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Reconstructing the Harmonization of Customary Law and National Law in the Formulation of Public Policy Based on Living Law in Indonesia

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ABSTRACT

Indonesia's plural legal system reflects the coexistence of national law, customary law, and other normative orders; however, the harmonization of customary law within public policy remains incomplete and often results in legal uncertainty, conflict, and limited social legitimacy. This study aimed to reconstruct a living-law-based model for harmonizing customary law and national law in public policy formulation in Indonesia. The research employed normative legal research using statutory, conceptual, comparative, and case approaches. Legal materials included constitutional provisions, legislation, court decisions, scholarly literature, and government policy documents, which were analyzed qualitatively through systematic, historical, and teleological interpretations. The findings revealed that disharmony persists in the recognition of customary law communities, natural resource management, and dispute resolution because sectoral regulations and administrative mechanisms have not fully accommodated living customary norms. This study proposed a five-stage harmonization model consisting of the identification of living customary values, synchronization with statutory law, participation of customary communities, context-sensitive policy implementation, and periodic evaluation. The study concluded that legal harmonization should integrate relevant customary values without compromising legal certainty, human rights, and the rule of law, thereby supporting more inclusive, responsive, legitimate, and substantively just public policies in Indonesia within the framework of its contemporary plural legal order.

INTRODUCTION

Indonesia is characterized by a diverse legal system shaped by its history, geographical conditions, and cultural diversity across more than 17,000 islands (Griffiths, 1986). Indonesia's national legal system is not only based on state-enacted laws established through legislative mechanisms but is also influenced by customary law, which existed long before the establishment of the modern Indonesian state (Soekanto, 2014; Bushar Muhammad, 2013). Customary law represents social, cultural, and local wisdom values that have developed within communities and function as guidelines for regulating relationships among individuals, communities, and their surrounding environment (Hadikusuma, 2014; Dominikus Rato, 2015).

Constitutionally, the existence of customary law communities is recognized under Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which stipulates that the state recognizes and respects customary law communities and their traditional rights as long as they remain alive, are consistent with societal development, and comply with the principles of the Unitary State of the Republic of Indonesia as regulated by law. This recognition confirms that customary law is an important element of the national

legal system and cannot be separated from the development of Indonesian law (Asshiddiqie, 2020). However, this constitutional recognition has not been fully accompanied by regulatory harmonization at the sectoral level (Mahfud MD, 2019). Various public policies continue to demonstrate a tendency to prioritize a centralized positive legal approach, causing customary law to often be positioned as a supplementary norm rather than as a legal source with a strategic role in policy formulation (Yuliandri, 2018; Asshiddiqie, 2021). This situation has resulted in various legal conflicts, including disputes concerning customary land ownership, natural resource management, customary forest protection, and the recognition of customary community institutions (Faiq Tobroni, 2013; Bedner, 2016).

In governance practices, disharmony between customary law and national law not only creates legal uncertainty but also has the potential to reduce the legitimacy of public policies in the eyes of communities. Policies formulated without considering the legal values embedded within society often encounter social resistance because they are perceived as inconsistent with long-established customary norms (Ehrlich, 1936; Rahardjo, 2009). Conversely, the application of customary law without adequate harmonization with national law may raise concerns regarding legal certainty, human rights protection, and compliance with the principles of a modern rule-of-law state (Fuller, 1969; Hart, 1994).

The development of contemporary legal paradigms demonstrates a shift from approaches solely oriented toward legal positivism to approaches that are more responsive to societal needs (Nonet & Selznick, 1978; Rahardjo, 2009). The concept of living law, introduced by Eugen Ehrlich, positions laws that develop and operate within society as important sources of legal development. In the Indonesian context, this concept remains highly relevant due to the continued practice of customary law among various indigenous communities across different regions, including Papua, Maluku, Bali, Minangkabau, Aceh, and Kalimantan. Meanwhile, contemporary public policy development increasingly requires participatory approaches in regulatory formulation. The principle of good governance requires policies not only to fulfill formal legal requirements but also to reflect values of justice, public participation, effectiveness, and sustainability (Birkland, 2019). Therefore, harmonization between customary law and national law should no longer be viewed solely as an issue of normative synchronization but also as an effort to establish inclusive governance that accommodates the diversity of legal systems within Indonesian society (Griffiths, 1986; Friedman, 1975). Although various studies have examined the relationship between customary law and national law, most have remained focused on descriptive or comparative perspectives. Previous research has generally discussed the existence of customary law, recognition of customary law communities, and conflicts between customary law and positive law without proposing a conceptual model for harmonizing these legal systems in public policy formulation. Consequently, a research gap remains in the absence of a systematic legal harmonization model that integrates living law principles into the public policy formation process.

Based on these conditions, this study sought to answer how disharmony between customary law and national law manifests in public policy formulation in Indonesia and how a living-law-based model for reconstructing legal harmonization can contribute to responsive and equitable public policies aligned with the characteristics of Indonesian legal pluralism. The main contribution of this study lies in developing a legal harmonization model that not

only emphasizes regulatory synchronization but also integrates the participation of customary law communities, protection of traditional rights, and mechanisms for continuous policy evaluation. Theoretically, this study is expected to contribute to the development of legal scholarship, particularly in the fields of legal pluralism, legal harmonization, and living law theory. Practically, the findings are expected to provide recommendations for legislators, central and regional governments, and other stakeholders in formulating public policies that are more responsive to the diversity of legal systems in Indonesia.

METHOD

This study employed normative legal research to analyze legal norms governing the relationship between customary law and national law in public policy formulation in Indonesia (Marzuki, 2021; Johnny Ibrahim, 2021). This approach was selected because the study focused on examining the synchronization of legal provisions, principles, doctrines, and court decisions related to the recognition of customary law and regulatory harmonization (Marzuki, 2021). The research applied statutory, conceptual, comparative, and case approaches (Marzuki, 2021; Mukti Fajar & Yulianto Achmad, 2017). These approaches enabled a comprehensive analysis of legal norms, implementation practices, and legal doctrines concerning legal pluralism and living law.

The primary legal materials included the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning Human Rights, Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law (Perppu) on Job Creation into Law, Constitutional Court Decision Number 35/PUU-X/2012 concerning customary forests, and relevant sectoral regulations on the recognition of customary law communities. Secondary legal materials consisted of scholarly books, national and international journal articles, research reports, and government policy documents, while tertiary legal materials, including legal dictionaries, encyclopedias, and legal indexes, were used to support the clarification of legal terminology (Johnny Ibrahim, 2021).

Legal materials were collected through library research and analyzed qualitatively using systematic, historical, and teleological interpretation methods (Marzuki, 2021; Johnny Ibrahim, 2021). The analysis results were presented descriptively and prescriptively to formulate recommendations for a legal harmonization model applicable to public policy formulation in Indonesia (Mukti Fajar & Yulianto Achmad, 2017).

RESULTS AND DISCUSSION

The Position of Customary Law within Indonesia's National Legal System

Indonesia is a country characterized by a plural society, whether viewed from the aspects of ethnicity, religion, culture, or the legal systems that have developed within community life (Griffiths, 1986). This diversity gives rise to a condition known as legal pluralism, that is, a situation in which more than one legal system operates simultaneously within a single state territory. In the Indonesian context, legal pluralism is reflected in the coexistence of state law, customary law (adat law), religious law, and customary practice law, all of which interact with one another in regulating community life.

Customary law is one of the oldest legal systems in Indonesia (Soekanto, 2014). Long before the formation of the modern state, communities already possessed their own

mechanisms for regulating social relations, resolving disputes, managing natural resources, governing ownership rights, and maintaining the balance between humans and their environment. This law emerged from social values passed down through generations, thereby acquiring legitimacy from the community without requiring formal enactment through a legislative institution. For this reason, customary law is often understood as living law—law that lives and develops within society (Ehrlich, 1936).

The view of customary law as living law was first systematically developed by Eugen Ehrlich. According to Ehrlich, the primary source of law is not written regulation, but rather the social norms that are genuinely observed by society in daily life. From this perspective, the effectiveness of law is determined not merely by the existence of legislation, but by the degree of societal acceptance of the norms governing behavior. This theory holds strong relevance in the Indonesian context, given that many customary communities continue to rely on adat-based dispute resolution mechanisms even where state law is already available.

Recognition of customary law within Indonesia's legal system rests on constitutional grounds through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that the state recognizes and respects units of customary law communities together with their traditional rights, insofar as these remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia, and are regulated by law. This provision affirms that customary law is not merely a cultural heritage but forms part of the national legal system that has acquired constitutional legitimacy (Asshiddiqie, 2020). In addition to Article 18B paragraph (2), recognition of customary law communities is also reflected in Article 28I paragraph (3) of the 1945 Constitution, which affirms that cultural identity and the rights of traditional communities are respected in line with the development of the times and civilization. This provision demonstrates that the Indonesian Constitution not only protects individual rights but also recognizes the collective rights of customary communities as part of human rights. Accordingly, the existence of customary law carries a constitutional dimension that must be taken into consideration in both the formulation and implementation of public policy (Asshiddiqie, 2020).

Despite having attained constitutional recognition, the implementation of recognition toward customary law continues to face various challenges. One of the principal problems is the absence of adequate harmonization among various sectoral regulations. For instance, regulations concerning ulayat land, customary forests, natural resources, and customary village governance remain scattered across numerous statutes with approaches that are not always consistent. As a result, customary law communities frequently encounter legal uncertainty whenever their traditional rights come into conflict with the interests of national development or investment.

This problem is clearly evident in disputes over the management of customary forests. Prior to Constitutional Court Decision No. 35/PUU-X/2012, customary forests were categorized as part of state forests, granting the state dominant authority over their management. This Constitutional Court decision changed the paradigm by affirming that customary forests are forests located within the territory of customary law communities and are no longer part of state forests. This ruling became an important milestone in strengthening recognition of the rights of customary communities, while also demonstrating that the national

legal system has begun to accommodate the living values of law within society. Nevertheless, implementation of this decision continues to face various administrative and regulatory obstacles. Many regions have yet to enact regional regulations governing the recognition of customary law communities, causing the process of designating customary territories to proceed slowly. In addition, coordination among government agencies in recognizing the rights of customary communities has yet to function optimally. This condition demonstrates that normative recognition alone is insufficient; what is required is the harmonization of public policy capable of translating constitutional recognition into effective administrative mechanisms.

From the perspective of Lawrence M. Friedman's legal system theory, this problem reveals an imbalance among the three components of the legal system, namely legal structure, legal substance, and legal culture (Friedman, 1975). In terms of substance, the Constitution has provided a basis for recognizing customary law. However, in terms of structure, the institutions responsible for implementing this recognition have yet to establish adequate coordination mechanisms. Meanwhile, in terms of legal culture, there remains a tendency among law enforcement officials and policymakers to prioritize a positivist approach over the values of law that develop within society. This dominance of the positivist paradigm causes customary law to often be regarded as an informal norm, thereby failing to attain a position equal to that of state law. Yet in a pluralistic state, harmonization between customary law and national law is an essential precondition for achieving legal certainty grounded in justice. Legal certainty oriented solely toward written rules, without regard for social reality, has the potential to generate conflict, social resistance, and diminished policy effectiveness. Furthermore, the development of governmental decentralization through regional autonomy has opened greater space for local governments to accommodate customary legal values in policy formulation. Several regions—such as Bali through its customary villages (desa adat), West Sumatra through nagari governance, and Papua through recognition of ulayat rights—have demonstrated relatively successful practices in integrating customary law with governmental policy. Nonetheless, such practices remain sectoral in nature and have yet to be supported by a harmonization model capable of nationwide application.

Based on the foregoing discussion, it can be understood that the position of customary law within the national legal system carries strong constitutional legitimacy. However, this recognition has not been fully followed by adequate regulatory harmonization or implementation mechanisms. Therefore, a model for the reconstruction of legal harmonization is needed—one capable of bridging the relationship between customary law and national law, so that the resulting public policy not only satisfies the principle of legality but also reflects social justice, respect for the rights of customary communities, and effectiveness in implementation.

Disharmony between Customary Law and National Law in the Formulation of Public Policy in Indonesia

1. The Concept of Legal Disharmony in a Pluralistic State

Legal pluralism is a defining characteristic of Indonesia's legal system, built upon the diversity of its society, culture, and value systems. In a pluralistic state, the existence of more than one legal system is not a deviation but a social reality that must be accommodated in the formulation of public policy (Griffiths, 1986). Nevertheless, this diversity also has the

potential to generate disharmony if it is not supported by adequate integration mechanisms (Asshiddiqie, 2020). Legal disharmony may be understood as a condition in which two or more legal norms operating within a single system possess differing objectives, substance, or mechanisms of application, thereby generating legal uncertainty (Marzuki, 2021). In the Indonesian context, disharmony arises when national law—formal and written in nature—fails to fully accommodate the customary law that lives within society. As a result, public policy frequently encounters resistance because it does not align with the social values that have developed within customary communities.

According to Lawrence M. Friedman, the effectiveness of law depends on the balance among legal substance, legal structure, and legal culture. When policymakers focus solely on formal legal substance without regard for the legal culture of society, policy implementation will encounter obstacles (Friedman, 1975). This is evident across various policies related to natural resource management, land, forestry, and regional governance. On the other hand, Satjipto Rahardjo, through his theory of progressive law, affirms that law must not be understood merely as a collection of written regulations but must be capable of responding to the needs of society (Rahardjo, 2009). Therefore, the formulation of public policy must take into account the values of living law so that law does not lose its social legitimacy.

2. Forms of Disharmony between Customary Law and National Law

a. Disharmony in the Recognition of Customary Law Communities

Although the 1945 Constitution recognizes the existence of customary law communities, its implementation continues to face various obstacles. One cause is the divergence in regulation across various sectoral statutes (Mahfud MD, 2019). For example, the Basic Agrarian Law recognizes ulayat rights insofar as they still exist in reality. Meanwhile, the Forestry Law requires that customary law communities first be formally designated by local government before such rights can be recognized. On the other hand, several investment-related regulations grant broad authority to the government to designate national strategic areas without adequate consultation mechanisms with customary communities. These divergent recognition mechanisms compel customary communities to undergo lengthy administrative procedures in order to obtain recognition of their traditional rights. As a result, many customary communities that remain sociologically in existence have yet to obtain juridical recognition, leaving them without a strong legal standing when confronted with development interests. This phenomenon reveals a gap between normative recognition at the constitutional level and implementation at the level of sectoral policy (Asshiddiqie, 2020). In other words, the recognition of customary law remains largely declarative and has not yet become fully operational.

b. Disharmony in Natural Resource Management

Another problem that frequently arises is conflict between customary communities and the government or corporations over natural resource management. Across various regions of Indonesia, customary communities maintain their own natural resource management systems grounded in the principle of sustainability (Soekanto, 2014). For instance, the customary community of Papua recognizes a system of ulayat rights that governs the relationship between the community and the land as part of cultural identity. In Maluku, the sasi system is known—a prohibition on harvesting natural resources for a specified period in order to preserve environmental sustainability. The Balinese community holds the concept

of awig-awig (Windia, 2006), while the Minangkabau community applies the principle of communally managed clan ulayat land. In contrast, government policy in granting mining, plantation, and forestry permits relies predominantly on an administrative approach grounded in positive law (Bedner, 2016). This divergence in approach frequently triggers social conflict, as customary communities perceive their traditional rights as being disregarded. Prolonged conflict not only harms customary communities but also hinders investment and diminishes public trust in government. Legal harmonization is therefore an essential precondition for sustainable development.

c. Disharmony in Dispute Resolution

Differences in dispute resolution mechanisms also constitute a form of disharmony between customary law and national law. Under customary law, dispute resolution prioritizes deliberation (musyawarah), the restoration of social relations, and communal balance. Sanctions imposed are not always punitive in nature but may take the form of customary compensation, apology, or an obligation to perform customary rituals. National law, by contrast, places greater emphasis on litigation through the courts, oriented toward legal certainty and the application of written norms. This difference in paradigm often leads customary communities to prefer adat mechanisms over resolution through the courts. However, the outcomes of customary resolution have not always received adequate recognition within the national legal system, thereby generating legal uncertainty (Soekanto, 2014).

3. Comparative Analysis of Regulatory Disharmony

Substantively, customary law and national law differ in their sources of law, the formation of norms, dispute resolution mechanisms, and regulatory objectives (Soekanto, 2014). Customary law develops from values and customs that live within society, oriented toward the creation of social balance, whereas national law is formed through statutory legislation oriented toward legal certainty. This difference does not constitute a form of contradiction but rather reflects a legal pluralism that requires harmonization. Public policy formulation must therefore be capable of integrating both legal systems in order to create legal certainty alongside justice that is consistent with the social values of Indonesian society.

4. Analysis Based on Legal Pluralism Theory

According to John Griffiths, legal pluralism is a natural condition within modern society. The state cannot absolutely impose a single legal system, as society continues to observe norms it regards as possessing social legitimacy (Griffiths, 1986). In the Indonesian context, legal pluralism must not be viewed as an obstacle to development but rather as social capital in the formulation of public policy. Policy that accommodates customary law will be more readily accepted by society, as it aligns with the prevailing legal culture (Friedman, 1975). This view is reinforced by the theory of Responsive Law put forward by Nonet and Selznick. According to them, effective law is law capable of responding to the needs of society, rather than merely upholding formal legality (Nonet & Selznick, 1978). Policymakers must therefore provide space for customary communities to participate in the drafting of regulations.

Reconstruction of Harmonization between Customary Law and National Law Based on Living Law

The disharmony between customary law and national law demonstrates that public policy formulation in Indonesia remains dominated by a positivist legal approach that emphasizes formal legal certainty (Asshiddiqie, 2020; Mahfud MD, 2019). This condition has caused the living values of customary law within society to remain inadequately accommodated, resulting in public policies that frequently generate conflict—particularly in the management of natural resources, the recognition of ulayat rights, and the protection of customary law communities (Faiq Tobroni, 2013; Bedner, 2016). Based on the findings of this study, legal harmonization cannot be understood as the wholesale absorption of all customary legal norms into national law. Rather, harmonization must be understood as an effort to integrate the values of customary law that remain relevant into the process of public policy formulation, without disregarding the principles of the rule of law, human rights, and legal certainty (Yuliandri, 2018; Asshiddiqie, 2021). This approach is consistent with the concept of living law, which regards law as a norm that lives and is observed by society.

This study proposes a Model for the Reconstruction of Living-Law-Based Legal Harmonization, consisting of five stages: (1) identifying the values of customary law that remain alive within society; (2) harmonization with statutory legislation; (3) engaging customary law communities in policy formulation; (4) implementing policy with due regard for local social and cultural characteristics; and (5) periodic policy evaluation. This model aims to create public policy that possesses not only legal certainty but also social legitimacy, and that is capable of achieving substantive justice (Friedman, 1975; Nonet & Selznick, 1978). Conceptually, this model positions customary law communities as subjects within the policy formulation process, rather than merely as objects that bear the impact of policy. Accordingly, legal harmonization is expected to produce public policy that is more inclusive, responsive, and sustainable (Rahardjo, 2009; Anderson, 2015). This model demonstrates that legal harmonization is an ongoing process. Evaluation of policy implementation serves as the basis for regulatory refinement, so that national law remains capable of accommodating the evolving values that live within society (Dunn, 2018; Birkland, 2019).

CONCLUSION

This study concluded that the harmonization of customary law and national law in Indonesia remains a fundamental challenge in public policy formulation, despite the strong constitutional recognition of customary law communities. The findings indicated that disharmony persists, particularly in the recognition of customary law communities, natural resource management, and dispute resolution mechanisms, largely because sectoral regulations, administrative procedures, institutional coordination, and positivistic legal approaches have not fully accommodated the values of living law. Accordingly, harmonization should not be understood as the complete incorporation of customary norms into national law but rather as a systematic process of integrating relevant customary values while maintaining the principles of legal certainty, human rights, and the rule of law. This study proposed a Living-Law-Based Legal Harmonization Reconstruction Model consisting of five stages: identification of living customary law values, harmonization with statutory regulations, involvement of customary communities in policy formulation, context-sensitive

policy implementation, and periodic policy evaluation. This model provides a conceptual foundation for developing public policies that are more inclusive, responsive, socially legitimate, and capable of achieving substantive justice within Indonesia's pluralistic legal system.

Future research should empirically examine the applicability and effectiveness of the proposed Living-Law-Based Legal Harmonization Reconstruction Model across different customary law communities and policy sectors in Indonesia. As this study employed a normative legal approach based primarily on statutory, conceptual, comparative, and case analyses, subsequent research may apply socio-legal, qualitative, quantitative, or mixed-method approaches involving customary leaders, local communities, policymakers, government institutions, businesses, and other relevant stakeholders. Comparative studies across regions such as Papua, Maluku, Bali, West Sumatra, Aceh, and Kalimantan may further examine how variations in customary institutions, local governance structures, and regulatory environments influence the implementation of legal harmonization. Future studies should also develop measurable indicators to assess community participation, protection of traditional rights, policy legitimacy, regulatory consistency, conflict reduction, and policy effectiveness. Such empirical validation would strengthen the proposed model and provide more practical recommendations for national and regional governments in integrating living law into sustainable, equitable, and context-sensitive public policy.

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