

The Challenge of Indonesian Customary Law Enforcement in the Coexistence of State Law

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Abstract: This article examines the challenges that arise from implementing customary law in Indonesian society amidst the predominance of state law. The data was collected from primary and secondary legal materials as well as facts on the ground. Applying a juridical-empirical approach, this study identifies various factors that contribute to difficulties in the application of customary law, including the tendency for law enforcers to prioritize state law over customary law, and the textual understanding of law that permeates legal discourse. Furthermore, efforts to unify the law have also created additional problems for customary law. In addition, this article also finds evidence that a number of concepts offered by experts in overcoming this problem are in fact not able to guarantee the application of customary law in the life of Indonesian society. Thus, it is necessary to support these proposals with legal-political changes that can ensure the existence and enforceability of customary law in Indonesian society.

Keywords: *Customary law; state law; national legal system*

Abstrak: Artikel ini mengkaji problematika penerapan hukum adat dalam kehidupan masyarakat Indonesia di tengah dominannya hukum negara. Data-data dikumpulkan dari bahan-bahan hukum primer dan sekunder serta fakta-fakta di lapangan. Menggunakan pendekatan yuridis-empiris, artikel ini menyimpulkan bahwa terdapat sejumlah faktor yang menyebabkan munculnya problematika dalam penerapan hukum adat, yakni adanya para penegak hukum yang sering kali mengesampingkan keberadaan hukum adat dan lebih mengedepankan berlakunya hukum negara; adanya pemahaman hukum yang cenderung tekstual dari para penegak hukum, dan juga adanya upaya unifikasi hukum yang ternyata justru telah menimbulkan masalah baru bagi penerapan hukum adat. Selain itu, artikel ini juga menemukan bukti bahwa sejumlah konsep yang ditawarkan oleh para sarjana dalam mengatasi persoalan tersebut dalam faktanya juga belum mampu menjamin bisa diterapkannya hukum adat dalam kehidupan masyarakat Indonesia. Oleh karena itu, tawaran-tawaran tersebut perlu didukung dengan upaya melakukan perubahan hukum

melalui politik hukum yang bisa menjamin eksistensi dan keberlakuan hukum adat dalam masyarakat Indonesia.

Kata Kunci: Customary law; state law; national legal system.

Introduction

The 1945 Constitution (UUD) recognizes the continued existence and relevance of customary laws within Indonesian society. Thus, the state is mandated to respect the social order and regulations that arise from customary law. Despite the ever-increasing modernization of Indonesian society, customary law remains a crucial aspect of social life for many individuals, particularly those residing in remote regions. Customary law is seen as an inheritance from ancestors and is maintained and enforced by communities in various parts of the country.

However, the application of customary law is often in conflict with state law in these areas. Thus, the recognition and enforcement of customary law present a significant challenge to the Indonesian legal system.¹ The encroachment of modernization, accompanied by the imposition of state law, has been identified as a contributing factor to the erosion of customary law values in some areas. As a result, the local legal order has been negatively affected, with the influence of state law supplanting traditional customary practices. Additionally, the presence of irresponsible individuals who intentionally undermine the local legal

¹ It can be said that customary law seems to have no proper place to exist. Several studies show that law enforcement officers such as police, prosecutors, and judges often overlook the role of customary law. However, on the other hand, as a form of pragmatism, some law enforcement officers in certain areas still recognize legal pluralism, as can be seen in Jawahir's research on 'siri' in South Sulawesi. The research results indicate that the state still provides space for other sources of law, besides modern law, such as customary law and Islamic law, to exist, but the dominance of one law cannot be avoided. National law is more dominant in some aspects among the community. See Ridwan Ridwan, Khudzaifah Dimyati, and Aidul Fitriadi Azhari, "Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi Hingga Konservasi," *Jurnal Jurisprudence* 6, no. 2 (2017), pp. 106–15.

system has exacerbated this problem in areas where customary law is still observed.²

The incursion of modernization into indigenous communities has posed a significant threat to the preservation of traditional values that have hitherto been deeply embedded in daily life. This has resulted in an added burden for these communities. For example, the Sabu people of East Nusa Tenggara have expressed their dissatisfaction with the imposition of state law as an alternative to resolving disputes, which has undermined the validity of their customary law. According to Tanya, the design of the national legal system is based on codification and unification politics, which has created a modern legal structure that is not compatible with the unique and pluralistic nature of local community law. Consequently, the implementation of the modern legal system has created significant challenges, particularly when dealing with local customary practices.

Given these challenges, it is important to examine the problems associated with the implementation of customary law within the national legal system. Specifically, this article aims to explore two issues: firstly, the problematic nature of applying customary law within the national legal system, and secondly, the positioning of customary law in relation to national law. By doing so, this article seeks to identify the factors that contribute to the challenges associated with the implementation of customary law in Indonesia. Furthermore, this article aims to propose a more concrete legal framework that can better address the challenges posed by the implementation of customary law within the national legal system.

Numerous researchers have conducted studies on the relationship between customary law and national law. One such study was carried out by Widiangela et al., who investigated the challenges

² The 'oknum' referred to are plantation owners, mining companies, and other entrepreneurs who gain access to indigenous lands and engage in activities such as opening plantations and seizing customary lands. Such actions often give rise to new problems. When indigenous communities are defending and fighting for their lands, these individuals often use state law to resist them. This is precisely what happened to the Kinipan community. See Nur Alfiyah, "Penjaga Hutan Adat Kinipan," September 12, 2020, <https://majalah.tempo.co/read/sosok/161395/effendi-buhing-ketua-komunitas-adat-kinipan-yang-mati-matian-menyetop-pembabatan-hutan>.

faced by the Laman Kinipan community regarding customary law.³ The research conducted by Widiangela et al. revealed that the dispute between the Laman Kinipan community, the local government, and PT Sawit Mandiri Lestari (SML) over the clearance of the Kinipan customary forest persists and remains unresolved. The recognition of indigenous peoples remains a contentious issue, largely due to the ambiguous nature of the national legal system.⁴ Parakhiyah and Irfan conducted research that focused on the challenges faced by the Sunda Wiwitan indigenous community in defending their customary lands against external interests. Parakhiyah and Irfan research revealed the existence of conflict issues that have arisen due to the lack of legal recognition and protection of customary land rights.⁵ Based on the findings, this study concludes that the government's recognition of customary law in Indonesia is insufficient and lacks commitment. Despite being constitutionally recognized in Article 18B Paragraph (2) of the 1945 Constitution, the application of customary law is often overshadowed by the government's development agenda and the interests of the wider public. This has led to conflicts and tensions, as illustrated by the case of land disputes within the Sunda Wiwitan community. The collision between the government's policies and the customary rights of indigenous peoples underscores the need for a more comprehensive and inclusive legal framework that recognizes and protects the rights of all stakeholders.⁶

According to Tanya, the existence of customary law is increasingly at risk due to the emergence of state law. The intersection between state law and customary law has resulted in numerous issues. For instance, the creation of land boundaries that apply to indigenous peoples has posed problems, as the state law requires the issuance of land certificates and other official documentation to indicate land

³ Apriska Widiangela, Ika Putri Rahayu, and Lailatul Komaria, "Analisis Yuridis Problematika Pengakuan Masyarakat Hukum Adat Laman Kinipan," *Jurnal Hukum Lex Generalis* 2, no. 3 (2021), pp. 213–35.

⁴ Widiangela, Rahayu, and Komaria.

⁵ Rachel Farakhiyah and Maulana Irfan, "EKSISTENSI MASYARAKAT ADAT TERGERUS OLEH KEBUTUHAN ZAMAN Studi Analisis Konflik Masyarakat Adat Sunda Wiwitan Di Kuningan Yang Terusir Dari Tanah Adatnya Sendiri Dengan Teori Identitas," *Jurnal Kolaborasi Resolusi Konflik* 1, no. 1 (2019), pp. 44–54.

⁶ Farakhiyah and Irfan.

ownership, while indigenous peoples still rely on traditional, often unwritten, boundaries to establish their ownership. The article thus sheds light on the complexities of implementing state law in areas where customary law is still prevalent and highlights the challenges that indigenous peoples face in navigating these legal systems.⁷ In light of the issues and conflicts arising from the implementation of customary law alongside state law, Tanya proposes several ideal concepts for the application of customary law. Firstly, he suggests that indigenous communities should be able to opt for plural folk law instead of uniform codification law, as this would allow for greater flexibility in adapting to their unique cultural practices. Secondly, he suggests that indigenous communities could utilize state law as a preliminary option to solve disputes before turning to customary law. Lastly, he proposes that the application of customary law and state law should be carried out independently according to their respective functions, in order to avoid conflicts and confusion between the two legal systems.⁸

This study aims to utilize the concept proposed by Tanya as an analytical tool to address the issues surrounding the implementation of customary law in Indonesia. Additionally, it seeks to establish a foundation for the development of an ideal concept for the application of customary law in the presence of state law. This research employs a descriptive-analytical approach with a juridical-empirical methodology. The study examines several articles in the 1945 Constitution that relate to the recognition and existence of customary law in Indonesia. The data for this study are obtained from literary sources such as research reports, journal articles, books, magazines, and other relevant sources that directly connect with the research theme.

In the context of this research, the identity conflict theory is applied to understand the tensions and conflicts that arise between state law and customary law, which can threaten the identity and existence of indigenous peoples and their customary practices. The analysis using this theory can help shed light on the underlying causes of conflicts related to customary law and provide insights into possible

⁷ Bernard L Tanya, "Beban Masyarakat Adat Di Tengah Berlakunya Hukum Negara Di Sabu NTT," in *Hukum Dalam Ruang Sosial* (Yogyakarta: Genta Publishing, 2011), p. 5.

⁸Bernard L Tanya.

solutions that can address these conflicts.⁹ In conflict theory, we know that the term "open conflict" refers to situations where social conflicts have surfaced and are deeply rooted, requiring various efforts and concrete actions to overcome the root causes and various impacts. Based on this theory, it can be said that defending customary law in the midst of the enactment of state law in Indonesia is not an easy matter due to the various forms of discrimination and intimidation faced by indigenous peoples from the regional government, the state, or private parties, as exemplified in the case of the Laman Kinipan community.

The Position of Customary Law in the Indonesian National Legal System

Vollenhoven characterizes customary law as an autonomous legal system that is not derived from any preexisting statutory regulation established by the Dutch East Indies.¹⁰ Soepomo defines customary law as unwritten rules or norms of conduct that are highly obeyed and respected by the community, despite not being made by law enforcement officials or authorities.¹¹ Customary law is also commonly understood as a form of indigenous law in Indonesia that has originated organically from the community and is not codified in written statutes like the laws and regulations of the Republic of Indonesia.¹² Nonetheless, despite the enactment of state law, customary law persists today, albeit with various dynamics that affect its application.

As elaborated earlier, customary law refers to a collection of uncoded legal norms and principles that regulate behavior within a community. This fundamental distinction between customary law and state law primarily lies in the former's non-written character.¹³ The

⁹ S. Fisher et al., *Mengelola Konflik: Ketrampilan & Strategi Untuk Bertindak* (Jakarta: Zed Books ; British Council ; Responding to Conflict (RTC), 2001).

¹⁰ C. Van Vollenhoven, "Het Adatrecht Van Nederlandsch Indie, Deel I.E.J.Brille," in *Pengantar Dan Azas-Azas Hukum Adat* (Jakarta: Universitas Indonesia, 1990), p. 15.

¹¹ Soepomo, *Kedudukan Hukum Adat Dikemudian Hari* (Jakarta: Universitas Indonesia, 1966).

¹² Jawahir Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat Dan Tantangannya Dalam Hukum Indonesia," *Jurnal Hukum Ius Quia Iustum* 20, no. 1 (2013), pp. 21–36.

¹³ Yulia, *Buku Ajar Hukum Adat* (Sulawesi: Unimal Press, 2016).

persistence and application of customary law remain prevalent among Indonesian communities, particularly those residing in remote and rural areas that are distanced from the influences of urban modernity. The existence of customary law is acknowledged and institutionalized in the Indonesian constitution, specifically in the 1945 Constitution (UUD), which explicitly acknowledges the presence of customary law and the traditional rights of local communities. Moreover, the recognition of customary law by state law is evident in legal provisions on land and criminal matters.¹⁴

Lukito asserted that since the beginning of Indonesia's independence, the state's approach towards legal pluralism has remained unchanged, which is to focus on strengthening state law institutions, while the existence of legal traditions beyond the state institutions is entirely dependent on the latter. This strategy reflects the theory of pluralism, where legal pluralism is regarded as a means of coexistence in a nation-state. Consequently, it can be argued that customary law can continue to exist and be enforced, provided it conforms to the principles of the Unitary State of the Republic of Indonesia (NKRI) and is in line with the evolving societal norms.¹⁵

Problems in the Application of Customary Law in Indonesia

According to the preceding discussion, customary law is a system of legal regulations that continues to persist and be applied in various regions that preserve their territories as customary territories. Typically, this body of law consists of unwritten rules inherited from the ancestors or forebears of a specific community. Such a legal system is distinct from state law, which is written and enshrined in statutory or other written regulations.¹⁶

The application of customary law in Indonesia frequently encounters difficulties, particularly in cases that involve conflicts with state law. The incidents that occurred in Kinipan and Sabu NTT serve

¹⁴ Sartika Intaning Pradhani, "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional," *Undang: Jurnal Hukum* 4, no. 1 (2021), pp. 81–124.

¹⁵ Winardi Winardi, "Eksistensi Dan Kedudukan Hukum Adat Dalam Pergumulan Politik Hukum Nasional," *Widya Yuridika: Jurnal Hukum* 3, no. 1 (2020), pp. 95–106.

¹⁶ Pradhani, "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional."

as prime examples. In these instances, there was a struggle between customary law and state law, as the indigenous people aimed to enforce customary law, while the government sought to enforce state law. The relentless opposition of the Kinipan indigenous people against the expansion of oil palm plantations by PT. Sawit Mandiri Lestari (SML) through the clearance of community customary forests has led to conflicts with corporations, law enforcement officials, and the state. Despite the fact that the customary law of the Kinipan people was still potent and applicable during the conflict, the dominance of state law was evident, as exemplified by the involvement of the police in the arrest of one of the traditional leaders. This shows that the Kinipan indigenous people had limited options, even in their efforts to defend themselves. Despite the indigenous people's actions being solely aimed at protecting their interests based on customary law, which they recognize as enforceable.¹⁷ Apriska argued that the conflicts between indigenous peoples and corporations can be prevented if the government, as the permitted provider, recognizes and respects the existence of indigenous peoples.¹⁸

The conflict between the people of Sabu, East Nusa Tenggara (NTT), and the state (government) is another example of the tensions that can arise between customary law and state law. The Savu people in NTT had established land boundaries between communities based on customary law, which conflicted with the state law that enforced the enactment of state law in determining community land boundaries. This conflict resulted in tension between the people of Savu and government officials. The predominance of state law has created its own conflict among the people of Savu, where some have accepted and based their land boundaries on state law, while others still maintain their rights or land boundaries based on customary law. Consequently, one party adheres to the land boundaries according to the drawings made by land officials, while the other party adheres to natural boundaries according to their customary law. This conflict highlights the challenge of reconciling different legal systems and the importance

¹⁷ "Kronologi Ketua Adat Kinipan Diseret Dan Ditangkap Polisi," August 27, 2020, <https://www.cnnindonesia.com/nasional/20200827015212-12-539719/kronologi-ketua-adat-kinipan-diseret-dan-ditangkap-polisi>.

¹⁸ Widiangela, Rahayu, and Komaria, "Analisis Yuridis Problematika Pengakuan Masyarakat Hukum Adat Laman Kinipan."

of respecting the existence of customary law in addressing conflicts between indigenous peoples and the state.¹⁹ The disputes concerning the land boundaries of the Sabu community would not have arisen if the customary law that was originally applied had not been displaced by the introduction of state law. The presence of state law, in this case, has become a burden for the people of Savu, as it represents a departure from their established traditions.

The cases of the Kinipan and Sabu communities illustrate the inherent conflict between customary law and state law, as they cannot simply be pitted against each other due to their distinct characteristics. Despite the recognition of customary law and legal pluralism in the law, in practice state law tends to dominate, putting pressure on the existence of customary law, which is seen as lacking in legal certainty due to its unwritten nature. Additionally, the textual attitudes of law enforcement officials and state efforts toward legal unification often contribute to the elimination of customary law. These factors continue to fuel conflicts between the two legal norms, ultimately leading to the marginalization of customary law in favor of state law.

1. Textual Attitude of Law Enforcers

In Indonesia, law enforcement officials, including the police, prosecutors, lawyers, and judges, tend to rely on written law or statutory regulations when dealing with legal issues. However, this approach has resulted in conflicts between customary law and state law, as seen in the cases of the Kinipan and Sabu communities in East Nusa Tenggara. The situation is further complicated by the unclear legal provisions and the lack of clarity regarding the purpose of the law, particularly concerning the application of principles such as harmony, justice, and legal certainty. As a consequence, the continued dominance of state law has marginalized customary law and undermined the legal pluralism that has been recognized in Indonesia.²⁰ In light of the conflicts between state law and customary law, it is essential for law enforcers to play a crucial role in interpreting statutory regulations to allow for legal pluralism. This can be achieved through legal interpretation that accommodates customary law without waiting for

¹⁹ Bernard L Tanya, "Beban Masyarakat Adat Di Tengah Berlakunya Hukum Negara Di Sabu NTT."

²⁰ Bernard L Tanya, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi* (Yogyakarta: Genta Publishing, 2019).

legislative changes. Moreover, giving full autonomy to indigenous peoples in solving their own problems using customary law can reduce conflicts between customary law and state law. Law enforcers can contribute to the development of a harmonious legal system that takes into account the principles of justice and legal certainty by recognizing and accommodating customary law. Such recognition can enable the creation of an inclusive legal system that respects diversity and serves the needs of all members of society.

Rahardjo's perspective emphasizes the importance of courage and creativity in law enforcement to achieve justice. According to him, prosecutors should take the lead in testing the limits of the law to create justice. This means that law enforcement should not only be about enforcing existing laws but also about using creativity and making breakthroughs in interpretation that can lead to the realization of justice. In other words, law enforcement should not be limited to the application of the law as written, but should also take into account the principles of justice, fairness, and equity. By doing so, law enforcement can play an active role in promoting the values and goals of justice and human rights.²¹ Siregar, a former chief justice of the Supreme Court, prioritizes justice over law and believes that justice should not be hidden in legal texts but rather should be brought to light. He has chosen to prioritize justice that is outside of legal texts over implementing legal provisions that may not accommodate justice. This approach mirrors the practices of indigenous communities who often rely on customary law to solve their problems without involving state law. The emphasis on justice over law and the recognition of the importance of bringing hidden justice to light can contribute to the promotion of legal pluralism and the recognition of the role of customary law in resolving disputes.²²

In the current context of shifting ways and perspectives on justice, it is important for law enforcers to take progressive steps. Nowadays, there is a tendency to view justice as what is written or contained in an official regulation or formality. Therefore, it is necessary to have a creative and courageous approach to law enforcement, with a focus on realizing justice rather than simply

²¹ Satjipto Rahardjo, *Penegakan Hukum Progresif* (Jakarta: Kompas Media Nusantara, 2010).

²² Rahardjo.

following the letter of the law. As exemplified by the former chief justice of the Supreme Court Siregar, it is important to seek out the justice hidden in legal texts and to choose justice outside of legal texts if necessary. This reflects the habits practiced by indigenous peoples who rely on customary law to solve problems without relying on state law.

The pursuit of formal justice as represented in legal texts sometimes conflicts with the norms and values of substantive justice. However, law enforcement officials are frequently overly focused on the letter of the law. Scholars such as Geny and Rahardjo have noted that "the law is never perfect." This suggests that legal provisions are not always able to fully capture the complexities of social life and may require flexible interpretation to achieve justice.²³ He stated: "there are so many that cannot be accommodated by the form of textual regulations".²⁴ In order to achieve justice, it is important not to solely rely on the provisions of legal text. Justice can be attained even outside of what the text stipulates. Therefore, law enforcers should conduct a more in-depth interpretation, exploration, and dissection of legal provisions to assess what exists beyond the legal text. This is particularly important in light of the hope that customary law will no longer be disregarded in the face of state law. The prioritization of formal justice, as stipulated in legal texts, can often be at odds with the norms and values of substantive justice. Hence, the imperfection of the law, as highlighted by Geny and Satjipto Rahardjo, should be taken into consideration in the pursuit of justice.

2. Efforts to unify customary law

Legal unification refers to the merging of various types of laws into a unified legal framework that can be applied and enforced either at a national scale or in a regionally based application within a country.²⁵ In Indonesia, the process of legal unification involves merging state law with customary or Islamic law, which is then codified into statutory regulations. However, this process can be challenging, particularly

²³Bernard L Tanya, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi*.

²⁴ Rahardjo, *Penegakan Hukum Progresif*.

²⁵ Muhammad Bakri, "Unifikasi Dalam Pluralisme Hukum Tanah Di Indonesia (Rekonstruksi Konsep Unifikasi Dalam UUPA)," *Kertha Patrika* 33, no. 1 (2008), pp. 1–5.

when it pertains to sensitive issues or customary practices that are deeply embedded within the community and widely practiced.

The legal unification process in Indonesia involves the integration of state law with customary law or Islamic law, which is then codified into statutory regulations. However, this is a complex undertaking, particularly when sensitive matters or deeply entrenched customary practices are involved. As part of this legal unification, the Basic Agrarian Law (UUPA) has established a unified national land law based on the principles of unity and simplicity. Consequently, the state seeks to implement a single type of land law (legal unification) throughout the Indonesian archipelago. Under the UUPA, all land issues must conform to this law, and all land rights must be converted to conform with the provisions of this law. This effectively compels individuals to adhere to the requirements of state law.

The implementation of legal unification or legal uniformity in a pluralistic society like Indonesia has resulted in instances of injustice. This is because enforcing a single law in a society with diverse legal systems is as unjust as imposing multiple laws (legal pluralism) in a homogenous society. Consequently, legal unification in the context of land issues in Indonesia's pluralistic society has given rise to problems and inequities.

Application of Customary Law in the Mid of State Law Enforcement: an Offer

In relation to the matter of the application of customary law alongside the implementation of state law, Tanya presents two concepts. Firstly, the separation of customary law from state law or the selection between uniform codified law or plural people's law, and secondly, the amalgamation of the two laws. On the other hand, I Dewa Made Suartha provides a comparison between state law and customary law.²⁶

1. Separation of State Law and Customary Law

The first concept was proposed by Tanya. This concept suggests that in the context of dualism between customary law and state law, a choice can be made between codified law and people's law. Therefore,

²⁶ I Dewa Made Suartha, "Hukum Negara Harus Menerima Sanksi Adat," January 29, 2013, dalam <https://uns.ac.id/id/uns-research/hukum-negara-harus-menerima-sanksi-adat.html>.

if customary law is still applicable in a community environment, it can be implemented in that community, even if the community is located within the territory of Indonesia where state law generally applies.²⁷ This concept can also be referred to as legal differentiation, which involves separating formal state law from customary law and recognizing the inherent norms within each legal system.²⁸

Whether the option to choose between customary law and state law is permissible in problem resolution can be determined from the provisions of Article 5, Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which obliges judges to examine, comprehend, and adhere to the values of legal norms that are still in effect and prevalent in society. However, the law does not clearly state that the community may choose which law to apply at their discretion. The emphasis is on law enforcement. In the event of a dispute resolution through the court, the judge is required to explore the customary law that is practiced in society. According to Mulyadi, customary institutions are fundamentally recognized in the Indonesian justice system. This recognition is demonstrated through the behavior of judges who strive to examine customary values and norms when making legal decisions.²⁹ According to him, when a problem or case can be resolved within customary institutions, it should be resolved in accordance with those customs. Only when it cannot be resolved within those institutions should it then become the authority of the state judiciary to resolve it. A case in point is an incident that occurred in Parauna Village, Unaaha Kendari District, Southeast Sulawesi, where an immoral act took place. The case was initially resolved according to custom by the Tolake Customary Head.³⁰ However, due to the prevalence of common offenses such as cases of immorality or rape, law enforcement officials are also empowered to take action on such

²⁷ Suartha.

²⁸ Kamsi, *Politik Hukum Islam Di Indonesia : Indonesianisasi Hukum Islam* (Yogyakarta: UIN Sunan Kalijaga, 2018).

²⁹ Lilik Mulyadi, "Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013), pp. 225–46.

³⁰ Sovia Hasanah, "Sudah Dipidana Secara Adat, Dapatkah Dipidana Lagi Berdasarkan Hukum Nasional," April 28, 2017, <https://www.hukumonline.com/klinik/a/sudah-dipidana-secara-adat--dapatkah-dipidana-lagi-berdasarkan-hukum-nasional-lt57dd96e1ea96c/>.

cases without the need for a formal complaint or report.³¹ Therefore, the case eventually came to the attention of the justice system. The Kendari District Court, at that time, rejected the defendant's argument that he had already been sanctioned with "Prohala" by the traditional leader and local customary officials for his immoral act.³²

The rejection was based on the provisions of the Judicial Powers Act, which stipulates that the state court, specifically the General Court, is the only authorized judicial body to preside over criminal cases.³³ The decision of the Kendari General Court was upheld by the decision of the Southeast Sulawesi High Court.³⁴ However, the decisions of the Kendari General Court and the Sulawesi High Court were ultimately overturned by the Supreme Court's decision which judged *judex factie* that (the District Court and the High Court) were deemed to have misused the law so that the decision must be annulled.³⁵

In this case, the Supreme Court considered that the defendant had already undergone the customary punishment of paying a buffalo and a piece of Kaci cloth, which is deemed equivalent and proportionate to the defendant's guilt. As such, in accordance with Article 5 Paragraph (3) letter b of the Emergency Law (*Undang-Undang Darurat*) Number 1 of 1951, the defendant could not be subjected to another sentence by the court. This is because customary sanctions may serve as the primary punishment that judges can consider in examining and adjudicating cases of this nature.

³¹ See Article 285 Criminal Code (KUHP) that rape is an ordinary offense, and not a complaint offense.

³² Ali Hakim, "Adat Minta Pengakuan Dari Negara," November 10, 2013, <https://www.hukumonline.com/berita/a/hakim-adat-minta-pengakuan-dari-negara-lt5257f9f8c5981?page=2#!>

³³ Read the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power.

³⁴ Decision of the Supreme Court of the Republic of Indonesia. Decision Number 1644K/Pid/1988 tanggal 15 Mei 1991, among other things determines: "A person who has committed an act which according to living law (customary law) in the area is an act that violates customary law, namely "customary delict". In Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 45, no. 2 (2016), pp. 123–30.

³⁵ Ali Abubakar, "Urgensi Penyelesaian Kasus Pidana Dengan Hukum Adat," *Madania: Jurnal Kajian Keislaman* 18, no. 1 (2014), pp. 57–66.

The Supreme Court's decision in this matter serves as a legal precedent for judges when faced with similar cases, thus preventing future conflicts or debates between state law and customary law. It concluded from the aforementioned cases that the Indonesian people do not have the authority to directly choose which law to apply, particularly in cases of common offenses. Nonetheless, resolving disputes using customary law is deemed acceptable. In cases that proceed to court, law enforcement officials are expected to diligently examine and consider the values and norms of customary law in effect within the society.

2. The Amalgamation of State Law and Customary Law³⁶

Tanya suggests that another way to apply customary law is to combine it with state law. This option is sometimes practiced in certain areas where indigenous peoples face legal cases. In this approach, the problem is first resolved using state law, and then settled according to customary law. This means that both legal systems are utilized in resolving the issue.³⁷ It is important to note that this approach is not a form of legal unification, but rather a legal practice that is initiated and driven by the moral awareness of indigenous peoples to implement both customary and state law in resolving legal cases. This approach allows for a more inclusive and collaborative approach to legal problem-solving that takes into account the unique cultural and social contexts of indigenous communities. By combining both customary and state law, indigenous peoples can benefit from the protection and support of the formal legal system while also maintaining their cultural practices and traditions.

Such a case occurred in Timor Tengah Utara District, East Nusa Tenggara regarding a man who broke his promise to marry a woman.³⁸ During the trial, the judge stated that the act of breaking a promise committed by the man was considered an act against customary law, and thus punished according to applicable customary law. Although this case did not result in sanctions from state law, it still falls into the category of cases that were resolved using two legal

³⁶Bernard L Tanya, "Beban Masyarakat Adat Di Tengah Berlakunya Hukum Negara Di Sabu NTT."

³⁷ Suartha, "Hukum Negara Harus Menerima Sanksi Adat."

³⁸ Siti Aminah, "Hukum Adat Dalam Berbagai Putusan Pengadilan," May 31, 2020, <https://bahasan.id/hukum-adat-dalam-berbagai-putusan-pengadilan/>.

systems. The problem was first resolved through state law by going through trial stages, followed by a settlement through customary law.

3. Compartmentalizing State Law and Customary Law³⁹

The third concept offered in an effort to apply customary law during the prevailing state law is to create a distinction between state law and customary law. This concept is proposed by Suartha. In this concept, state law and customary law do not have to be merged, but each is treated according to its function. This concept can be one of the solutions to resolving tensions between state law and customary law. However, in practice, this concept is not always easy to implement. This can be seen in problem-solving practices in Kinipan society, as explained earlier. In other words, this third concept may no longer be relevant for application in the present era.

The recognition of customary law is explicitly stated in the 1945 Constitution, yet its implementation cannot be fully guaranteed. Indonesia follows a civil law system where legal certainty is one of its fundamental principles. Consequently, laws always prioritize formal legality as the main principle to solve any problems that arise.⁴⁰ Despite the recognition of customary law in the 1945 Constitution, its implementation may not always run smoothly. In Indonesia, which adheres to a civil law system with legal certainty as one of its principles, laws are typically based on formal legality as the primary means of problem-solving. However, legal provisions often lag behind societal and temporal developments, leading to the emergence of new problems that are not adequately addressed by statutory regulations.⁴¹ The statement by Geny suggests that the law is not flawless and cannot fully encompass the complexity of real-life situations. It implies that laws, despite being created to regulate society, are limited in their ability to address all possible scenarios that may arise. Therefore, it is necessary to adapt and adjust laws to keep up with the changing needs

³⁹Bernard L Tanya, "Beban Masyarakat Adat Di Tengah Berlakunya Hukum Negara Di Sabu NTT."

⁴⁰ Rahardjo, *Penegakan Hukum Progresif*.

⁴¹ There are still many things that cannot be accommodated by written law or the legal system of statutory regulations, such as conditions or needs in the future, as the emergence of problems or new forms of crime that are not ready to be faced by existing laws and regulations, and also moral values embraced by society at a certain time. It is impossible for these things to be properly recorded in the existing legal system. See Satjipto Rahardjo, *Penegakan Hukum Progresif*, p. 11.

and realities of society. This is particularly important when dealing with customary law, which is deeply rooted in the culture and tradition of a community and may not be fully addressed by statutory provisions. Hence, there is a need for legal practitioners to be open-minded and innovative in finding ways to apply and integrate customary law into the current legal system.⁴² In light of the fact that law is a political product formulated and instituted by human beings and thus, subject to limitations, it follows that a legal product created by humans can never be deemed perfect.

Given the understanding that law is a human-made product with inherent limitations, the continued existence of customary law in various regions should not be disputed, especially considering that state law is not immune to weaknesses when utilized as a means to resolve problems. Therefore, the state must recognize and uphold customary law as a legal norm in everyday life, without excessive interference in the lives of those who already have their legal system. Instead, the state should monitor and ensure the proper application of customary law in society.

Similar practices can be observed among the Papuan communities where they tend to resort to customary sanctions in case of disputes or conflicts. For instance, the Jayawijaya Police Chief successfully mediated a murder case on August 24, 2020, where the parties agreed to pay a customary fine of 65 pigs, equivalent to 2 billion rupiahs. This exemplifies how customary law is still practiced in Papua as a way of resolving disputes and upholding traditional norms and values.⁴³

The case of the Papuan people who still implement customary sanctions demonstrates their adherence to their own legal system. The mediation of the murder case by the Jayawijaya Police Chief shows that the Papuan people can solve their own problems based on their customary law without the intervention of state law. This is in accordance with the provisions of the Law of the Republic of Indonesia Number 21 of 2001 concerning Special Autonomy for the People of

⁴² Bernard L Tanya, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang Dan Generasi*.

⁴³ See "Damai, 2 Kampung Perang Di Papua Bayar Denda 65 Ekor Babi Senilai Rp 2 M," August 25, 2020, <https://news.detik.com/berita/d-5145947/damai-2-kampung-perang-di-papua-bayar-denda-65-ekor-babi-senilai-rp-2-m>.

Papua, particularly in chapter 11 (eleven) Article 43 Paragraphs (1), (2), (3), (4), and (5). These provisions acknowledge and respect the existence of customary law and provide for its implementation within the framework of the state's legal system. Thus, the state should monitor and support the application of customary law in the daily lives of the people of Papua to promote legal pluralism and ensure the protection of their cultural rights.

In Madura, the practice of resolving disputes through customary law is also present. However, this does not imply that the Madurese reject or disobey state law, but they have confidence in the efficacy of their community's legal system to settle conflicts. This perspective aligns with the findings of Mahrus Ali's research on the integration of Madurese cultural values in conflict resolution. The study concludes that Madurese cultural values are preserved and evident, particularly in dispute settlement. Nevertheless, state law and local law coexist in harmony.⁴⁴

4. Strengthening Customary Law through Legal Politics

The author proposes an additional concept to strengthen the position of customary law and address the challenges in its application alongside state law. The proposed concept involves changing the law through legal politics. This approach aims to synchronize and harmonize laws and regulations, particularly Article 18B Paragraph (2) of the 1945 Constitution, which provides a constitutional basis for the existence and traditional rights of indigenous and tribal peoples. However, these provisions may also restrict the traditional rights of indigenous peoples, such as their rights to land and natural resources. Hence, the proposed approach seeks to address this limitation and promote greater recognition and protection of customary law.

The constitutional recognition of customary law communities in Indonesia is reflected in Article 18B Paragraph (2) and Article 33 of the 1945 Constitution. Despite their placement in different articles, these provisions are interrelated, as the state's control over land and natural resources is balanced with the recognition of customary community rights over these resources. This recognition affirms the importance of customary law as a valid legal system that coexists with

⁴⁴ Mahrus Ali, "Akomodasi Nilai-Nilai Budaya Masyarakat Madura Mengenai Penyelesaian Carok Dalam Hukum Pidana," *Jurnal Hukum Ins Quia Iustum* 17, no. 1 (2010), pp. 85–102.

state law.⁴⁵ In the context of human rights doctrine, all rights belong to the people, including customary law communities with their communal rights. Meanwhile, it is the responsibility of the state to recognize and respect all the human rights of its citizens. This means that the state must acknowledge and protect the communal rights of customary law communities, including their right to their own legal system and their right to land and natural resources. The state must also ensure that these communities are able to exercise their rights without interference or discrimination.⁴⁶

Therefore, the struggle of indigenous peoples in defending and reclaiming their homeland is part of the struggle for citizenship. Therefore, legal changes through legal politics must be made. Thus, the formation and ratification of all forms of legislation that can guarantee and protect the rights of indigenous communities must be continuously carried out.

Conclusion

This study has shown that although the 1945 Constitution acknowledges the existence of customary law, it is not easy to practice, especially when dealing with state law. The state, in this case, its law enforcement officials, often overlook the existence of customary law and prioritize the enforcement of state law. The problem of applying customary law amid state law arises from several factors, namely the effort to unify laws that create new problems, and the tendency of law enforcement officials to understand legal regulations textually, resulting in customary law being increasingly marginalized.

In addressing the problem of applying customary law in the midst of state law, several scholars have offered potential solutions. First, there is the option of separating the application of state law and customary law. This means that in a community where customary law is still practiced, customary law can be applied even if they also apply state law in other matters. Second, there is the possibility of combining state law and customary law. In this case, when a customary community faces a legal case, they will first seek to resolve it using state law, and then follow customary law if necessary, or vice versa. Third, there is the

⁴⁵ Final Report of the Constitutional Study Team on Legal Protection of Indigenous Peoples of the 2014 National Legal Development Agency (BPHN).

⁴⁶ Marianus Kleden, *Hak Asasi Manusia Dalam Masyarakat Komunal* (Yogyakarta: Lamalera, 2009).

option of dividing state law and customary law according to their respective functions.

The problem of applying customary law in the presence of state law has been addressed by several scholars, who have proposed several solutions. One potential solution is to separate the application of state law and customary law. This approach entails that in communities where customary law still holds, customary law may be applied, even when state law is used in other matters. A second option is to combine state law and customary law. In such a case, when a customary community faces a legal case, they will initially seek to resolve it using state law and then follow customary law if necessary, or vice versa. A third option is to differentiate state law and customary law according to their respective functions.

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