symbolic actions that stand for harmony and peace. One approach to prison mediation used by the Malay community in the resolution of criminal cases is a model of conflict resolution that focuses on settling disputes amicably and avoiding the worsening of existing situations by trying to keep the atmosphere of peace as much as possible.²²

Challenges to the trial judge's acceptance of customary criminal law in a ruling

The diverse ethnic groups that make up the Indonesian country had their own customs long before they gained independence and even before they formally formed a national legal system. Indonesians of different ethnic groups already had their own customs, which comprised culture, traditions, customary governance structures, and even

²¹ Misnar Syam, Devianty Fitri, Ulfanora, and Nanda Oetama, "Pembuktian Dalam Penyelesaian Sengketa Pada Peradilan Adat", *Unes Journal Of Swara Justisia* 6, no. 4 (2023), 565-575, DOI: <https://doi.org/10.31933/ujsj.v6i4>.

²² Dasrol and Riska Fitriani, "Model Mediasi Adat Dalam Penyelesaian Perkara Pelanggaran Hukum Di Kabupaten Pelalawan", *Jurnal Ilmiah Penegakan Hukum* 9, no. 1 (2022), 10.31289/jiph.v9i1.6697.

customary rules, before the country gained its independence and even before it formally established a national legal system.²³

Customary law refers to the uncodified legal system of the Indonesian people, encompassing customs, government structures, culture, and even a set of customary regulations.²⁴ The uncodified legislation of the Indonesian people is referred to as "customary law."²⁵ Customary law refers to the laws that exist and grow within a society without official codification, encompassing uncodified laws as well. In Christian Snouck Hurgronje work, he stated "[a]ccording to *De Atjehers*, customary law is custom without consequences, whereas customary law is custom with sanctions (reactions)". Normative conventions are those that are based on behavior that is accepted in society and does not carry consequences. The line separating customary law from non-customary law is very hazy.

Customary criminal law is a component of both formal and informal law, and it can be found in both written and unwritten forms in society. The unwritten customary criminal law is present in the thoughts of indigenous peoples and is communicated through customary decisions made by traditional authority, whereas the written customary criminal law is found in a text in the form of legislation. Customary criminal law is derived from codified forms of customary law by state or federal governments and is included in legal products. Even though customary criminal law originated informally, it is a legal system that is recognized by the state or government but exists only in the minds of those who follow it.

Every region has its own Customary Criminal Law, which is based on local norms that are either unwritten or codified. The existence of Customary Criminal Law in a community reflects the life of the community. Apart from the Criminal Code, which serves as a comprehensive framework for criminal law, criminal customary law is

²³ Patricia Pasapan and Juanrico Alfaromona Sumarezs Titahelu, "Denny Latumaerissa, Delik Adat dalam Sistem Hukum Pidana di Indonesia", *TATOHI Jurnal Ilmu Hukum* 2, no. 2 (2022), <https://doi.org/10.47268/tatohi.v2i2.910>.

²⁴ Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat", *Jurnal Hukum PRIORIS* 6, no. 3 (2018), <https://doi.org/10.25105/prio.v6i3.3178>.

²⁵ Tolib Setiadi, *Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan)*, (Bandung: Alfabeta, 2009), 8.

also implemented in specific areas of communal life through the imposition of fines, expulsion from the village, and ex-communication from the community. Society acknowledges that these penalties are just as legitimate as the criminal laws found in the Criminal Code.²⁶

Official law and customary law appeared to be distinct after Indonesia attained independence. Social interactions involve an inextricable relationship between law and society. Customary law is frequently one type of state law because not only it has been recognized by the state but it is also a component of national law. For a state to be considered unitary, the state or government must possess sovereignty and uphold the rule of law (unification). Under the motto "Bhinneka Tunggal Ika," however, the state acknowledges the diversity of conditions in both the national and state lives, including their legal elements. Because of this, Indonesia is unwilling to abandon its conception of legal pluralism (legal pluralism). Thus, there is an intention to keep customary law in place.

The wealth and source of identity of the Indonesian people come from their indigenous knowledge. In social life, society and the law are intricately intertwined. When there is civilization, there is law. As a result, the Rule of Law must govern social life to achieve public order. Both public and private law are covered by written and unwritten laws, which are applicable both nationally and regionally. The Constitution and other laws recognize customary law, which is evidence of this freedom.

These issues will be impacted by the increasing number of judges who adopt customary law, according to the preceding statement:²⁷

1. Due to their direct involvement in the community, judges can study and understand the prevailing feelings of justice and the law, enabling them to make decisions that align with these social norms. Because customary law is incorporated into court decisions, it must be recognized and backed by strong legal precedents, much like living law. Lilik Mulyadi of the North Kalimantan High Court

²⁶ Gerald Liem Imanuel, "Penerapan Hukum Pidana Adat Dalam Hukum Indonesia", *Lex Crimen* 2, no. 5 (2013), <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/3118>.

²⁷ Hilman Panjaitan, "Keberadaan Hukum Adat Dalam Yurisprudensi", *Hukum tô-râ*, 2, no. 3 (2016), <http://ejournal.uki.ac.id/index.php/tora/article/view/1109>.

stated that another consequence of court decisions will be to increase the judges' duty and they have to understand and research the legal norms and values that are present in society. Particularly in a multicultural country like Indonesia where a variety of cultures, customs, and traditions are kept as living laws, they must be cognizant of the society and its situations.²⁸

2. In determining an event in each case, a court will consider relevant facts or events rather than the law.²⁹ The importance of a judge's decision in the development of the law and the part judges play in both enacting new laws and upholding existing ones. To fulfill any unclear or unfinished laws in the investigation of cases, the legal discovery process is utilized to determine the law based on particular facts. To complete any unclear or unfinished laws and enable the law to be developed based on particular facts, the law discovery approach is utilized while reviewing cases when the law is vague, inadequate, or does not completely regulate a specific occurrence.³⁰
3. Because the state is responsible for ensuring that everyone in Indonesia has access to justice, including the rights of indigenous peoples, the judge had behaved proportionately. The judge's responsibilities have included putting into practice the 1945 Constitution's Article 18B, paragraph (2), which recognizes the rights of indigenous peoples. Philosophically, acknowledging and respecting the oneness of indigenous peoples and their historic rights, or quasi-recognition, entails acknowledging and respecting all existing legal structures and institutions, including the court.

²⁸ Hazar Kusmayanti et all, "Judges' Acceptance of Sharia-Inspired Laws in Indonesia", *Al-Manāhij: Jurnal Kajian Hukum Islam* 17, no. 2 (2023), <https://doi.org/10.24090/mnh.v17i2.771>.

²⁹ Trisna Muhammad Rofiqi at.all, "Peranan Hati Nurani Hakim dalam Persidangan, Nusantara", *Jurnal Pendidikan, Seni, Sains dan Sosial Humanioral* 1, no. 1 (2022), <https://journal.forikami.com/index.php/nusantara/article/view/103/47>.

³⁰ Isabella Takapente, "Tinjauan Hukum Terhadap Cara Hakim Menyelesaikan Sengketa Waris Adat", *Lex Et Societatis* 8, no. 1 (2020), <https://doi.org/10.35796/les.v8i1.28479>.

4. Building legal development that raises public and indigenous peoples' awareness is the foundation for judges who respect customary law when making decisions in court.

Nonetheless, there are a few challenges that must be overcome before a court can adopt customary criminal law into their ruling. These challenges are as follows:³¹

1. As Indonesia's highest court, the Supreme Court upholds the decision of the customary head against those who violate customary law and impose customary sanctions. It goes on to say that it is not reasonable to have cases retried for individuals who have already been punished for their acts. This refers to Supreme Court Jurisprudence of May 15, 1991, Supreme Court Decision Number 1644/Pid/1988. This legal precedent was upheld by the Supreme Court in Decision No. 984 K/Pid/96, issued on January 30, 1996. The judges' panel decided that in a place where customary law is still respected and thrives, if the adulterers (daders) received customary punishments or responses from customary village leaders, the prosecution must be declared inadmissible. The Supreme Court "recognizes the existence of customary criminal law and its persistent customary reflexes in Indonesian society," as this case illustrates." Furthermore, customary criminal law incorporates living law. The law might be based on it.³²
2. Even in circumstances when the State Court only imposes minor criminal penalties, many customary criminal cases are retried in district courts due to the executory authority deficit in customary decisions. Reversing the conviction would be the ideal outcome (released from all lawsuits). This is because the current Indonesian criminal law is mostly inherited from the colonial era of the Netherlands, especially the codified criminal law known as the Criminal Code (*Kitab Undang-undang Hukum Pidana* or KUHP).

³¹ Hazar Kusmayanti, *Penguatan Lembaga Penyelesaian Sengketa Adat Dalam Rangka Penegakan Hukum Menuju Pembaharuan Hukum Acara Perdata di Indonesia*, (Bandung: Fakultas Hukum Universitas Padjadjaran, 2022), 64.

³² Sovia Hasanah, "Sudah Dipidana Secara Adat, Dapatkah Dipidana Lagi Berdasarkan Hukum Nasional", *hukumonline.co*, August 9 (2023), Retrieved from < <https://www.hukumonline.co/Sudah-Dipidana-Secara-Adat,-Dapatkah-Dipidana-Lagi-Berdasarkan-Hukum-Nasional?m/klinik/a/sudah-dipidana-secara-adat--dapatkah-dipidana-lagi-berdasarkan-hukum-nasional-lt57dd96e1ea96c/#!>>.

Various general rules are formulated within the KUHP, serving as the basis for the application of criminal law regulations in Indonesia. Unless otherwise specified in the law, the general rules contained in the KUHP must be followed in criminal justice practice. One of these rules is the principle of legality. The formulation of the legality principle is contained in Article 1 paragraph (1) of the KUHP, which states: "*an act cannot be punished, except based on the strength of existing criminal legislation.*"

The principle of legality formally requires the existence of written rules (legislation) to determine an act as a criminal offense (delict), so that individuals can be punished for committing a criminal act based on that. The adoption of the legality principle formally implies not giving room for the application of customary criminal law because customary criminal law is not written in legislation. Therefore, individuals cannot be convicted by the court for committing an act that violates customary criminal law if the act is not declared as a criminal offense (delict) in the law.³³

With the pretext of Article 1 paragraph (1) of the KUHP, the legal values that live in society become not well channelled, even rejected. Conditions like this are felt as something very concerning as if the values of customary law have been eliminated. However, amidst the application of legality principles, customary criminal law still shows its figure and existence as a law that lives in society (the living law). Rules must be put in place, and it must be confirmed that law enforcement does not have to bring charges in criminal matters that have already been handled by the traditional legal system. Thus, the victim does not want it anymore, but society's equilibrium has been restored. Thus, the judge's decision needs to be upheld to make sure it won't be contested later. It will be a brand-new issue.³⁴

³³ Masril dan Ade Kosasih, "Keberlakuan Asas Ne Bis in Idem terhadap Putusan Pengadilan Adat dalam Tata Hukum Indonesia", *AL-IMARAH: Jurnal Pemerintahan dan Politik Islam* 4, no. 1 (2019), <http://dx.doi.org/10.29300/imr.v4i1.2167>.

³⁴ Budi Suhariyanto, "Problema Penyerapan Adat oleh Pengadilan dan Pengaruhnya bagi Pembaruan Hukum Pidana Nasional", *Mimbar Hukum* 30, no. 3 (2018), <https://doi.org/10.22146/jmh.33227>.

3. We need to consider the general understanding that victims' interests may not be adequately represented by the criminal justice system as it exists today.³⁵ According to Faizal Adi Surya's research, a public prosecutor's only duty is to serve the interests of the state, not the interests of the victim. The legal system eliminates the victims' ability to file a lawsuit. Even though both the victim and the offender are interested participants in the case, this aspect prevents the matter from being resolved through discussion and compromise. And both continue to be optimistic, hoping for a more satisfying result outside of the legal system or official channels.³⁶ By using restorative justice to retain as much peace as possible, conflict must be directed toward harmonization or harmony in society rather than making matters worse.³⁷ The current criminal law system contained in the Criminal Code is more individualistic and formal procedural. Because this penal system has disregarded the value of peace as expressed in customary criminal law, it cannot serve as justification for doing away with the penalty. The state is highly motivated to prosecute in criminal situations even when the offender and victim have made reparations (customarily). If the person who was granted a pardon and received compensation for the victim forfeits it, it seems that the state will bear responsibility for the situation.

Until now, the existence and use of the Pancasila-based concept of peaceful, consensual discussion as a means of resolving conflicts between individuals—both private and public order—have been ignored by the Criminal Code. It is believed that society's legal culture will become feared if the ideology of punishment that ignores peace (customarily) is allowed to persist.³⁸

³⁵ Rena Yulianti, *Melihat Kembali Keberadaan Korban dalam Sistem Peradilan Pidana*, (Yogyakarta: Total Media, 2014), 163.

³⁶ Faizal Adi Surya, "Tinjauan Mediasi Penal dalam Perspektif Hukum Adat dan Hukum Islam", *Jurnal Jurisprudence* 5, no.2 (2015), <https://doi.org/10.23917/jurisprudence.v5i2.4229>.

³⁷ Ahmadi Hasan, "Penyelesaian Sengketa Melalui Upaya (Non-Litigasi) Menurut Peraturan Perundang-Undangan", *Jurnal Al-Banjari* 5, no. 9 (2007).

³⁸ Budi Suhariyanto, "Kedudukan Perdamaian Sebagai Penghapus Pidana Guna Mewujudkan Keadilan Dalam Pembaruan Hukum Pidana", *Jurnal Rechtsvinding* 5, no. 1 (2017), <http://dx.doi.org/10.33331/rechtsvinding.v6i1.127>.

4. The social background, educational background, ethnicity, and environmental conditions of the judge at the time of the decision.³⁹ Regarding this aspect, Yulia, a researcher and lecturer on Acehese customary justice, stated that certain court judges in Aceh may have taken into account the rulings of customary dispute resolution organizations when rendering their decisions because they feared that doing so would undermine the rights of indigenous peoples to justice. On the other hand, some judges also disregard customary rulings because they are typically national judges appointed to the position and frequently do not comprehend Acehese customary law if a matter is brought before them. According to Article 10 paragraph (3) of the Law on Judicial Power, the judge continues to hear cases because it is against the law for him to reject a case on the basis that it.⁴⁰ Another factor to take into account is the seniority of the judge, who took the case and promptly rendered the judgment without consulting prior rulings or researching Aceh customary law.⁴¹
5. When it comes to applying the law, certain law enforcement personnel behave in an unprofessional and discriminatory manner because the judge lacks the necessary understanding of the local customary law. According to Supreme Court judge Pranata Subhan, elder judges are the ones who understand customary law on the ground because they know how to look into a feeling of fairness in the community. Many younger justices do not. Since many judges these days frequently rely on written testimony or official papers, these new justices must learn customary law, which is present in many different contexts. Judges are not simply obsessed with the letter of the law. Not all Indonesians, particularly those living in rural regions, are known to be accustomed to using daily life documentation.⁴²

³⁹ Achmad Ali, *Menguak Tabir Hukum, Edisi Pertama*, (Jakarta: Pustaka Prima 1988), 175.

⁴⁰ An Interview with Yulia, interview, by Hazar Kusmayanti, *Dissertation, Fakultas Hukum Universitas Padjadjaran*, (2022): 236.

⁴¹ Subhan, Pranata, 2020. Interview by author, Indonesia, September, 25, 2020.

Conclusion

District court judges play a critical role in implementing restorative justice within the framework of traditional criminal law. They need to know a lot about customary law, use techniques for mediation, apply restorative justice, provide education and counseling, involve communities, and prioritize reconciliation. Through this approach, they can facilitate the restoration of relationships and communities that have been harmed by violations of customary criminal law, while also safeguarding the cultural values and customs that hold significance for these communities. Even while district court judges are required by some jurisdictions to recognize the decisions made by customary functionaries, the parties resubmit any customary criminal rulings that these functionaries have made. Furthermore, it might be argued that the nation's current criminal justice system does not adequately represent the needs of the economy, social welfare, or victims.

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