



## **Legal Politics of the Existence of Customary Courts in Civil Procedure Law**

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**Abstract:** Along with the development of increasingly modern globalization, the authority and existence of customary institutions for dispute resolution began to be questioned, especially now that some people tend to resolve their disputes through formal institutions such as state courts and the police. This article examines the legal politics of the existence of customary courts in civil procedure law. The research approach is normative juridic and is analyzed through qualitative juridic, which studies data based on legal aspects. The study's findings indicate that legal discrepancies regarding customary justice in the law of civil events remain. However, there is a history of cooperation between the state and the village courts as regulated in Article 86 letter A, article 103, paragraphs (2) and (3). article 120 letter a and article 135 letter a HIR (KUH Perdata Hindia Belanda). Since the entry into force of Emergency Law No. 1 of 1951, these articles have been abrogated, except for Article 135 letter a HIR. The practical implications of the political study of customary law include adopting a common law recognizing the right to justice for indigenous peoples in Indonesia.

**Keywords:** Customary, Politic, Civil Procedure, Law

**Abstrak:** Seiring perkembangan globalisasi yang semakin modern, kewenangan dan eksistensi lembaga adat dalam penyelesaian sengketa mulai dipertanyakan, apalagi saat ini sebagian masyarakat cenderung menyelesaikan sengketa melalui lembaga formal seperti pengadilan negara dan kepolisian. Artikel ini mengkaji tentang politik hukum keberadaan peradilan adat dalam hukum acara perdata. Pendekatan penelitian adalah yuridis normatif, dan dianalisis melalui yuridis kualitatif, yaitu mengkaji data berdasarkan aspek hukum. Temuan penelitian menunjukkan kerancuan hukum mengenai keberadaan peradilan adat dalam hukum acara perdata masih tetap ada, meskipun terdapat sejarah kerjasama antara peradilan negara dan peradilan desa sebagaimana diatur dalam Pasal 86 huruf a, Pasal 103 ayat (2) dan (3). Pasal 120 huruf a, dan Pasal 135 huruf a HIR (KUH Perdata Hindia Belanda). Sejak berlakunya Undang-Undang Darurat Nomor 1 Tahun 1951, pasal-pasal tersebut dicabut, kecuali Pasal 135 huruf a HIR. Implikasi praktis dari penelitian politik hukum adat adalah disetujuinya RUU masyarakat hukum adat yang mengakui hak-atas keadilan masyarakat adat di Indonesia

**Kata Kunci:** Adat, Politik, Acara Perdata, Hukum

## A. Introduction

Indonesia's legal system includes three recognized legal systems: customary, Islamic, and Western. The three legal systems are mutually sustainable between one another and go hand in hand to achieve the same goal, and scholars call it legal pluralism.<sup>1</sup> According to John Griffiths, legal pluralism is the existence of more than one legal order that applies in a social area.<sup>2</sup> An Indian scholar named Pooja Parmar has a similar opinion about this pluralism: legal pluralism is the recognition of the continuous existence of several normative states, where the state interprets the law as right and wrong, valid and invalid, valid and invalid when the law is continuously created and maintained by the people who inhabit the state through the understanding of rituals, language, myths, obligations, and strong interpersonal commitments.<sup>3</sup>

Every society worldwide has a legal system within its territory; no nation does not have a national legal system. The national law of a nation is a manifestation of the culture of the nation concerned because the law is the nation's mind and grows from the nation's legal consciousness. The law will appear from the nation's culture.<sup>4</sup> Article 1, paragraph

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<sup>1</sup>Dedy Sumardi, Ratno Lukito, and Moch Nur Ichwan, "Legal Pluralism Within The Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (2021): 426–49, <https://doi.org/DOI: http://dx.doi.org/10.22373/sjhh.v5i1.9303>.

<sup>2</sup>John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law*, 1986, <https://doi.org/10.1080/07329113.1986.10756387>; Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "The Dynamics of Change and Continuity in Plural Legal Orders," *Journal of Legal Pluralism and Unofficial Law* 38, no. 53–54 (2006): 1–44..

<sup>3</sup>Jati Nugroho, "Restore Recognition Of Legal Pluralism As A National Law Development Model That Is Justice," *Law & Justice Review Journal* 1, no. 1 (2021), <https://doi.org/10.11594/lrjj.01.01.05>; Pooja Parmar, *Indigeneity and Legal Pluralism in India (Cambridge Studies In Law and Society)* (New York: First Publish 32 Avenue of The Americas, 2018), 6.

<sup>4</sup>Ratno Lukito, "The Enigma of National Law in Indonesia: The Supreme Court's Decisions on Gender-Neutral Inheritance," *Journal of Legal Pluralism and Unofficial Law* 38, no. 52 (2006),

(3) of the 1945 Constitution of the Republic of Indonesia, Fourth Amendment, affirms Indonesia as a state of law that has a legal system. Interestingly, as explained above, Indonesia adheres to three legal systems that live and develop in society and state administration: the civil law system (western law), the customary law system, and the Islamic law system. The civil legal system, which is characterized by "written law," namely laws that can be found in written form and included in various state regulations, is rigid, firm and guarantees more legal certainty because there are clear sanctions in writing, for example, criminal law is written in the Criminal Code, civil law is written in the Civil Code.<sup>5</sup>

Written law developed in Indonesia during the Dutch colonial period and continues to influence current legal products. Although the colonial period ended 75 years ago, its impact can still be felt today, given the existence and enactment of several Dutch civil colonial legal products. Indonesia has a distinctive feature, namely customary law, as the original law that grows and develops from the habits of the community, which greatly influences the process of enacting law in Indonesia. This customary law is very diverse in Indonesia. Hence, the civil law system adopted by the Indonesian state is not pure because it is also influenced by unwritten sources of law, namely custom or customary law.

Cornelis Van Vollenhoven, as the first customary law expert who initiated the division of customary law, classified 19 customary environments in the archipelago, namely: (1) Aceh, (2) Gayo, Alas, Batak, and Nias (3) Minangkabau, Mentawai, (4) South Sumatra, Enggano, (5) Malay, (6) Bangka, Belitung, (7) Kalimantan, (8) Minahasa, (9) Gorontalo, (10) Toraja, (11) South Sulawesi, (12) Ternate Islands, (13) Maluku, (14) West Irian, (15) Timor Islands, (16) Bali, Lombok, (17) Central Java, East Java, Madura, (18) Solo, Yogyakarta, (19) West Java, Jakarta. Gerztorang, an American writer, stated that Indonesians have 350 cultures and 250 languages, and all beliefs and religions in the world are in Indonesia.<sup>6</sup>

As explained earlier, customary law is a characteristic of the nation's personality and embodies the nation's soul from century to century. Customary law owned by different regions is different, although the basis and nature are one, namely Indonesia. Customary law consists of the various customs of the Indonesian nation, which is "Bhinneka Tunggal Ika," which means different but still one. These customs are always developed by the development of society and are related to folk traditions. Custom is a sediment (absorption) of morality in society, whose truth has received general recognition in the community. Customs essentially existed in ancient times, namely before the entry of Hinduism into Indonesia.<sup>7</sup>

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<https://doi.org/10.1080/07329113.2006.10756594>; Nabilah Apriani and Nur Shofa, "Telaah Eksistensi Hukum Adat Positif Indonesia Dalam Perspektif Aliran Sociological Jurisprudence," *Rewang Rencang: Jurnal Hukum Lex Generalis* 3, no. 3 (2022): 232–46.

<sup>5</sup>Lili Rasjidi dan Wyasa Putra, *Hukum Sebagai Suatu Sistem* (Bandung: Manda Maju, 2003).

<sup>6</sup>Hazar Kusmayanti, "Praktik Beracara Penyelesaian Sengketa Adat Sumatera Barat Berdasarkan Asas Bajanjang Naiak Batanggo Turun," *Refleksi Hukum* 6, no. 2 (2022): 185–202.

<sup>7</sup>Soerojo Wignjodipuro, *Pengantar Dan Azas-Azas Hukum Adat* (Jakarta: Gunung Agung, 2017), 1.

At that time, the prevailing customs were Malay-Polynesian; Islamic and Christian cultures gradually influenced the native culture. The influence of the immigrants mentioned above cultures was so great that eventually, the indigenous culture that had long dominated the way of life of the Indonesian people was displaced, and the prevailing custom was an acculturation between the original custom and the custom brought by Hinduism, Islam, and Christianity. The three religions mentioned above greatly influenced the development of customary law in the community. Factors influencing customary law include magic and animism, higher powers of the community, relations with foreign people and powers, and religion's greatest influence, especially Islam.<sup>8</sup>

The level of legal pluralism in Indonesia also differs from region to region. The view of legal pluralism can explain the diverse laws that jointly regulate a case. It cannot be denied that other legal systems outside state law that live in society are recognized and maintained by society. So, through legal pluralism, it can be observed that all these legal systems complement each other in everyday life. Laws that are not established in law play a very important role in everyday life; for example, at the institutional level, there are various dispute resolution institutions other than those that are resolved through state courts. Customary dispute resolution can be done conventionally through the courts (litigation) or alternative dispute resolution mechanisms outside the courts (non-litigation). The procedure for resolving civil disputes through the courts is based on the *Het Herziene Indonesische Reglement* (hereinafter HIR), which applies to the jurisdictions of Java and Madura, and the *Rechts Buitengewesten* (hereinafter RBG). The procedural law governing court procedures is binding and compelling (cannot be deviated from) for parties who apply it, in this case, both for parties seeking justice and law enforcers.<sup>9</sup>

The terms used to refer to customary dispute resolution mechanisms within the indigenous communities in Indonesia are very diverse.<sup>10</sup> Some customary law communities refer to adat courts with various terms, for example, "adat court," "adat trial," "adat deliberation," "adat para-para," "adat Pokhara," or "adat meeting," as well as various terms according to the peculiarities of the local language. The existence of customary courts in various regions has slowly encouraged the rebirth of customary courts whose existence is juridically recognized in the justice system in Indonesia.<sup>11</sup>

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<sup>8</sup>Duco W. Ryngaert, Cedric M. J., Hora Siccama, "Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts," *Netherlands International Law Review* 65, no. 1 (2018): 1-25; Hamzah, Muhammad Haidirsyah Putra, and Zulkarnain, "Customary Law Impact in The Development of Indonesia's Criminal Code," *Journal Of Critical Reviews* 7, no. 3 (2020): 233-36.

<sup>9</sup>Efa Laela Fakhriah, *Eksistensi Hakim Perdamaian Desa Dalam Penyelesaian Sengketa Di Pengadilan Negeri*, *Jurnal Sosiohumaniora*, vol. 18, 2016, 92.

<sup>10</sup>Sitti Mawar, "PERKEMBANGAN SISTEM HUKUM PERADILAN ADAT ACEH," *LEGITIMASI: Jurnal Hukum Pidana Dan Politik Hukum* 10, no. 1 (2021), <https://doi.org/10.22373/legitimasi.v10i1.10522>; Mohammad Jamin, *Eksistensi Peradilan (Desa) Adat Berdasarkan Undang-Undang Desa* (Surakarta: UNS Press, 2015), 9.

<sup>11</sup>Ewa Wojkoswka, "How Informal Justice System Can Contribute," in *United Nations Development Program Oslo Governance Centre* (Oslo, 2006), 11.

For example, the Province of Nanggroe Aceh Darussalam (hereinafter referred to as Aceh Province) is one of the special provinces that is given special authority to regulate all government affairs and the interests of its people by the laws and regulations that apply in its territory. The implementation of customary court in Aceh has been going on since a long time ago and continues to this day; one of the customary courts that is still alive and running among the people of Aceh is the customary institution of *gampong* at the sub-district level and the customary institution of *mukim* at the village level.<sup>12</sup>

West Sumatra, through Regional Regulation No. 6/2008 on Customary Land and its Utilization, gives authority to the Kerapatan Adat Nagari (hereinafter referred to as KAN) to resolve customary land disputes in the Nagari. Article 12 of the regulation states that customary land disputes in the nagari are resolved by the KAN according to the provisions of the prevailing adat, *bajanjang naiak batanggo turun* (tiered up, stairs down, meaning everything must follow its path/rules/sequence to be orderly and well implemented) and attempted by way of peace through deliberation and consensus in the form of a peace decision.<sup>13</sup> Settlement of customary disputes by deliberation outside the judicial system in the opinion of DS. Dewi and Fatahilah A. Syakur:

"The national public in Indonesia, for example, in Bali, Irian, Minangkabau, Sulawesi, and other traditional communities that firmly adhere to local wisdom, if a crime is committed by someone, the settlement is carried out through the internal customary community, the state apparatus is not involved, by using the available customary institutions, through customary deliberations, using customary elders as mediators and customary peace."<sup>14</sup>

Along with the development of increasingly modern globalization, the authority and existence of customary institutions for dispute resolution began to be questioned, especially now that some people tend to resolve their disputes through formal institutions such as state courts and the police. In this paper, the author will examine the legal politics of the existence of customary courts in civil procedure law.

The research method used is the normative juridical approach with analytical descriptive research specifications. The data collection technique uses interviews with relevant agencies to obtain primary data and literature studies to obtain secondary data such as laws and regulations, opinions of legal experts, scholars, and jurisprudence. The

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<sup>12</sup>Abdurrahman, *Peradilan Adat Di Aceh Sebagai Sarana Kerukunan Masyarakat* (Banda Aceh: Majelis Adat Aceh, 2009); Apri Rotin Djusfi, "Keberadaan Tuha Peut Gampong Dalam Penyelesaian Perselisihan Hukum Adat Aceh," *Jurnal Public Policy* 4, no. 1 (2018): 51-58.

<sup>13</sup>Interview with Abu, Cendikia KAN Kota Padang Pada Tanggal 31 November 2023, Pukul 12.00 Wib

<sup>14</sup>Rusjdi Ali Muhammad, "Reconciliation for the Settlement of Criminal Cases: Reactualization of Local Wisdom in Indonesian Criminal Law [Upaya Perdamaian Untuk Penyelesaian Perkara Pidana: Reaktualisasi Kearifan Lokal Dalam Hukum Pidana Indonesia]," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 10, no. 2 (November 19, 2021): 171; Anggita Anggraeni, "Penal Mediation as Alternative Dispute Resolution: A Criminal Law Reform in Indonesia," *Journal of Law and Legal Reform* (2020), 1, no. January (2020): 369-80.

data analysis method used is a qualitative juridical analysis by examining data based on legal aspects.

## **B. Customary Court in The Structure of Customary Law**

The settlement of customary disputes through deliberation to reach consensus is in line with the theory of living law that this customary court is closely related to the laws that live in the community as well as the process of resolving disputes using customary norms, namely deliberation to reach consensus. The plurality of socio-cultural realities of Indonesian society includes the plurality of socio-political structures with various sets of values and norms owned by each as the basis for rules in the community.<sup>15</sup> State law must pay attention to the living law that has lived and grown in people's lives. Related to this, Eugen Ehrlich stated:<sup>16</sup>

"The rule of law is not a lifeless construct that exists independently of social reality. Rather, the law is part of a "living" functioning and effective social order of communication, which protects certain interests privileged by society and discriminates against interests frowned upon and disapproved of by society. Society generates the general order of social relations, which is then put into legal form by social groups and individuals acting as such in a law-making capacity (in the broader sense, as specified above)."

The living law theory of Eugen Ehrlich above is related to the theory of F.K. Von Savigny, who stated that his theory was a rebuttal to the transplantation of Roman law and German codification into French law. F.K. von Savigny's theory is known as the *Volksgesetz* theory (national character, nationalist, folk character, soul of the nation), which states that the law is born from the nation's beliefs.

In Indonesia, this living law theory by Indonesian customary law experts, namely Soepomo, is implied in the definition of customary law; according to Soepomo, customary law is a living law (the living law) because it embodies the real feelings of the people.<sup>17</sup> Following its origin, customary law continues to grow and develop like society. Based on this understanding, the existence of the living law in the Indonesian context can be proven in the existence of customary law. Customs that have coercive power for the community, because they have sanctions for deviations committed, are what later became law. This customary law grows together with the community's life to order and regulate it. Along with the times, the customary law, which continues to grow in the community's life but is

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<sup>15</sup>Griffiths, "What Is Legal Pluralism?"; Dedy Sumardi, "Islam , Pluralisme Hukum Dan Refleksi Masyarakat Homogen," *Asy-Syirah Jurnal Ilmu Syariah'ah Dan Hukum* 50, no. 2 (2016); Muhazir Muhazir, "Islam, Fatwa Dan Negara: Meretas Pluralisme Hukum Perceraian Di Aceh," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (2021), <https://doi.org/10.24090/mnh.v15i2.5150>.

<sup>16</sup>Otje Salman Soemadinigrat, *Rekonseptualisasi Hukum Adat Kontemporer* (Bandung: Alumnus, 2015), 5; Satjipto Rahardjo, *Relevansi Hukum Adat Dengan Modernisasi Hukum Kita* (Yogyakarta: Fakultas Hukum UII, 1998).

<sup>17</sup>Mufid Mufid, "Mediasi Dalam Hukum Adat," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 2, no. 2 (2020): 128, <https://doi.org/10.19105/al-manhaj.v2i2.3490>; Eka Srimulyani, "Islam, Adat, and the State: Matrilocality in Aceh Revisited," *Al-Jami'ah: Journal of Islamic Studies*, 2010.

not formed in legislation, is deemed less able to accommodate the community's needs. The written law formed later becomes legislation with an element of force and sanctions for its deviation. According to Van Vollenhoven, to distinguish between *adat* and customary law is seen from the element of sanctions, so not all *adat* is customary law. Only customs with sanctions can be classified as customary law.<sup>18</sup>

Sanctions in the Western legal system are the main feature of law, so if sanctions are used as the only feature to distinguish between the term *adat* and customary law, it is very appropriate. Van Vollenhoven also stated that a customary rule can be made as a rule of law without using any theory, only by examining the circumstances. The judge finds customary rules and customary behavior that the community considers appropriate and binding, and there is a general feeling that these rules must be maintained by customary chiefs and other legal officers, then the customary rules are legal. On the other hand, Ter Haar argues that customary law is all the rules applied in authoritative and binding decisions. The following is the formulation of customary law according to Ter Haar:

"...arises and is maintained by decisions, decisions of the citizens (of the legal community), especially authoritative decisions of the heads of the people who participate in legal conduct or, there is a conflict of interest. Decisions of judges adjudicating cases, insofar as such decisions ... as a result of arbitrariness or ignorance ... are not contrary to the legal beliefs of the community but insofar as they are included in the legal consciousness so that they are accepted in the future."

Ter Haar emphasized that customary law arises and is maintained by the decisions of community members, legal officials, or functionaries. Soepomo emphasizes the recognition and strengthening factor rather than *adat istiadat* because, according to Ter Haar, legal officials are an absolute element determining the birth of customary law from *adat istiadat*.<sup>19</sup>

"... the term customary law is used as a synonym ... for the law that is not written in the legislature (unstatutory law), the law that lives as a convention in the legal bodies of the state (Parliament, Provincial Councils), the law that lives as a rule of custom maintained in the living association both in cities and in villages ('customary law')".

This opinion is known as the Decision Theory (*Beslissingenleer*), namely that customary law originates and is maintained by the decisions of the members of the legal

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<sup>18</sup>Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer*.

<sup>19</sup>Erwati Dzofir, Mohammad, Widodo, Aris, Aziz, "The Acculturation of Islam and Customary Law: An Experience of Minangkabau, Indonesia," *QIJIS (Qudus International Journal of Islamic Studies)* 8, no. 1 (2020): 131–53; Kamaruddin et al., "Justice, Mediation, and Kalosara Custom of the Tolaki Community in Southeast Sulawesi from the Perspective of Islamic Law," *Samarah* 7, no. 2 (2023), <https://doi.org/10.22373/sjhk.v7i2.13183>; Ayman Shabana, *Customs in Islamic Law and Legal Theory: The Developmet of the Concepts of 'Urf and Adah in Islamic Legal Tradition*, Palgrave Series in Islamic Theology, Law and History, 2010.

community. The decisions of legal functionaries are more than that; they are not only those produced by judges but also include the decisions of customary chiefs, village meetings, land trustees, and other village officials. They are also not only decisions on official disputes but also decisions based on the living values prevailing in the social realm of the members of the community, the community members of which are known as customary law communities.<sup>20</sup>

Ter Haar's thinking that customary law is the decisions of customary functionaries is strongly influenced by the views of Legal Realism, linked to the similarities between the customary law system and the Anglo-Saxon or common law system. Customary law and Anglo-Saxon legal systems provide great autonomy to judges when making laws. In this legal system, the law is very contextual because it is always adjusted to the case being handled. Using this method, the law used by the court is dynamic and flexible. Apart from adjusting to the case, this dynamism and flexibility also occur because the judiciary adjusts to social changes.<sup>21</sup>

### **C. Customary Court in the Pancasila Rule of Law Theory**

There are several concepts of the rule of law from several jurists. Still, the author takes the opinion of Padmo Wahjono, who suggests that the rule of law has the following basic characteristics:

1. The country has just laws
2. The principle of power distribution applies
3. State authorities, legal apparatus, and society must be subject to the law
4. Equality of rights and position in the law for all people
5. 5. Legal protection of people's rights

Based on the explanation of the characteristics of the rule of law according to Padmo Wahjono, it is reaffirmed in Article 1 paragraph (3) of the 1945 Constitution that the Indonesian state is a state of law. This article requires that government administration be based on the principles of law to limit government power, meaning that state power through its apparatus is limited by law (*rechtsstaat*), not based on power (*machtsstaat*). Therefore, everything that applies in the Republic of Indonesia must be based on applicable law. Laws based on Pancasila and the 1945 Constitution must be able to protect every right and obligation of its citizens. Indonesia, as a state of law in general, has a fundamental principle that the government must run the government based on law, not based on power. It is known as Rule by law, not Rule by man. This statement means that

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<sup>20</sup>Sonny Dewi Judiasih and Hazar Kusmayanti, *Pergeseran Norma Hukum Waris Adat Di Indonesia* (Bandung: Unpad Press, 2020), 19; Sayuthi Sayuthi and Dedy Sumardi, "Model Penyelesaian Sengketa Waris Dalam Masyarakat Aceh," *Indonesian Journal of Shariah and Justice* 1, no. 2 (2021).

<sup>21</sup>Icardo Simarmata, "Filosofi Dan Prinsip Peradilan Adat," in *Memperkuat Kapasitas Peradilan Adat Melalui Penyusunan Pedoman Peradilan Adat Di Kalimantan Tengah, 18 Juli 2013* (Palangkaraya: Kementerian PPN/Bappenas dan SAJI Project UNDP, 2013), 20.



the law includes the enforcement of equality, freedom of every individual, and human rights.<sup>22</sup>

The concept of rule of law is a concept that places law as the highest supremacy in the implementation of the life of the nation and state. Based on this, the concept of the state cannot be separated from the state entity as a macro sociopolitical structure that has power over all citizens, including power in the formation and enforcement of the state as the basis of the state. When talking about the concept of the state, it is about the concept of state supremacy. The reality of micro socio-political structures is formed in societies whose lives and relationships between people are based on the state outside the state law, which is made by itself.<sup>23</sup>

The legal system in Indonesia adheres to Pancasila as a fundamental norm (*staatfundamental norm*); this means that Pancasila is the foundation of every regulation that applies in Indonesia. These regulations must not conflict with the values contained in Pancasila. The dimension of universality and particularity causes conceptual tension in Pancasila, which shows that the founders of the Indonesian state wanted to establish a nation-state with modern characteristics that were still based on the traditions of the Indonesian people, namely customary law.

The founders of the Indonesian state have chosen a paradigm of state that not only refers to the Western legal tradition but also comes from the indigenous traditions of the Indonesian people. The state paradigm was formulated by integrating five state principles, namely the Almighty God (theism), humanity (humanism), nationality (nationalism), populism (democracy), and social justice (socialism) into the concept of Pancasila. The five principles of Pancasila contain universal values but also have a basis of particularity in the traditions of the Indonesian people. The dimensions of universality and particularity cause conceptual tensions in the Pancasila that show that the founding fathers of Indonesia wanted to establish a nation-state with modern characteristics but still based on the traditions of the Indonesian people.<sup>24</sup>

The five precepts contained in Pancasila are Belief in One God, Fair and Civilized Humanity, Indonesian Unity, Democracy Led by Wisdom in Consultation/Representation, and Social Justice for All Indonesian People. The Pancasila contained in the 4th paragraph of the Preamble of the 1945 Constitution, when connected with customary courts in Indonesia, can be described as follows: The first principle is the principle of divinity, which mandates that national legal products should not conflict with religious values. Customary courts, in their dispute resolution processes and decisions, are related to religious provisions and magical religious matters.

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<sup>22</sup>Simarmata, 30.

<sup>23</sup>Mulya Sarmono, "Eksistensi Masyarakat Hukum Adat," *Jurnal Adhikari* 2, no. April (2023): 468–78.

<sup>24</sup>Bambang Daru Nugroho Hazar Kusmayanti, "Legal Protection for Marriages of Traditional Beliefs Adherents in Indonesia," *Nat. Volatiles & Essent. Oils* 8, no. 5 (2021): 10297–308.

The second principle, just and civilized humanity, means that the government must be able to protect and respect Indigenous peoples and everything that is attached to these communities, including the customary court. The third principle of Pancasila adheres to the principle of unity, which reflects the various values adopted by the Indonesian people (pluralistic), including customary courts whose procedural laws are different but, in principle, the same to create peace. The fourth precept means that all problems or disputes should be resolved through deliberation and consensus through customary courts according to the community's norms. The fifth precept is that the state guarantees the existence of customary laws applicable in Indonesia (including customary courts) that grow and develop so that justice for all levels of society can be fulfilled.

Law enforcement through deliberation and consensus in Indonesia, the principle of deliberation aims to realize legal certainty, justice, and expediency by the true, noble values of the nation, namely Pancasila. Deliberation and consensus result from the Indonesian cultural system, affirmed in the fourth principle of Pancasila, which states: "Democracy led by wisdom in deliberation/representation." The mechanism for resolving disputes in Indonesia through dispute resolution by deliberation and consensus has been accustomed, which is a culture of local wisdom in the community or from the foundation of Pancasila.<sup>25</sup>

The practice of the 4th precept of Pancasila, when associated with the concept of customary judicial proceedings, is that deliberation is prioritized in resolving common interests based on the spirit of kinship, common sense, and conscience and can be morally accounted for. Customary law communities prioritize dispute resolution through deliberation to realize peace in society. Susanti Adi Nugroho states, "Customary law places the customary head as the arbiter and gives customary decisions for disputes among its citizens. Especially in 1945, this procedure officially became a state philosophy of the Indonesian nation, which is reflected in the principle of deliberation to reach a consensus."

#### **D. The Politics of Customary Court in Civil Procedure Law**

The settlement of customary disputes through deliberation to reach consensus is in line with the theory of living law that the author explained above that this customary court is closely related to the laws that live in the community as well as the process of resolving disputes using customary norms, namely deliberation to reach consensus. The plurality of socio-cultural realities of Indonesian society includes the plurality of socio-political structures with various sets of values and norms owned by each as the basis for rules in

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<sup>25</sup>Trisno Raharjo, "Mediasi Sebagai Bentuk Penyelesaian Perkara Pidana," *Jurnal Media Hukum* 17, no. 2 (2010); Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum* 45, no. 2 (2016): 123.

the community.<sup>26</sup> State law must pay attention to the living law that has lived and grown in people's lives. Related to this, Eugen Ehrlich stated:<sup>27</sup>

"The rule of law is not a lifeless construct that exists independently of social reality. Rather, the law is part of a "living", functioning and effective social order of communication, which protects certain interests privileged by society and discriminates against interests frowned upon and disapproved of by society. Society generates the general order of social relations, which is then put into legal form by social groups and individuals acting as such in a law-making capacity (in the broader sense, as specified above)."

Gustav Radburch argues that the law aims to realize legal certainty, justice, and benefit,<sup>28</sup> However, the fact must be recognized that there are still limitations to the ability of state institutions to provide access to justice quickly and affordably for the community, especially about limited access to justice through formal justice. The obstacles for the poor and/or marginalized indigenous peoples to resolve their problems through formal institutions are not only the lack of justice but also the high costs and convoluted procedures. On the other hand, the practice of people's justice has lived in the community for generations, one of which is customary justice. Strengthening access to justice is encouraged by efforts to strengthen and utilize other alternatives to gain access to justice outside formal courts.<sup>29</sup>

One of these ideas is strengthening informal justice with various variants, such as mediation efforts (non-judicial) and implementing customary justice as a model of customary justice reform in Indonesia. Daniel S. Lev, in his writing entitled *The Supreme Court and Adat Inheritance Law in Indonesia*, states that if the legislative body does not form legislation governing a case, judges can use customary law up to the Supreme Court level. This is necessary to increase the understanding of Indonesian judges of the concept of customary law in Indonesia. The legal politics of recognizing customary courts in the units of customary law communities has a philosophical basis in the values contained in the 4th Alenia of the Preamble of the 1945 Constitution, namely:<sup>30</sup>

"The Government of the Republic of Indonesia, which protects all the people of Indonesia and the entire bloodline of Indonesia..."

The statement in the Preamble of the Constitution philosophically contains a value affirmation about the state's obligation to protect all the people and the entire bloodline of Indonesia without exception. This philosophical value is elaborated into legal

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<sup>26</sup>Griffiths, "What Is Legal Pluralism?"; Richard J. Ross, *Legal Pluralism and Empires, 1500-1850*, *Legal Pluralism and Empires, 1500-1850*, 2013, <https://doi.org/10.18574/nyu/9780814771167.001.0001>.

<sup>27</sup>Soemadinigrat, *Rekonseptualisasi Hukum Adat Kontemporer*.

<sup>28</sup>Erlina Maria Christn Sinaga and Sharfna Sabila, "Politik Legislasi Hukum Tidak Tertulis Dalam Pembangunan Hukum Nasional," *Jurnal Rechtsvinding* 8, no. 1 (2019): 2.

<sup>29</sup>Ahmadi Hasan, "Penyelesaian Sengketa Hukum Berdasarkan Adat Badamai Pada Masyarakat Banjar Dalam Kerangka Sistem Hukum Nasional" (Universitas Islam Indonesia, 2007), 80.

<sup>30</sup>Mohammad Jamin, *Peradilan Adat (Pergeseran Politik Hukum, Perspektif Undang-Undang Otonomi Khusus Papua)* (Yogyakarta: Graha Ilmu, 2014), 213.

politics and macro levels, providing guidance on the recognition and respect for the unity of customary law society (constitutional respect and recognition), namely in Article 18B paragraph (2) of the 1945 Constitution, which states: "The state acknowledges and respects the unity of customary law communities along with their traditional rights as long as they are still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated by law.

The recognition and respect for the unity of customary law communities, along with their traditional rights (even if conditional), philosophically contain the value of recognition and respect for all the orders and institutions (including the judiciary) that exist and are owned by customary law communities. The consequence of this constitutional mandate on legal politics at the mess level (tribe/clan/community) developed within the legal system in Indonesia must consider the diversity of laws developed within the legal system in Indonesia while still considering unity as the binding force of the national legal system.<sup>31</sup>

The legal politics at the constitutional level have been translated into legal political directions at the meso level, particularly in Chapter IV of the Republic of Indonesia Law Number 17 of 2007 Concerning the National Long-Term Development Plan for the Years 2005-2025. The stages and priorities of the long-term development plan for the years 2005-2025 include the realization of a democratic Indonesia based on the rule of law and justice, as evidenced by the following:

"...Legal development is carried out through the renewal of legal materials while still considering the diversity of existing legal orders and the influence of globalization as an effort to enhance legal certainty and protection, law enforcement and human rights, legal awareness, as well as legal services centered on justice, truth, order, and welfare in the context of increasingly orderly, organized, smooth, and globally competitive state administration."

Based on the provisions of Law No. 17 of 2007 Concerning the National Long-Term Development Plan for the Years 2005-2025, it can be concluded that the future direction of legal development is to build a just legal system while considering legal diversity. The direction of development policy indicates that legal pluralism and legal multiculturalism are recognized and will be developed as the foundation of the national legal system to be built. Legal pluralism and multiculturalism ontologically do not only mean material law; with the legal politics of pluralism and multiculturalism, it is not a doctrine of unification. Customary justice living within the unity of customary law communities should have a solid footing in the legal system in Indonesia." Customary courts in the Fourth Amendment of the Constitution of the Republic of Indonesia 1945 (hereinafter referred to as the 1945 Constitution), although not explicitly recognized, mention that the state recognizes and respects every traditional right of customary law communities that are still alive and preserved until now. Recognition and respect for a traditional right make customary law,

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<sup>31</sup>Jamin, 214.

which is part of the traditional right, including the right to justice as stated in Article 18B paragraph (2), Article 28 I paragraph (3), and Article 32 paragraph (1) of the 1945 Constitution.<sup>32</sup>

The existence of customary courts is gradually abolished, a presence that was previously recognized in the colonial legal system with the Emergency Law No. 1 of 1951 concerning Temporary Measures for Organizing the Unity of the Structure of Power and Civil Court Procedures (hereinafter referred to as Emergency Law No. 1 of 1951). As stated in Article 1, paragraph 2b, namely:

"At a gradually determined time by the Minister of Justice will be abolished: all Customary Courts (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*), except for Religious Courts if the court, according to living law, is a separate part of Customary Courts."

The limitation or abolition of the existence of princely courts (royal courts) and customary courts became stronger with the enactment of Law Number 19 of 1964 concerning the Basic Provisions of Judicial Power. In the General Explanation, it is stated emphatically:

"... that the judiciary is the state's judiciary, thus there is no place for princely or customary courts. If those courts still exist, they will be abolished as soon as possible, as has gradually been done. The provision is not intended to deny the unwritten law called customary law. but will only transfer the development and application of the law to State Courts."

The Explanation of Article 1 of Law Number 19 of 1964 concerning the Basic Provisions of Judicial Power also states, "There is no place for princely courts that are feudalistic, or customary courts that are not state instruments."

The policy of abolishing customary courts was followed in the old order era through Law Number 14 of 1970 concerning the Basic Provisions of Judicial Power. This is regulated in the Closing section of the law,<sup>33</sup> The provision stating the Elimination of Customary and Princely Courts is carried out by the Government. As seen from the Judicial Power Law, as stated above, customary courts and customary judges are not recognized in positive law in Indonesia. The provisions in the Judicial Power Law do not mean that customary law decided by village chiefs or customary judges does not exist at all. The regulation states that only formal courts remain, but in practice, the existence of customary courts is not easily erased. In some areas, the resolution of customary disputes is still maintained, especially in areas where customary law is still strong.

Structurally, customary courts are not bound hierarchically with formal judicial bodies in Indonesia. According to Law No. 48 of 2009 concerning Judicial Power,

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<sup>32</sup> Hazar Kusmayanti, "Patterns of Religious Magic Customary Law in Traditional Sundanese Wiwitan Marriage in West Java," *Sasi* 29, no. 3 (2023): 579–88.

<sup>33</sup> Herlambang P. Wiratraman, "Perkembangan Politik Peradilan Adat," *Mimbar Hukum* 30, no. 3 (2018): 490–502.

customary courts are not recognized as part of judicial power in Indonesia. However, Article 5, paragraph (1) of the Judicial Power Law requires judges in courts to consider the values that exist in society to achieve justice for all layers of society without exception. The legal values and sense of justice in society include laws that grow and develop within the community. These two articles provide two different meanings; on one hand, they do not recognize customary courts, but on the other hand, they authorize judges to decide cases based on customary law. Efa Laela Fakhriah, in her writing, explains that civil procedure law also implicitly regulates customary courts in Article 135a (1) of the Civil Code regarding the role and function of village judges in adjudicating disputes arising among village residents.<sup>34</sup> Unfortunately, the legal and political ambiguity regarding the existence of customary courts in this Civil Procedure Law exists, even though, in reality, cooperation between state courts and village courts has occurred in the past as regulated in Article 86 letter a, Article 103 paragraph (2) and (3), Article 120 letter a, and Article 135 letter a of the HIR (Hindia Belanda Civil Code). Since the enactment of Emergency Law No. 1 of 1951, these articles have been repealed, except for Article 135, letter A of the HIR.<sup>35</sup>

## **E. Conclusion**

Customary courts are not bound hierarchically with formal judicial bodies in Indonesia. According to Law No. 48 of 2009 concerning Judicial Power, customary courts are not recognized as part of judicial power in Indonesia. However, Article 5, paragraph (1) of the Judicial Power Law requires judges in courts to consider the values that exist in society to achieve justice for all layers of society without exception. The legal values and sense of justice in society include laws that grow and develop within the community. Unfortunately, the legal and political ambiguity regarding the existence of customary courts in this Civil Procedure Law exists, even though, in reality, cooperation between state courts and village courts has occurred in the past as regulated in Article 86 letter a, Article 103 paragraph (2) and (3), Article 120 letter a, and Article 135 letter a of the HIR (Hindia Belanda Civil Code). Since the enactment of Emergency Law No. 1 of 1951, these articles have been repealed, except for Article 135, letter A of the HIR.

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<sup>34</sup>Fakhriah, *Eksistensi Hakim Perdamaian Desa Dalam Penyelesaian Sengketa Di Pengadilan Negeri*, 18:15.

<sup>35</sup>Herowati Poesoko, *Paradigma Pengadilan Adat Dalam Sistem Peradilan Perdata Di Indonesia* (Surabaya: Laksbang Justitia Surabaya, 2015), 9.

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