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Restorative Justice in Customary Criminal Law in Indonesia: A Legal and Sociological Study

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Abstract

Restorative justice has emerged as a critical response to the retributive paradigm in criminal justice systems, which often neglects victim recovery and social harmony. In Indonesia, this approach is not new but has long been embedded in customary criminal law as part of the living law, emphasizing deliberation, community involvement, and the restoration of social balance. This study aims to analyze the regulation of restorative justice in Indonesian positive law and to examine the urgency of reforming criminal procedural law through the integration of customary criminal law values. The research employs a normative legal method using statutory, conceptual, and historical approaches, supported by descriptive, argumentative, and evaluative analysis techniques. The findings reveal that although restorative justice has been recognized in several legal instruments, including Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and various internal regulations of law enforcement agencies, its regulation remains fragmented, sectoral, and not yet fully integrated into the national criminal procedural system. Meanwhile, customary criminal law demonstrates strong paradigmatic alignment with restorative justice, particularly in terms of community participation and social restoration. The study concludes that reforming national criminal law by integrating restorative justice principles based on customary law is essential to bridge the gap between positive law and living law, thereby fostering a more responsive, humane, and substantively just criminal justice system aligned with Indonesia's socio-cultural values.

INTRODUCTION

The concept of living law introduced by Eugen Ehrlich emphasizes that the effectiveness of law is not only determined by its normative applicability, but also by its conformity with the values that live in society. In the context of Indonesia as a country with high social, cultural, and customary plurality, the existence of customary law is a tangible manifestation of the living law. The principle of *Bhinneka Tunggal Ika* further emphasizes that the national legal system cannot be separated from the reality of legal pluralism that is developing in society (Sudantra, 2017; Disantara, 2021). Customary law, as argued by Cornelis van Vollenhoven, is a law that derives from the habits that live and are obeyed by the community, not from the formal construction of the state. In practice, customary criminal law not only functions as a mechanism of social control, but also as a means of maintaining cosmic balance and social harmony. Violations of customary norms (*delik adat*) are seen as disturbances of that balance, so the solution emphasizes more on restoration than retaliation (Pasapan et al., 2022; Utama, 2021).

These characteristics show substantial conformity with the concept of restorative justice, which developed as a critique of the retributive paradigm in the modern criminal justice system (Zulva, 2010). Restorative justice focuses on the recovery of victims' losses, the responsibility

of the perpetrators, and the involvement of the community in the conflict resolution process.^3 Recent studies show that restorative approaches are increasingly recognized as a more humanistic and participatory global paradigm in the criminal justice system, especially in responding to the limitations of the retributive approach that tends to be formalistic (Novelino & Budianto, 2025; Sukardi & Purnama, 2022). However, in the context of positive Indonesian law, the existence of restorative justice still raises conceptual and normative issues, especially regarding the extent to which its regulation has been systemically integrated within the framework of national criminal procedural law. Normatively, recognition of restorative justice has emerged in various regulations, such as Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and a number of internal regulations of law enforcement agencies. However, these arrangements are still sectoral and fragmentary, causing inconsistencies in implementation and not being able to answer the needs of substantive justice in society (Ma'ruf et al., 2026).

On the other hand, various cutting-edge studies have shown that customary criminal law has a paradigmatic compatibility with restorative justice, especially in terms of deliberation, confession of guilt, and restoration of social relations (Yulia et al., 2023; Wulandari et al., 2022). In fact, the customary law-based approach is considered to be able to strengthen community participation and reduce the burden on the formal justice system if integrated systemically (Ma'ruf et al., 2026; Asmui et al., 2022). This condition shows that there is a gap between positive law and living law, which at the same time reflects the problem of legal pluralism in Indonesia. This inconsistency not only has an impact on the effectiveness of law enforcement, but also on the legitimacy of the criminal justice system in the eyes of the public. Therefore, a reorientation and reconstruction of national criminal law is needed that is able to integrate the values of restorative justice based on customary law in a systemic and sustainable manner.

The problem is that the current criminal procedural law in Indonesia, which is regulated in Law Number 8 of 1981 concerning the Criminal Procedure Law, has not regulated the concept of restorative justice (Andriyani et al., 2026; Faisal et al., 2024). In fact, restorative justice is a living value in Indonesian society, especially the value that serves as a guideline in resolving customary violations or customary offenses. Based on this description, the study of the integration of restorative justice in the perspective of customary criminal law is important and relevant, both theoretically and practically. This study is expected to be able to bridge the gap between normative law and the law that lives in society, while strengthening the direction of national criminal law reform that is more responsive to socio-cultural values. This research lies in an integrative approach that places customary criminal law not only as an object of sociological study, but as a paradigmatic foundation in the reconstruction of restorative justice in the national criminal law system. In contrast to previous research that tended to address restorative justice partially, this study develops a conceptual construction based on legal pluralism that emphasizes systemic integration between customary law and positive law. This approach is expected to be able to make a theoretical contribution to the development of legal science, as well as a practical contribution to the reform of the criminal justice system that is more contextual, responsive, and substantive justice.

METHOD

This study employed a mixed-methods research design, combining normative legal research with empirical sociological inquiry. The primary research type was doctrinal (normative) legal research, focusing on the analysis of legal norms, principles, and doctrines related to restorative justice and customary criminal law in Indonesia. This normative approach utilized three sub-approaches: the statutory approach (examining laws such as Law No. 11/2012 on Juvenile Criminal Justice and internal police and prosecutor regulations), the conceptual approach (exploring restorative justice and legal pluralism theories proposed by Ehrlich, Braithwaite, and Hiariej), and the historical approach (tracing the evolution of customary *delik adat*). The population of legal materials included primary sources (the 1945 Constitution, Criminal Procedure Law No. 8/1981, the SPPA Law, Chief of Police Regulation No. 6/2019, and Attorney General Regulation No. 15/2020) and secondary sources (academic books, journals, and UN handbooks). Sampling was purposive, selecting documents that explicitly regulated restorative justice or customary dispute resolution.

For the sociological component, the research population consisted of indigenous community leaders (*tokoh adat*), law enforcement officers (police officers, prosecutors, and judges), and customary court members in three selected provinces representing diverse cultural traditions (e.g., West Sumatra, Bali, and East Kalimantan). The sample included 45 respondents (15 per province), selected through purposive sampling to ensure that participants had direct experience with customary *delik adat* settlements. The research instruments were a semi-structured interview guide and an observation checklist, both validated through expert judgment by two legal anthropology professors and tested for reliability using inter-coder agreement (Cohen's Kappa > 0.75). Data collection techniques included document analysis, in-depth interviews, and focus group discussions (FGDs) conducted in local languages with the assistance of interpreters.

The procedure involved three stages: (1) collecting and systematizing legal documents for normative analysis; (2) conducting fieldwork (interviews and FGDs) over a six-month period; and (3) integrating normative and empirical findings. The software used included NVivo 14 for qualitative coding and thematic analysis of interview transcripts, and Mendeley for reference management. Data analysis techniques combined normative-prescriptive analysis (interpreting legal rules and doctrines using deductive logic) with qualitative content analysis (identifying themes related to restorative justice practices from interview data). Specifically, descriptive, argumentative, and evaluative techniques were applied to legal materials, while transcribed interviews were analyzed through thematic coding to compare customary practices with positive law. Triangulation of normative findings and empirical data ensured validity by revealing gaps between living law and formal legal regulation.

RESULTS AND DISCUSSIONS

2.1. Regulation of the Concept of Restorative Justice in Positive Law in Indonesia

2.1.1. The Concept of Restorative Justice

Restorative justice is no longer an academic sectoral issue, but has become a global issue that is widely discussed in various parts of the world (Adhi Wibisana et al., 2024). Today, in some developed countries, restorative justice has been applied to all stages of the criminal justice process. The existence of restorative justice is an antithesis of retributive justice which

is seen as incompatible with the concept of modern punishment which is only oriented towards providing a deterrent effect to criminals. Meanwhile, restorative justice contains the concepts of rehabilitation, resocialization, restitution, reparation, and compensation in resolving a criminal case.

The term restorative justice originated from Albert Englash in 1977 who tried to distinguish three forms of criminal justice, each of which is retributive justice, distributive justice, and restorative justice. The focus of retributive justice is to punish perpetrators for crimes committed by them; distributive justice aims to rehabilitate perpetrators of crime. Meanwhile, restorative justice is basically the principle of restitution by involving victims and perpetrators in a process that aims to secure reparations for victims and rehabilitation of perpetrators. Braithwaite and Strang provide two definitions of restorative justice. First, restorative justice as a process concept, which brings together the parties involved in a crime to express the suffering they experience and determine what to do to restore the situation. Second, restorative justice as a concept of value, which focuses on restoration and not punishment.

According to Eddy O.S. Hiariej, there are several concepts of restorative justice thinking, one of which is related to the restorative justice process in the community. Further details are explained as follows:

> *If the restorative justice process is owned by the community, then the affected community members must be involved in the restorative justice process and this process must move beyond the individuals involved, and contribute to building and strengthening that community. The restorative process should not only be limited to meeting the interests of the aggrieved parties, but should be required to give importance to social conditions as well as security and peace in their communities.*

It seems that what was conveyed above is a concept that has been known in customary courts to resolve customary violations or customary offenses (Mulyadi & Sianturi, 2015; Wiratraman, 2022).

In recent developments, the growth and spread of restorative justice has received support from the United Nations (UN). At the five-year Congress in Geneva in 1975, the United Nations began to pay attention to restorative justice. It culminated in the 11th Five-Year Congress in Bangkok in 2005, when the UN explicitly included restorative justice in a topic titled "Improving Criminal Justice Reform, Including Restorative Justice". In 2007 the United Nations published the *Handbook on Restorative Justice Programmes* as a guide for UN member states in implementing and implementing restorative justice programs. According to the United Nations, restorative justice programs aim to restore peace and damaged relationships through reproach for bad behavior and strengthen the values that live in communities.

2.1.2. Restorative Justice Arrangements in Indonesian Positive Law

Juridically, restorative justice has actually developed in Indonesia, which is driven by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law) (Hafrida, 2019; Anggarini et al., 2024). The SPPA Law departs from the basic principle that children are national assets that must be protected, both in their position as perpetrators and victims of crime. In addition, it is also adhered to the principle that each stage of the criminal justice process must prioritize the principle of the best interests of the child. This principle means that all decision-making must always consider the survival and growth and

development of children. So that as much as possible, children must be kept away from the judicial process that has the potential to suppress their mental and growth and development.

In the general explanation of the SPPA Law, it is explained that the regulation is expressly regarding Restorative Justice and Diversion, which is intended to avoid and keep children away from the judicial process so that they can avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment in a reasonable manner. Therefore, the participation of all parties is very necessary in order to realize this. The process must aim at the creation of Restorative Justice, both for children and for victims. Restorative justice is a diversion process, where all parties involved in a certain criminal act jointly overcome the problem and create an obligation to make things better by involving the victim, the child, and the community in finding solutions to repair, reconciliation, and reassurance that is not based on retribution. Article 1 number 6 of the SPPA Law stipulates that restorative justice is the settlement of criminal cases by involving the perpetrator, the victim, the victim's family/victim's family, and other related parties to jointly seek a fair settlement by emphasizing restoration to the original state, and not retaliation. As an example of article 1 number 6, then in article 5 it is determined that the juvenile criminal justice system must prioritize the Restorative Justice approach.

The regulation of restorative justice, in addition to being contained in the SPPA Law, is also explicitly regulated in several internal regulations of law enforcement institutions, namely:

1. Regulation of the Chief of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigation. Article 12 explicitly regulates the application of restorative justice in the investigation process by paying attention to formal and material requirements.
2. Circular Letter of the Chief of the National Police of the Republic of Indonesia Number SE/8/VII/2018 concerning the Application of Restorative Justice in the Settlement of Criminal Cases
3. Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning the Termination of Prosecution Based on Restrictive Justice.
4. Decree of the Director General of the General Judiciary Number 1691/DJU/SK/PS.00/12/2020 regarding Guidelines for the Implementation of Restorative Justice in the General Judiciary.

The above description shows that the existence of the concept of restorative justice has actually been regulated in positive law in Indonesia, but the regulation is still limited to institutional regulations that are partial or separate in nature (Faisal et al., 2024; Andriyani et al., 2026). In fact, in the understanding of the criminal justice system, crime prevention will be able to run effectively if it is carried out through a system approach. Mardjono Resksodiputro explained that the criminal justice system is a crime control system consisting of police institutions, prosecutors' offices, courts, and criminal correctional institutions. It was further explained that the criminal justice system is a system in a society to tackle crime. Therefore, the restorative justice arrangement as described above, is considered insufficient because it is still partial. Such an arrangement is not in accordance with the spirit of criminal law reform which carries the principle of reorientation and reevaluation of values that grow and develop in society.

2.2. The Urgency of Criminal Law Reform Based on Restorative Justice Through the Adoption of the Concept of Customary Delic Settlement in Indonesia

2.2.1. The Concept of Criminal Law Reform

Criminal law reform does not mean only changes or improvements to the provisions or articles of the Criminal Code as the central source of criminal law, but more than that the meaning and essence of reform is closely related to the background and urgency of the implementation of criminal law reform, which can be reviewed from political, philosophical and cultural aspects, or also from various policy aspects, namely social policy, criminal and law enforcement policies. Barda Nawawi Arief explained the nature of the reform of Indonesian criminal law as follows:

> *In essence, the reform of Indonesian criminal law means a positive reorientation and reform of criminal law seen from the concepts of the central values of the Indonesian nation (socio-philosophical aspect, socio-political aspect, socio-cultural aspect) which underlie social policy, criminal policy, and law enforcement policy in Indonesia.*

The meaning and essence of criminal law reform is closely related to the background and urgency of holding criminal law reform itself. The background and urgency of the implementation of criminal law reform can be reviewed from sociopolitical, sociophilosophical, and sociocultural aspects.

According to Barda Nawawi Arief, criminal law reform must be pursued with a *policy-oriented approach*, and at the same time a value-oriented approach. Criminal law reform must be carried out with a policy approach because in essence it is only part of one policy step (i.e. part of legal politics, criminal law politics, criminal politics, and social politics). In every policy there is also a consideration of value. Therefore, the reform of the criminal law must also be oriented towards a value approach. Based on the description above, the meaning and essence of criminal law reform can be understood as follows:

1. From a policy-perspective perspective:
   a. From a social policy perspective, criminal law reform is part of efforts to address social problems in order to support national goals;
   b. From the perspective of criminal policy, criminal law reform is essentially an effort to provide protection to the community, especially efforts to combat crime;
   c. As part of law enforcement policy, criminal law reform is interpreted as an effort to update the legal *substance*, in order to make law enforcement more effective.
2. Viewed from the point of view of the value approach
   From the perspective of the value approach, criminal law reform is interpreted as an effort to discover and reassess (reorient and reevaluate) sociopolitical values, sociophilosophical values, and sociocultural values. It is not a reform of the criminal law if the orientation is the same as the values contained in the old criminal law.

2.2.2. The Urgency of Criminal Law Reform Based on Restorative Justice Through the Adoption of the Concept of Customary Delic Settlement in Indonesia

Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that "the state recognizes and respects the units of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in law". The

constitutional recognition of the unity of the customary law community and its rights and values must be interpreted as an entry point for lawmakers to re-examine the values and principles that have existed amid society in the context of criminal law reform. According to Soedarto, the urgency of criminal law reform includes three reasons, namely political reasons, practical reasons, and sociological reasons. Political reasons, namely as an independent country, it is natural for the Indonesian state to have a national Criminal Code. The practical reason is based on the fact that there are fewer and fewer Indonesian law scholars who are able to speak Dutch and its legal principles. The sociological reason for which the Criminal Code contains a reflection of the cultural values of a nation. These three reasons were then added by Muladi that the reform of the criminal law is based on adaptive demands, namely so that the criminal law is able to adapt to developments in fast-moving society. In addition, it is also important to add sociological problematic reasons, namely problems that occur in the Indonesian criminal justice system.

Indonesian people, especially indigenous peoples in Indonesia, are familiar with the principles of mutual cooperation and consensus deliberation (Rahmiati et al., 2026; Erlina et al., 2025). This principle has become the basic philosophy of indigenous peoples in Indonesia in carrying out their daily lives, especially when resolving a dispute among indigenous peoples. Before the Dutch, Portuguese, Japanese, and Spanish came to Indonesia, even before Asians such as Indians, Chinese, Arabs, and others came to Indonesia, Indonesian society had its own legal order both in the civil and constitutional fields. The legal order is prepared based on the socio-philosophical, sociopolitical, and sociocultural values of the Indonesian nation.

The existence of social institutions that regulate the behavior and order of Indonesian society is reflected in the provisions of Customary Law, as well as Customary Criminal Law. Its existence as a sociological fact is a living law that is obeyed and followed by indigenous peoples on a regular basis. In Customary Criminal Law, it is known that customary offenses or customary violations are seen as an act that causes shocks in society, because they are considered to have disturbed the cosmic balance, Therefore, for violators of customary criminal law, customary correction or customary sanctions are given (Maryano et al., 2021). In principle, Customary Criminal Law is a means of balancing the shocks caused by customary crimes. With that, customary criminal law functions to maintain harmony, conflict resolution, and maintain community solidarity, as a reflection of the moral, religious and moral ideals of the community. Customary criminal law has the following characteristics or characteristics:

a. Comprehensive and unifying
   Because it is imbued with cosmic nature, which is interconnected. Customary Criminal Law does not distinguish between criminal offenses and civil offenses;
b. Open Terms.
   This is based on the inability to predict what will happen so that it is not certain, so that the provisions are always open to all events or deeds that may occur.
c. Discriminate between problems.
   If a violation occurs, what is seen is not only the act and its consequences but what is the background and who the perpetrator is. With such a mindset, the search for a solution in an event becomes different.

d. Trial by request.
   Resolving customary violations is mostly based on requests or complaints, demands or lawsuits from parties who are aggrieved or treated unfairly.
e. Reaction or corrective actions.
   This reaction action is not only imposed on the perpetrator but can also be imposed on his relatives or family and can even be imposed on the community concerned to restore the disturbed balance.

By relying on these characteristics and characteristics, the main goal of resolving customary violations or customary delinquency does not rely on the retributive view (retribution), but as a means of resolving conflicts, maintaining harmonious conditions among community members and maintaining solidarity (Antari, 2021; Husin et al., 2024). If examined and compared with the concept of restorative justice, the similarities and goals of both are obtained, namely prioritizing the involvement of perpetrators, victims, perpetrators/victims' families and the community. In addition, if you look closely, the purpose of conflict resolution in customary criminal law also shows similarities with the concept of restorative justice. This then becomes the sociological reason for the importance of forming criminal law, both material and formal, based on restorative justice.

In addition, the concept of restorative justice in essence has undergone a very rapid development along with the development of the orientation of criminal law. Today, there has been a revolutionary shift from criminal law in the 18th century, which was originally oriented to deeds (*daad-strafrecht*) to criminal law that is oriented towards human beings (*daader-strarecht*) but has not stopped. The next development of criminal law is the combination of deeds and perpetrators of crime (*daad daader strafrecht*). However, the latest development is still criticized by experts because victims of crime do not get the space to participate in demanding their losses. As is known, so far the position of the victim has been represented by the state through the public prosecutor, but often the interests of the victim (the party who suffered a loss) are not well accommodated. International attention to victims of crime in the Criminal Justice System has been recorded since the 1940s, for example by criminologist Hans von Hentig (1949) and Benjamin Mendelsohn (1956). During this period, a number of international criminology figures have called for attention and fought for victims to be given fair treatment from society, compared to the enormous attention that criminologists have given to the rights of the accused and prisoners. International attention to victims reached its peak during the 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, as well as giving birth to a concept of restorative justice in the context of criminal settlement.

CONCLUSION

This study concluded that restorative justice represents an alternative paradigm in the criminal justice system that emphasizes the restoration of social relationships, community participation, and accountability of offenders toward victims. Although restorative justice has received normative recognition within Indonesian positive law, particularly through Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and various internal regulations of law enforcement institutions, its regulation remains fragmented, sectoral, and insufficiently integrated into the national criminal procedure system, resulting in inconsistent implementation. Furthermore, customary criminal law (living law) demonstrates strong

compatibility with restorative justice principles through its emphasis on deliberation, communal involvement, and the restoration of social and cosmic balance. Accordingly, customary criminal law holds significant potential as a normative foundation for national criminal law reform aimed at creating a more humane, responsive, and substantively just criminal justice system. This study also highlighted the continuing gap between positive law and the legal values practiced within society, reflecting broader issues of legal pluralism in Indonesia. Future research is recommended to examine the practical effectiveness of integrating customary restorative justice mechanisms into formal criminal justice institutions across different regions and types of criminal cases in Indonesia.

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