

# The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice

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## Abstract

*This article examines data and facts related to implementing and functionalizing traditional institutions as living laws in society. It presents the concept of revitalizing traditional institutions in the criminal law system to realize restorative justice. According to indigenous peoples, justice is a complex concept because formal courts and other forums, such as customary courts, can administer it. This study aims to analyze the contribution of traditional institutions and restorative justice in the criminal law system in Indonesia. The approaches used in this research are conceptual, historical, statutory, and case approaches. The study results from show that customary institutions and restorative justice in Indonesia have been carried out through the participation of community members with traditional legal characteristics, cultural pluralism, moral values, and religion to solve problems through consultation to reach an agreement. Customary institutions and restorative justice in Indonesia are carried out by mediation for an agreement to reach an agreement in the best interests of victims, perpetrators, families, and other parties related to the traditional characteristics of law, cultural pluralism, moral values, and religion.*

## 1. Introduction

Indonesia is a rule-of-law country under Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. What is meant by the rule of law is a country that upholds the supremacy of law to uphold justice and truth, and no power is not held accountable (accountable). The laws that apply in Indonesia are very diverse, both positive law and customary law or customs that apply in people's lives and Islamic law used in marriage and inheritance, all of which are contained in the constitution of the Republic of Indonesia.

The discussion of customary law (including customary criminal law) is closely related to the current condition of positive law (*ius constitutum*) that applies in Indonesia, with various regional cultures which also have implications for the law. This diversity shows the existence of a diversity of legal systems that apply together in an Indonesian nation's legal order. Unwritten customary law is one side of legal pluralism in our country besides state law. Customary laws that are not factually written are still recognized and alive and in tune with the indigenous peoples' development.

The existence of customary law as living law Indonesian people are increasingly marginalized.<sup>1</sup> Customary law, which was initially a living law and able to provide solutions to various problems in the social life of the Indonesian people, is increasingly fading in its existence. At present, in empirical reality, sometimes there are many problems faced by Indonesian indigenous peoples when customary law deals with positive law. For example, when the traditional rights of the people deal with the interests of investors through state law. The development of the Indonesian legal system, which tends to prefer civil law and standard law systems, and Indonesian legal politics, which leads to codifying and unifying laws, has accelerated the disappearance of customary law institutions.

The history of enacting a law in Indonesia has noted that many legal experts have studied customary law as a living law in Indonesian society. Van Vollenhoven stated that if someone wants to get knowledge and information about the laws that live on

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<sup>1</sup> Mason C Hoadley, "The Leiden Legacy: Concepts of Law in Indonesia (Review)," *Sojourn: Journal of Social Issues in Southeast Asia* 21, no. 1 (2006): 124–28.

this earth, precisely because of the variety of forms in the past and present, then the whole Indian rule is an inexhaustible source for study. This statement acknowledges that legal pluralism in the familiar environment is unique, engaging, and a characteristic of Indonesian society. Until now, the pluralism of customary law in Indonesia, which is growing dynamically, follows the development of its society while still relying on the characteristics of indigenous peoples and the *participerend coschmish* mindset. Which can attract the interest of experts from all over the world to be the object of research. The *participerend coschmish* mindset is based on the view that the universe and everything in it is a unit whose integrity and balance must always be maintained. Therefore, any disturbance to the universe's balance needs to be restored as before.<sup>2</sup> As a reminder, currently related to the settlement of civil and criminal disputes, a method or approach known as the therapeutic approach is developing.<sup>3</sup> Which is similar to the *participerend coschmish* mindset held by indigenous peoples. Implementation of restoring a state of balance based on the *participerend coschmish* mindset, incarnated in several ceremonies, taboos, or rites (*rites de passage*).<sup>4</sup> This fact shows that the conception and mindset of *adat* are still relevant and an inspiration for other countries to develop laws to fulfill people's sense of justice. Indigenous peoples have the same pattern in resolving conflicts in the community, namely controlling life in the community and imposing sanctions if violated so that recovery is very effective.<sup>5</sup>

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<sup>2</sup> Indah Dwi Qurbani and Muhammad Lukman Hakim, "Analisis Normatif Pengaturan Pembentukan Desa Adat," *Grondwet* 1, no. 2 (July 13, 2022): 93, <https://ejournal.grondwet.id/index.php/gr/article/view/10>.

<sup>3</sup> Romli Atmasasmita, *Globalisasi Kejahatan Bisnis*, 2nd ed. (Jakarta: Kencana Prenada Media Group, 2010), 190.

<sup>4</sup> Bushar Muhammad, *Asas-Asas Hukum Adat (Suatu Pengantar)* (Jakarta: Pradnya peramita, 2002), 47.

<sup>5</sup> Desi Tamarasari, "Pendekatan Hukum Adat dalam Menyelesaikan Konflik Masyarakat pada Daerah Otonom," *Indonesian Journal of Criminology* 2, no. 1 (January 2002): 4219.

Gorontalo is one of the 19 Indonesian Customary Law Regions, according to Prof. Mr. C. Van Vollen Hoven.<sup>6</sup> Highly respects Customs and Culture as a unified whole and is a norm that is adhered to in social life. Before Islam entered Gorontalo, the way of life for the people of Gorontalo was well-known as hospitable indigenous people both in speaking, behaving, and acting so that their behavior (*Popoli*) is the main pattern and basis for evaluating one's life and that of others. In terms of language and behavior, expressing feelings to others or conveying information to someone is preferable to using spoken language rather than straightforward language. The language of expression has given rise to the language of art in society. Gorontalo in the form of poems, poems that aim to create an atmosphere of peace among people as the following poem:

- 1) *Opiyohe lo, Dudelo* = With good manners.
- 2) *Openu Dila Motonelo* = No need to pay for it
- 3) *Opiyohe lo loiya* = With good words
- 4) *Open dila Tidoiya* = No need for money.

The poem above illustrates the relationship between material and morals). either directly from the community or from *Olongiya* (King) State Officials.

There are several differences between customary criminal law and national criminal law, such as having an open legal system, meaning that what is prohibited or permitted according to customary law will always be measured by the chain of views of society as a whole. If an event occurs and disrupts the balance of life in indigenous peoples, it is categorized as a violation. This differs from the national criminal law, which is closed in nature, where violations or legal events are limited to one provision in Article 1 of the Criminal Code. (2) In law, wrongdoing punishes the person who made the mistake. In contrast to customary criminal law, which does not see that wrongdoing was done intentionally (*dolus*) or negligence (*culpa*) but the result of the action. Does the wrongdoing require light or heavy correction, whether the act is borne by the person who made a mistake or is it borne by the family, relatives, or community, and can even

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<sup>6</sup> Soerjono Soekanto and Soleman B. Taneko, *Hukum Adat Indonesia*, Cet. 15 (Jakarta: Rajawali Pers, 2016), 17.

be borne by both parties, both the person who made a mistake or the party who received the consequences of the act? (3) The severity of the sentence in the national criminal law system is determined by the judge's decision based on the applicable rules. In contrast, in the conventional criminal law system, justice is carried out according to kinship, harmony of peace, and a sense of justice, so customary judges are given the freedom to settle a matter. Customary criminal cases are based on the atmosphere and awareness of the local community.<sup>7</sup>

A striking difference between Customary Criminal Law and National Criminal Law is the legal action against drunk people who make noise. Customary law justifies people who act on drunk people (*tambali*). Still, National Law takes issue with people who beat (*molambali*) and doesn't mind people who are drunk as long as the person doesn't commit a crime. The Indigenous people of Gorontalo hate drunks who have disturbed others, so the support for those who act on them is extensive. Still, the community is often disappointed because it turns out that those who are punished under the National Criminal Code are the ones who act on them.

## 2. Problem Statement

Based on the description above, regarding the position of customary law as a living law in indigenous peoples in Indonesia, the authors are interested and intend to examine legal issues regarding the implementation and functionalization of traditional institutions as living law in society and the concept of revitalizing traditional institutions in the criminal law system to realize restorative justice by taking the scope of customary law studies in Gorontalo.

## 3. Methods

In this study, researchers used a type of normative research. Normative legal research is oriented toward approaches to various statutory norms, legal references, scientific

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<sup>7</sup> Stevania Bella Kalengkongan, "Kajian Hukum Pidana Adat Dalam Sistem Hukum Pidana Indonesia," *LEX CRIMEN* 6, no. 2 (March 27, 2017): 30–32, <https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/15340>.

journals, legal theories, and legal principles.<sup>8</sup> The normative legal research method examines existing literature to obtain objective law (legal norms), namely by researching legal issues. The second stage in normative legal research is research aimed at obtaining subjective law (rights and obligations).<sup>9</sup>

The approach used is a conceptual approach (conceptual approach), historical approach (history approach), statutory approach (statute approach), and case approach (case approach).

## 4. Discussion

### 4.1. Implementation and Functionalization of Customary Institutions as Living Law in the Middle of Society

Humans are social beings; as social beings, humans cannot live alone and, therefore, must live together to form bonds. From this reciprocal relationship between human beings, a society is formed. Thomas Hobbes (1588-1629) stated that one of human nature is the existence of a social contract, namely that each individual must respect and protect the rights of other individuals. Social contracts appear in people's lives in the form of rules, norms, and values that every community must obey and obey.<sup>10</sup>

One of those community arrangements is what is called "*adat*". Etymologically, the term *adat* comes from Arabic, which means "custom". Immaterial, which concerns matters relating to the belief system.<sup>11</sup>

Customary law is a social product resulting from joint work (agreement) and collective work (social property) of a customary law community. The application of customary law in Indonesia is very diverse; each region has different customary laws. Starting

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<sup>8</sup> Syahrudin Nawi, *Penelitian Hukum Normatif Versus Penelitian Hukum Empiris* (Makassar: Umitoha, 2014), 250.

<sup>9</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Cet. 17 (Jakarta: Rajawali Pers, 2015), 13-14.

<sup>10</sup> Meilanny Budiarti Santoso, "Mengurai Konsep Dasar Manusia Sebagai Individu Melalui Relasi Sosial Yang Dibangunnya," *Prosiding Penelitian Dan Pengabdian Kepada Masyarakat* 4, no. 1 (2017): 107.

<sup>11</sup> Soekanto and Taneko, *Hukum Adat Indonesia*, 83.

from those very close to Islamic law to those that still adhere to animism, there are customary laws that adhere to patrilineal and matrilineal, but there are also those that adhere to a parental system. Van Vollenhoven divides 19 customary law circles in Indonesia, namely Aceh, Gayo, Minangkabau, South Sumatra, Malay, Bangka-Belitung, Kalimantan, Minahasa, Gorontalo, Toraja, South Sulawesi, Ternate, Maluku, Irian, Timor, Bali and Lombok, Central Java and East Java Solo, Yogyakarta, and West Java.<sup>12</sup>

The existence of indigenous peoples in Indonesia is also recognized constitutionally as stipulated in the 1945 Constitution 4th Amendment Article 18B paragraph (2): "The state recognizes and respects the units of indigenous peoples and their traditional rights as long as they are still alive and following the development of society and the principles of The Unitary State of the Republic of Indonesia which is regulated by law". The relation with that based on the Regulation of the Minister of Home Affairs Number 5 of 2007 concerning Guidelines for the Arrangement of Community Institutions, Customary Institutions are social institutions that are either intentionally formed or that have naturally grown and developed in the history of society or a specific customary law community with jurisdiction and property rights. Wealth in customary law has the right and authority to regulate, manage and resolve various life problems related to and referring to applicable customs and customary laws. The role of traditional institutions is a behavior or activity based on a person's position following his rights and obligations in an indigenous community regarding all matters related to local customs.<sup>13</sup>

In practice, customary institutions in Indonesia, especially those in Gorontalo, refer to a system of values, norms, and traditions that have long existed and developed in the local community. The functionalization of customary institutions refers to efforts to provide a broader and more relevant role for traditional institutions in legal, social,

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<sup>12</sup> Soerojo Wignjodipoero, *Pengantar Dan Asas-Asas Hukum Adat* (Jakarta: Haji Masagung, 1992), 89.

<sup>13</sup> Tya Sonia and Sarwititi Sarwoprasodjo, "Peran Lembaga Adat dalam Pelestarian Budaya Masyarakat Adat Kampung Naga, Desa Neglasari, Kecamatan Salawu, Tasikmalaya," *Jurnal Sains Komunikasi dan Pengembangan Masyarakat [JSKPM]* 4, no. 1 (February 1, 2020): 116, <https://doi.org/10.29244/jskpm.4.1.113-124>.

political, and national development. The description of the functionalization of this customary institution includes several aspects. First, recognizing and respecting the existence and rights of traditional institutions in state laws and policies. This includes recognizing local autonomy in decision-making related to daily affairs in certain areas. Second, functionalizing customary institutions can also involve collaboration between traditional institutions, the government, and other institutions.

The functionalization of these customary institutions can contribute in terms of realizing restorative justice, which can be pursued through several steps and principles as follows:

- 1) Recognition and restoration of Indigenous people's rights: The functionalization of traditional institutions can begin with recognizing and respecting the rights of Indigenous peoples, including traditional rights, land rights, and natural resource management rights. This is important to restore and correct injustices that indigenous peoples may experience.
- 2) Participation and involvement of Indigenous peoples: The functionalization of customary institutions also involves the active participation of Indigenous peoples in making decisions related to issues that affect them. This includes involving indigenous peoples in legal proceedings, remedies, and dispute resolution. Their involvement ensures that decisions taken take into account indigenous peoples' perspectives, interests, and needs.
- 3) Healing and reconciliation: Restorative justice focuses on healing victims, communities, and relationships damaged by crime or conflict. The functionalization of customary institutions can provide space for a therapeutic approach to resolving disputes and managing conflict. Indigenous peoples can improve relations and restore social balance through customary mechanisms involving negotiations, mediation, and reconciliation efforts.
- 4) Fair and sustainable conflict management: Customary institutions have traditional knowledge and mechanisms for dealing with conflict. In functionalization, this knowledge can be recognized and used with the formal legal system to ensure fair and sustainable conflict resolution. This includes



building bridges between customary law systems and national law, strengthening cooperation, and respecting the principles of restorative justice.

- 5) Cultural education and understanding: The functionalization of *adat* institutions may also include efforts to increase understanding and appreciation of the culture of indigenous peoples. Education that recognizes and respects the traditional knowledge, values, and practices of indigenous institutions can help address structural inequities and promote awareness of the interests of indigenous peoples in the context of restorative justice.

#### **4.2. The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice**

Customary institutions are a part of social institutions that regulate matters related to customs in the place where these institutions are located. The existence of customary law as a component of legal substance must be given a suitable place in the development of legal material following the socio-cultural diversity of society.<sup>14</sup>

Thoughts to codify or the unification of the concepts of customary institutions and restorative justice in the reform of the criminal law system in Indonesia must at least contain various provisions in the general rules, which include, among others: the principles of a restorative justice system based on Pancasila, which is compiled based on the foundation of Pancasila, which contains thoughts about Belief in One Almighty God, Just and Civilized Humanity, Indonesian Unity, Democracy Led by wisdom in deliberations representation and social justice for all Indonesian people. Attempts to forgive as part of the sanction of action. As well as a balance between religious values (religious morals), human values (humanist), and societal values (nationalistic, democratic, and social justice). Based on this idea, it is possible to develop various principles regarding alternative sanctions that are educational, not retaliatory. Then the legal principles as guidelines for implementing restorative justice were formed based on the principles of the formation of the National legal system as stipulated in Law Number 12 of 2011 concerning the formation of statutory regulations. An

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<sup>14</sup> La Syarifuddin, "Sistem Hukum Adat Terhadap Upaya Penyelesaian Perkara Pidana," *Risalah Hukum*, December 31, 2019, 2.

organization with clear roles and functions is the implementing organizational structure that implements the restorative justice system carrying out the process.

Concerning the concept of restorative justice, Muladi in Abintoro Prakoso details the characteristics of restorative justice as follows:

- 1) Crime is defined as a person's violation of another person and is seen as a conflict;
- 2) Focus attention on solving accountability and liability issues for the future;
- 3) Normative nature is built based on dialogue and negotiation;
- 4) Restitution as a means of the parties, reconciliation, and restoration is the main goal;
- 5) Justice is defined as the relationship between rights, assessed based on results;
- 6) The focus of attention is on repairing social wounds caused by crime;
- 7) The community is a facilitator in the therapeutic process;
- 8) The role of victims and perpetrators is recognized, both in determining problems and solving the rights and needs of victims. Perpetrators are encouraged to be held accountable;
- 9) The perpetrator's responsibility is formulated as the impact of understanding his actions and directed to participate in making the best decision;
- 10) Criminal acts are understood in a holistic, moral, social, and economic context;
- 11) Stigma can be removed through restorative.<sup>15</sup>

This restorative justice can be realized through the presence of traditional institutions, which have several advantages and positive contributions to the criminal law system in Indonesia. The advantages are that customary institutions have strong local knowledge and values. Recognizing and integrating these values into the criminal justice system can create an approach that is more appropriate to the local cultural and social context. This enables respect for the needs and aspirations of indigenous peoples and strengthens trust in the legal system. Then customary institutions generally have traditional mechanisms that involve community participation in dispute resolution.

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<sup>15</sup> Abintaroro Prakoso, *Pembaruan Sistem Peradilan Pidana Anak*, ed. Tina Sabriantina, Cet. 2 (Yogyakarta: Aswaja Pressindo, 2016), 163–64.

This approach can be a more inclusive alternative to the formal criminal justice system, which is often more centered on case processing. By involving traditional institutions, the needs of victims, perpetrators, and the community can be fulfilled in restorative justice. In restoring social relations and reconciliation between perpetrators, victims, and communities, traditional institutions can provide a more holistic and sustainable approach to dealing with crime, considering social, cultural, and spiritual aspects. In addition, customary institutions have in-depth knowledge of local conflict resolution.

They often have time-tested and effective mechanisms for dealing with community disputes and abuses. By leveraging this knowledge, the criminal justice system can engage traditional institutions to help resolve conflicts and avoid escalations of violence. And society can be more fulfilled in the process of restorative justice. In restoring social relations and reconciliation between perpetrators, victims, and communities, traditional institutions can provide a more holistic and sustainable approach to dealing with crime, considering social, cultural, and spiritual aspects. In addition, customary institutions have in-depth knowledge of local conflict resolution.

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Settlement mechanisms through traditional institutions always prioritize harmony and social harmony. Maintaining social harmony is highly valued in rural life, and informal actors prioritize restoring social relations when problems arise. Settlements through traditional institutions have a flexible character. Structures and norms are loose to adapt to social changes. Dispute resolution through customary institutions relies on local authority and legitimacy. Society prefers non-state justice primarily because of the authority of the perpetrators in the rural environment to solve problems and implement decisions.<sup>16</sup>

Revitalizing traditional institutions in the criminal law system aims to integrate the values and mechanisms of customary institutions into the existing criminal law system

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<sup>16</sup> Inosentius Samsul, "Penguatan Lembaga Adat Sebagai Lembaga Alternatif Penyelesaian Sengketa (Studi terhadap Lembaga Adat di Kabupaten Banyu Asin, Sumsel dan di Provinsi Papua)," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 5, no. 2 (August 4, 2016): 135, <https://doi.org/10.22212/jnh.v5i2.237>.

to achieve restorative justice. The following is the concept of revitalizing traditional institutions in the criminal law system to achieve restorative justice:

- 1) **Recognition and respect for traditional institutions:** Revitalization begins with acknowledging and respecting the existence and role of traditional institutions in criminal law enforcement. This includes recognition of the traditional values, norms, and procedures of traditional institutions in dealing with conflict and crime in the community.
- 2) **Collaboration and Partnerships:** Revitalization involves collaboration between traditional institutions, the formal criminal justice system, and other relevant stakeholders. This collaboration aims to integrate customary practices and knowledge into the criminal justice process, including involving traditional leaders or customary institutions in resolving disputes or making decisions related to indigenous peoples.
- 3) **Restoration and Recovery:** The main focus of restorative justice is the recovery of victims, perpetrators, and communities affected by crime. In revitalizing traditional institutions, a therapeutic approach can include restoring social relations, restoring damaged customary values, and rehabilitating criminals through processes recognized by traditional institutions.
- 4) **Education and Understanding:** Revitalizing traditional institutions also require efforts to increase understanding and awareness of traditional values and conflict resolution mechanisms. Education and training can be provided to authorities, legal personnel, and the broader community so that they understand the importance of traditional institutions and can respect and use them in restorative justice processes.
- 5) **Harmonization of Customary Law and Formal Criminal Law:** Revitalizing traditional institutions involves harmonizing customary and formal criminal laws. This involves harmonizing the norms and principles of customary law with applicable criminal law without neglecting the principles of justice and the protection of human rights.

Applying the concept of revitalizing traditional institutions in the criminal law system requires a joint commitment from the government, legal institutions, indigenous peoples, and other relevant stakeholders.

## 5. Conclusion

Customary law is a social product resulting from joint work (agreement) and collective work (social property) of a customary law community. Concerning the renewal of Indonesian criminal law in the future, it is demanded that there be a value system that is the spirit in the legal instrument, namely that which is embodied in the unity of the Pancasila precepts to formulate applicable law based on mutually agreed values, both as values that live in customs and traditions as well as nationally within a legal framework based on Belief in One Almighty God, with just and civilized humanity for the sake of Indonesian unity, in a democracy led by deliberative/representative wisdom and social justice for all Indonesian people. The condition of society in Indonesia has social ties, so it is a strength to optimize as part of the process of restorative justice.

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