



The Urgency of Expanding Judges' Perspectives to Response of Enactment Adat Law in the Indonesian Criminal Code

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ABSTRACT

Indonesia is a country of religious culture, and the enactment of Law No.1 of 2023 is an effort to decolonize and recognize and strengthen the existence of customary law in Indonesia. This research will explore the ability of judges in implementing Article 2 of the Law. This research adopts normative legal research using conceptual, statutory, and comparative approaches. The results of this study show that judges in Indonesia generally have a positivist view due to the limited views of judges. The recommendation from this research is for judges in Indonesia to explore, follow, and understand the laws that live in society. This needs to be done so that in determining a decision in accordance with the spirit, norms, values that exist in society and can realize an ideal customary criminal justice system, ideal customary criminal justice.

INTRODUCTION

The criminal justice system is a justice system in which there are law enforcement officials such as police, prosecutors, advocates, judges, correctional institutions and other professionals who are interrelated with each other in order to run the system. In the trial process, the judge has a role as a leader who is responsible for organizing the trial and taking steps to maintain order in it. For the judge, it is important to gather evidence from all parties, including witnesses, defendants and their legal advisors, to ensure that the decision made meets the standards of justice based on the principle of God Almighty. This is part of the judge's responsibility as a law enforcer in court proceedings. However, the reality shows that judges' decisions often cause controversy.

In the context of implementing the law in Indonesia, the role of judges with a sociological outlook is vital, especially in recognizing and considering customary law. Law No. 1 of 2023 on Judiciary provides a stronger basis for the recognition of customary law in the national justice system. Judges who adopt a sociological outlook will understand that customary law reflects deep values and norms in society, often reflecting local wisdom and social justice that are different from general positive law. Thus, in making decisions, judges must consider not only the technical aspects of positive law (such as deductive methods or analogies), but also the relevant sociological and justice implications in the context of customary law.

LITERATURE REVIEW

The source of law that is strong and has its own place is society, meaning that there is a development of law that is centred on society outside of the formation of law by the state, judge decisions or on legal science, where this is the opposite of state law called *The Living Law* by Eugen Erlich so that in this case the state at least has a review of what is happening in society, because the purpose of *The Living Law* explained by Eugen Erlich is that the law is also born together with society and society is the source of law. Law No. 1 Year 2023 affirms the importance of judges to recognize and consider customary law as part of Indonesia's cultural heritage, as well as a legitimate source of law in conflict resolution at the local level. Therefore, a judge with a sociological outlook is expected to be able to integrate customary law values in the decision-making process, especially in cases where customary law offers a different perspective or is more in line with the justice of the local community. This application of customary law also has the potential to reduce disparities in legal decisions that are often controversial in the community. By considering both perspectives in a balanced manner, judges can play a more effective role in realizing comprehensive and deep justice for all parties involved in the Indonesian justice system.

METHODOLOGY

In this legal research, the type of research used in is normative legal research which is prescriptive, descriptive. In conducting research on law, it is necessary to understand the concept of law itself. The subject matter of normative legal research is law which is conceptualized as regulatory norms

that apply in society and become a reference for everyone's behaviour. The approaches used in this legal research include conceptual approaches, legislation and comparative approaches. The analysis technique uses literature study where research is conducted by analysing relevant previous research.

RESULT AND DISCUSSION

Customary law is a collection of customs that live in society, including morals, habits, and conventions that have legal effects. As part of Indonesian culture, customary law is still practiced in some regions and serves as a true norm reflected in people's behaviour. These norms arise naturally and govern the community's reaction to violations, in contrast to formal norms that may not always be recognized by the community. Customary law originates from social realities and relationships that existed before modern positive law. Therefore, to understand true norms, we do not need to refer to the law book, it is enough to observe that customary law is part of the law that lives in society. The concept of national customary law refers to the recognition, implementation and incorporation of legal norms arising from the traditions and practices of indigenous peoples into the legal framework of the state. Customary law in Indonesia is a legal system formed in the lives of indigenous peoples and recognized in various state legal regulations.

Customary law, which originates from the nation's consciousness and culture, has an important role in the national legal system. Even in the midst of globalization, customary law remains one of the main sources in the formation of national law. However, customary law must adjust to changing conditions from the past, although its main principles remain influential in the formation and application of national law. The 1945 Constitution of the Republic of Indonesia explicitly recognizes and respects the unity of customary law communities and their traditional rights. This recognition applies as long as the customary law is still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. The recognition and respect for customary law as the foundation of national law shows the importance of maintaining the cultural diversity and traditions of the Indonesian nation. In the face of changes brought about by globalization, customary law needs to be adjusted to remain relevant and able to provide solutions to modern problems faced by society. However, the principles and values contained in customary law will continue to play a role in the formation and application of national law.

The 1945 Constitution has recognized the existence of customary law communities, an issue that was also hotly debated in the BPUPKI sessions. The results of the discussions were then embodied in Article 18 and Explanation II of Article 18 of the 1945 Constitution before it was amended. Although the 1945 Constitution has been amended, the constitutional recognition and protection of indigenous peoples is maintained, as reflected in Article 18B Paragraph (2) and Article 281 Paragraph (3) of the 1945 Constitution. The recognition and protection of indigenous peoples' rights by the state has great significance. This is because indigenous peoples have existed since long before the Unitary State

of the Republic of Indonesia was formed. Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that the state recognizes customary law communities and their traditional rights, as long as they are still valid and in accordance with the development of society and the principles of the unitary state of the Republic of Indonesia as regulated by law. Prior to the amendment, Article 18 of the 1945 Constitution consisted of only one article that regulated the division of Indonesia's regions and the structure of its government through Law by taking into account the principle of deliberation in government and the right of origin in special regions. After the amendment, Article 18 of the 1945 Constitution is divided into three articles: Article 18, Article 18A, and Article 18B.

In addition to the 1945 Constitution, there are many norms relating to customary law including: first, Law No. 1/1946, also known as the Civil Code (KUHPPerdata), provides an important basis for the relationship with customary law in Indonesia. While it does not specifically address customary law, it provides a broad foundation for the recognition and regulation of customary law at the local and regional levels. Although it does not specifically address customary law, the Civil Code regulates basic principles of civil law that are often related to customary law practices, such as inheritance and family law. At the local level, communities often use customary law to resolve disputes, such as land and inheritance issues. Thus, although not directly related, the Civil Code provides a legal framework that facilitates the recognition, protection and implementation of customary law in Indonesia. In addition, the principles of civil procedural law set out in the Civil Code also influence how customary law is considered in the dispute resolution process in the courts. Therefore, Law No. 1/1946 has an important impact in the context of recognizing and regulating customary law in Indonesia.

Most recently, Law No.1 of 2023 is an effort by the government to better organize the criminal justice system. One of the main aspects is the recognition and application of customary law in the criminal justice process. Through this law, the government provides a legal basis for judges to consider customary law applicable in the local community when handling certain cases. The aim is to ensure that justice is maintained by taking into account Indonesia's cultural and social diversity and the local context in making legal decisions. Thus, Law No. 1 of 2023 is the government's step in improving the criminal justice system by recognizing and taking into account cultural diversity and customary law values in the judicial process.

Law No. 1 Year 2023 on the Criminal Code (KUHP) is the main legal framework in Indonesia's criminal justice system. One of the aspects regulated by this law is the recognition and application of customary law in the criminal justice process. In it, judges have the authority to consider customary law applicable in the local community when handling certain cases. As such, judges can take into account the values, traditions, and norms of customary law in the judicial decision-making process. The aim is to ensure that justice is maintained by taking into account Indonesia's cultural and social diversity and taking into account the local context in the application of the law.

Articles 5(1) and 50(1) of Law No. 48/2009 on Judicial Power provide for the official recognition of customary law. These articles mandate judges to understand and consider the legal values and concepts of justice prevailing in society. Furthermore, the principle of legality in criminal law is emphasized by Article 2 of the new Criminal Code. This article affirms that written criminal law does not override the validity of the prevailing law in the community, so that a person can still be prosecuted even though his actions are not specifically regulated in the law. The importance of consistency of community law with the values of Pancasila, human rights, and the principles of international law was also highlighted.

From a sociological and normative perspective, the presence of customary law in the criminal sphere is strengthened by this new Criminal Code, making it an integral part of the positive law applicable in customary communities in Indonesia and playing an important role in regulating social order. In more detail, the Act authorizes judges to consider the values, cultural heritage and norms of customary law held by local communities when making decisions in court. This includes the possibility of using customary law as a basis for assessing the circumstances, motives and social context in a criminal case. For example, in conflicts between citizens in an indigenous community, judges are given the discretion to decide by taking into account the values and procedures recognized by local customary law.

In Ahmad Tanjung et al's research, it was stated that judges play an important role as leaders who are responsible for organizing the trial and taking action if there is a disturbance of order in the courtroom. Based on research conducted using inductive, deductive, analogy, and productive approaches, it can be concluded that the approach of judges in Indonesia tends to be positivistic. This is reflected in judges' decisions that are based exclusively on the text of the law, without considering other legal perspectives. Specifically, in general criminal cases, most judges in the Supreme Court use the deductive method (55%), followed by analogy (30%), productive (25%), and other methods (5%). In special criminal matters, the dominance of the deductive method is stronger, with 80% of judges adopting this approach, while analogy is used by 15%, and other methods by 5%. Overall, when combined between special and general criminal matters, approximately 70% of judges in the Supreme Court use the deductive method, with a smaller proportion using analogies, deductive, and other methods. From the results of the study, it can be concluded that the dominant paradigm in the decision-making process of judges in the Supreme Court, especially in criminal cases during 2017, is positivism.

Law No. 1 Year 2023 affirms the importance of judges to recognize and consider customary law as part of Indonesia's cultural heritage, as well as a legitimate source of law in conflict resolution at the local level. Therefore, a judge with a sociological outlook is expected to be able to integrate customary law values in the decision-making process, especially in cases where customary law offers a different perspective or is more in line with the justice of the local community. This application of customary law also has the potential to reduce

disparities in legal decisions that are often controversial in the community. By considering both perspectives in a balanced manner, judges can play a more effective role in realizing comprehensive and deep justice for all parties involved in the Indonesian justice system.

There are several countries that have significant relevance to Indonesia regarding the implementation of customary law in Law No. 1 Year 2023 on Judiciary. The following are some countries that can be used as references in this regard:

1. New Zealand: This country gives strong recognition to Māori customary law in its criminal justice system. Māori customary law is formally recognized and well protected in the judicial process, as well as integrated within official judicial institutions. This approach is in line with Indonesia's move to recognize customary law as part of the nation's cultural heritage and integrate it into the national justice system.
2. Canada: The country also demonstrates extensive recognition of the customary laws of indigenous tribes such as First Nation, Inuit and Metis in its criminal justice practices. Indigenous law in Canada is strongly protected in the criminal justice system, supported by government institutions that ensure adequate recognition and protection. This approach can provide inspiration for Indonesia in strengthening the protection of customary law in the criminal justice context.
3. Papua New Guinea: Despite facing challenges in the integration and implementation of customary law, Papua New Guinea has demonstrated efforts to recognize customary law in its criminal justice system. Various approaches are used to maintain the existence of customary law in the context of the modernization of national law. This is relevant for Indonesia which is also struggling with similar challenges in integrating customary law within the broader national legal system.

Of these three countries, New Zealand, Canada and Papua New Guinea emerge as the most relevant examples for Indonesia in the context of Law No. 1 of 2023 on the Judiciary. Both countries demonstrate a strong commitment to the recognition, integration and protection of customary law within their criminal justice systems, which can provide valuable guidance for Indonesia in strengthening the implementation and protection of customary law within its criminal justice system.

From a comparison of the recognition, integration, implementation and protection of customary law in several countries with the situation of customary law in Indonesia, there are several steps that the Indonesian criminal justice system can take to improve the implementation of customary law:

1. Strengthening the Recognition of Customary Law: Indonesia's criminal justice system can enhance the recognition of customary law within the national legal framework more clearly and explicitly. This can be

- achieved through clarifying the procedures for recognizing customary law, both by revising Law No. 1 Year 2023 and its derivative regulations.
2. **Improving Integration:** The next step is to improve the integration of customary law into the national criminal justice system. This includes intensive training for judges, prosecutors and other relevant parties on relevant aspects of customary law. It is important to ensure that judicial decisions take into account customary law values and norms in a proportionate manner.
 3. **Improving Implementation:** Improving the implementation of customary law practices in the criminal justice process is also a key focus. This includes ensuring that judicial institutions have a deep understanding of how to apply customary law in concrete cases. Adequate support and guidance to judges is also crucial to perform their duties properly.
 4. **Ensure the Protection of Customary Law:** Another important step is to ensure strong protection of customary law from challenges and threats. This includes efforts to protect the existence and strength of customary law in the national criminal justice system.
 5. **Encourage Public Awareness and Participation:** Raising public awareness about the importance of customary law and its role in achieving holistic justice is necessary. Providing space for public participation in the judicial process can also help increase the legitimacy and acceptance of judicial decisions involving customary law.

By taking these steps, it is hoped that Indonesia's criminal justice system can more effectively recognize, integrate, implement and protect customary law. These steps will not only strengthen customary law as an integral part of the richness of local culture and justice, but will also increase public confidence in the entire justice system.

CONCLUSIONS AND RECOMMENDATIONS

It is important for judges to broaden their outlook in responding to the recognition of customary law in Indonesia's Criminal Code as this not only recognizes Indonesia's cultural diversity but also protects the traditional rights of indigenous peoples and increases confidence in a fair justice system. By integrating customary law into the Criminal Code, judges can ensure that legal decisions are not only based on the formal statutory text but also consider local legal values and procedures that are more relevant to the social and cultural context of local communities. This approach supports the consistency of national laws and strengthens legal sovereignty based on Indonesia's constitutional values that respect and recognize cultural plurality and the rights of indigenous peoples.

FURTHER RESEARCH

This research still has limitations, so it is hoped that further research relevant to the research can be carried out in more depth related to what the

judge's belief is and how the judge is able to realize his belief into a fair decision and can reflect the values that exist in society.

REFERENCES

- Aldi, M., & Putra, F. (2023). Pengakuan dan Perlindungan Masyarakat Hukum Adat Berdasarkan Peraturan Perundang-Undangan. *Limbago: Journal of Constitutional Law*, 3(2), 310–320.
- Borrows, J. (2010). *Canada's Indigenous Constitution*. University of Toronto Press.
- Demian, M. (2023). *Grassroots Law in Papua New Guinea*. ANU Press.
- Hardiyanti, M., & Sugiyanto, S. (2023). Relevansi Living Law Theorie dalam RUU Masyarakat Adat Pada Sistem Negara Hukum Prismatik. *Progressive Law and Society*, 1(1).
- Jones, C. (2016). *New Treaty, New Tradition: Reconciling New Zealand and Maori Law*. UBC Press.
- Putri, N. (2021). Memikirkan Kembali Unsur "Hukum yang Hidup Dalam Masyarakat" Dalam Pasal 2 Rkuhp Ditinjau Perspektif Asas Legalitas. *Indonesia Criminal Law Review*, 1(1).
- Saleh, M. (2013). Eksistensi Hukum Adat Dalam Polemik Hukum Positif Suatu Kajian Dalam Perspektif Tatanegara.
- Tamanaha, B. Z., Sage, C., & Woolcock, M. (Ed.). (2012). *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (1 ed.). Cambridge University Press. <https://doi.org/10.1017/CBO9781139094597>
- Tanjung, A. K. J., Purwadi, H., & Hartiwiningsih. (2019). Paradigma Hakim Dalam Memutuskan Perkara Pidana di Indonesia. *Jurnal Hukum Dan Pembangunan Ekonomi*, 7(1), Article 1.
- Utama, T. S. J. (2021). Between adat law and living law: An illusion of customary law incorporation into Indonesia penal system. *The Journal of Legal Pluralism and Unofficial Law*, 53(2), 269–289.