



Application of Restorative Justice In The Settlement of Customary Criminal Cases

Anna Maria Salamor^{1*}, Juanrico Alfaramona Sumarezs Titahelu², Erwin Ubwarin³, Iqbal Taufik⁴

^{1,2,3,4} Faculty of Law Pattimura University, Ambon, Indonesia.

 : nnamariasalamor@yahoo.com

Corresponding Author*



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Abstract

Introduction: Indonesia is a country with a variety of ethnic and cultural patterns, including race, language, and others. With diversity in each customary area, it has different rules and legal regulation because it has its own customs.

Purposes of the Research: The purpose of this research is to find out the application of restoration justice in the settlement of customary criminal cases

Methods of the Research: Normative legal research is carried out by examining laws and regulations, jurisprudence and values that lives in society

Results of the Research: The application of restorative justice as long as it does not conflict with positive law or customary law can be used in resolving customary criminal cases that occur as in Nua Nea Country and Akoon Country while upholding the customary values of their respective regions. the application of customary criminal punishment can provide a deterrent effect for perpetrators who make mistakes and do not repeat their actions again.

1. INTRODUCTION

Indonesia is a state of law. Indonesia is a country with a variety of ethnic and cultural patterns, including race, language, and others. With diversity in each customary area, it has different rules and legal regulation because it has its own customs. In social life, law and society are two things that cannot be separated, such as in the adage *ibi ius ibu societatis*, which means where there is society, there is law.

Customary law as a form of law that is recognized for its existence in the life and legal culture of the Indonesian people is listed in the 1945 Constitution of the Republic of Indonesia in Article 18B Paragraph (2), which stipulates "The state recognizes and respects the unity of the Indigenous Peoples and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law". In the Indonesia legal system, there are three legal systems that are inseparable parts of one another, namely customary law, islamic law, and western law.

Customary law is a form of unwritten law that is still alive in the lives of indigenous peoples in Indonesia. Developing laws that live in Indonesian society (customary law), in fact, is a necessity, because the customary laws of the Indonesian nation are actually values

that originate from the Indonesian people themselves. Specifically regarding customary criminal law, it has the same principle, which lives and develops from the identity of the Indonesian nation itself. In fact, customary criminal law also has differences in several respects compared to the criminal law currently used by the Indonesian nation as positive law. Even so, the differences that exist can be used to enrich, material to consider which is more acceptable, and cover up if there are still weaknesses in the previous regulations.¹

In customary law there are laws that regulate property and family matters and there are also customary criminal laws which can also be referred to as customary criminal law, or customary violation laws. Customary delict laws are customary law rules that regulate events or wrongdoing that result in disturbing the balance of society, so it needs to be resolved so that the balance of society is not disturbed. There is a kind of legal agreement agreed upon by certain indigenous peoples continuously, from generation to generation, regarding something that is prohibited or something that is prohibited allowed. This is something that is prohibited if it is violated will receive sanctions to achieve justice, both justice for the offender, justice for someone who is violated, including realizing justice for indigenous peoples as a whole. This sense of wanting to realize justice is what experts in customary criminal law say is a restoration of the balance that has been disturbed, so that custom can then become a source of national criminal law.

Besides being recognized in national legal instruments, the existence of customary law is also regulated in international instruments. The provisions of Article 15 Paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR) state that, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". Then the recommendation from the United Nations (UN) Congress on "The Prevention of Crime and the Treatment of Offenders" stated that the criminal law system that had existed in several countries (especially those originating or imported from foreign law during the colonial era) was generally "obsolete and unjust" and "outmoded and unreal" (outdated and not in accordance with reality).

Customary criminal law is the original law of the Indonesian nation, which has existed for a long time and has been influenced by various religions. It has been followed and obeyed by the community continuously from one generation to the next. Customary criminal law still exists and is applied to the lives of indigenous peoples in the Mollucas region.

The existence of customary law can be seen to date through the existence of customary courts and instruments of customary law that are still maintained by indigenous and tribal peoples in Indonesia to resolve various disputes and offenses that cannot be handled by the police, courts, and correctional institutions. Customary law has been maintained to this day by customary law communities because they believe that decisions issued through customary courts against an offense being tried by customary courts can provide satisfaction with a sense of justice, as well as a return to balance in the lives of indigenous peoples over the spiritual shock that occurs due to the enactment of the offense.

The settlement of criminal cases through the courts is regulated in the applicable laws and regulations. However, many customary law regulations have different resolutions

¹ Ahmad Irzal Fardiansyah, Dkk, "Pengakuan Terhadap Hukum Pidana Adat Di Indonesia" *Jurnal Bina Mulia Hukum* 4 no.1 (2019): 113

regulated by law. Usually, indigenous peoples choose to use the path of peace by prioritizing the principle of deliberation to reach a consensus. In addition, the application of customary criminal sanctions mostly uses a system of compensation and or the peaceful route. Rarely do customary punishments use imprisonment. The existence of customary law is still recognized and maintained by each indigenous community.² The existence of customary law as a component of legal substance must be given a reasonable place in the development of legal material in accordance with the socio-cultural diversity of society.³ The rule of law concept puts forward the principle of justice not only based on the arguments contained in the law. Indonesia is not only a state based on laws, but also sees the values that live in society according to its development. An example is customary law.⁴

2. METHOD

The use of research methods in this paper is a normative research method. A legal research method that is carried out by examining library materials or secondary data as the basic material for research by conducting a search of regulations and literature related to the problem of the researcher.⁵ The data used is secondary data, with the priority of collecting secondary and tertiary legal materials. The data obtained is then processed and presented in a descriptive analysis. This normative legal research is based on primary and secondary legal materials, namely research that refers to the norms contained in the legislation.⁶

3. RESULTS AND DISCUSSION

Settlement of cases according to customary law is commonly known as a restorative justice approach, namely, justice that seeks to restore conditions to their original condition, is profitable, wins all parties, and is not confined to legal mechanisms. Restorative justice is a fair settlement involving perpetrators, victims, their families, and other parties involved in a crime, jointly seeking a solution to the crime and its implications, emphasizing recovery and not retaliation.⁷

Restorative Justice aims to empower victims, perpetrators, families, and communities to correct an unlawful act by using awareness and conviction as a basis for improving social life, explaining that the concept of restorative justice is basically simple. Restorative justice is a theory of justice that emphasizes the recovery of losses caused by criminal acts. Law Number 48 of 2009 concerning Judicial Powers, Article 5 paragraph (1), Article 10 paragraph (1), and Article 50 paragraph (1), explains that the position of customary criminal law in Indonesia has received recognition so that the application of customary sanctions imposed

² Airil Safrijal, "Penerapan Sanksi Adar Dalam Penyelesaian Perkara Pidana di Kabupaten Nagan Raya" *Kanun Jurnal Ilmu Hukum* 59 .(2013) : 145-162.

³ Yusril Ihza Mahendra, *Mewujudkan Supremasi Hukum Di Indonesia* (Jakarta: Depkeh HAM RI, 2002), p. 5.

⁴ La Syarifuddin, "Sistem Hukum Adat Terhadap Upaya Penyelesaian Perkara Pidana" *Risalah Hukum* Vol.15.No.2.(2019) : 1-10.

⁵ Soekanto. S Mamudji. and S, "Penelitian Hukum Normatif (Suatu Tinjauan Singkat). Jakarta: Rajawali Press," (Jakarta: Rajawali Press, 2001), p.13-14.

⁶ Soeryono Soekarto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1984), p. 20.

⁷ Munawara, M. Syukri Akkub, Musakkir. *Pendekatan Restorative Justice Dalam Penyelesaian Tindak Pidana Yang Dilakukan Oleh Anak Di Kota Makassar*. Makassar: Fakultas Hukum Universitas Hasanuddin. Makassar, p. 4

on perpetrators who commit crimes or violations does not conflict with the norms of the state. As long as the customary law is still alive and growing in the midst of society.

The concept of restorative justice emphasizes justice based on peace, which, in solving a case, does not recognize justice based on revenge or punishment of the perpetrator. The application of this concept is a form of development in the criminal justice system that focuses on involvement between the perpetrator and the victim in the settlement of a case where this is not one of the mechanisms known in conventional criminal procedural law at this time.

This research was conducted in the Central Maluku area, among others Negeri Nua Nea, dan Negeri Akoon. Culture in Maluku consists of hundreds of sub-tribes, which can be indicated from local language. Although the people in this area reflect the characteristics of a multi-cultural society, they basically have the same cultural values as a collective representation. One of them is the Siwalima philosophy which has been institutionalized as a society's perspective on living together. This philosophy contains various institutions that have common values and can be found throughout the Maluku region. Call it cultural institutions such as *masohi*, *maren*, *sweri*, *sasi*, *hawear*, *pela gandong*, and so on. The Siwalima philosophy in question has become a symbol of regional identity, because so far it has been stamped as and becomes the logo of the Maluku Regional Government.

Indigenous law communities have long since resolved disputes through deliberation and consensus through customary institutions such as village courts or the so-called customary courts. Legal regulations that live in indigenous peoples are still obeyed and obeyed by the indigenous peoples themselves. Violations of customary criminal law rules are still considered as things that can cause chaos and greatly disrupt the life that takes place in society. Therefore, the perpetrators of crimes or criminals will be given customary sanctions in accordance with their respective customary laws.⁸

The resolution of violations that occur in indigenous peoples is always resolved through traditional officials. Customary law always regulates people's social life. The existence of Soa and its role in several countries in Maluku is currently re-emerging after the re-enactment of Act Number 32 of 2004 concerning Regional Government and followed by Maluku Provincial Regulation Number 14 of 2005 concerning Re-determination of the State as a Customary Law Community Unit in Maluku Province. The application of restorative justice in the settlement of customary criminal cases cannot be carried out for all types of criminal acts. only some types of crime can be solved through restorative justice. such as cases of murder, theft, domestic violence, eloping, infidelity, fights between youths, and *sasi*.

The restorative settlement of criminal cases outside the criminal justice system in the Maluku region also applies to a number of other regions, although with different names. It is known as the Law of Sea *Sasi* in Maluku.⁹ *Sasi* is a form of traditional tradition that lives among the people of Central Moluccas Regency. In addition, based on research conducted by us, the customary law of the people of Nua Nea Village, Central Moluccas Regency, the concept of restorative justice is also known to create peace. As for criminal cases that occurred in the village of Nua Nea and were resolved according to customary law, such as

⁸ Elwi Danil, "Konstitusionalitas Penerapan Hukum Adat dalam Penyelesaian Perkara Pidana" *Jurnal Konstitusi* 9 no 3 (2012) : 584-596

⁹ Reny H. Nendissa, "Eksistensi Lembaga Adat Dalam Pelaksanaan Hukum *Sasi* Laut Di Maluku Tengah," *Jurnal Sasi* 16, no. 4 (2010): p.1.

murder cases, cases of theft committed by children and adolescents, domestic violence, and cases of not wanting to be responsible for a pregnant girl. Basically, when the customary government of Nua Nea Village hears directly from victims or receives reports regarding criminal cases that have occurred, they will approach the victims and perpetrators to resolve the problem. However, despite the settlement efforts carried out by the customary government, if the perpetrator himself does not admit mistakes, then at some point the perpetrator will definitely get karma for the actions he has committed.

In direct interviews with saniri/officials and indigenous peoples in several countries in the Central Maluku region. In Negeri Nua Nea¹⁰ In 2015, a member of the Nua Nea community accidentally committed murder, in which people or perpetrators made traps to catch animals in the forest, but the traps they made unexpectedly caused casualties to other people who were temporarily on the scene. This perpetrator was subject to a positive sentence of 5 years in prison, and the perpetrator's family underwent the customary criminal sanctions committed by the perpetrator because a member of the perpetrator's family had an accident. For cases of chicken theft, which are usually carried out by children or adolescents, the customary government imposes sanctions by hitting the hands of the children or adolescents who steal them so they don't repeat their actions again. As for cases of domestic violence and cases of not wanting to take responsibility for a pregnant daughter, a family approach is usually used and as a sanction, the victim must give a piece of land to the victim or the victim's family.

Negeri Akoon¹¹ When a child who is still at school is caught red-handed committing theft, the customary government gives a sanction, namely "getting on the black bench." The term "riding a black bench" itself is like whipping, where the child sleeps on his stomach on a bench and is beaten from the buttocks using a rattan. When it comes to fights between parents, they are usually resolved through their kinship. It is different from the sanctions given by the customary government to people who violate sea sasi (gorita and sia-sia sasi, or sea worms), usually for 6 months. The case on April 12, 2022, when a community member violated the sea sasi, was given a sanction in the form of paying a fine by purchasing one ret each of stones and sand for the development of the country.

In addition, for cases of adultery committed by one of those who already have a partner, both husband and wife, the penalty of caning is applied. In addition to caning, there are other forms of punishment known as "Bailele Dalam Negri," such as a procession walking through the village and being expelled from or leaving the village. In 2010–2022, there have been four cases of adultery that have occurred in Akoon village. The criminal sanction given by the customary government to the two lovebirds/couples is "bailele dalam negeri", where the two couples were paraded around the vilagge by hitting Tifa and walking while shouting "don't be like me."

Customary law can be a source of positive law in the sense that customary criminal law can be the legal basis for examination in court and also as a source of negative law, namely customary law provisions can be justification reasons, mitigating punishment or aggravating punishment. separated from society, there is also reason to say that the source of law in this regard is customary criminal law, so the source of law is the community. customary criminal law still adheres to its own culture in accordance with indigenous

¹⁰ Tim Peneliti, "Wawancara Dengan Saniri/Pejabat Negeri Nua Nea" (Maluku Tengah, 2022).

¹¹ Tim Peneliti, "Wawancara Dengan Saniri Negeri Akoon" (Maluku Tengah, 2022).

peoples in Indonesia as existing law and lives within the indigenous peoples themselves (The Living Law).

Settlement of customary offenses which result in disruption of the balance of the family or society, even though sometimes the case is handled by state instruments, can be reached by means of the person and/or family concerned, or handled by the heads of relatives, traditional heads, village heads, heads of associations of organizations and state instruments. The restorative justice approach to crime resolution in the settlement of cases involving law enforcement officials. as long as restorative justice does not conflict with positive law or customary law, restorative justice can be used to resolve criminal cases that occur.

The obstacle in applying this customary criminal sanction, according to interviews conducted by the research team, is that there are no written rules related to this customary crime, so that customary stakeholders do not receive legal protection in carrying out executions of perpetrators. Some customary crimes no longer exist in some countries because when carrying out executions such as flogging the perpetrators, the perpetrators object and report back to the executioners with allegations of abuse. The role of traditional stakeholders is currently a means of facilitator to resolve problems that occur, through deliberation and to reach an agreement whether the settlement will be under the customary domain or resolved through positive legal channels.

4. CONCLUSION

Based on the description above, it can be concluded that restorative justice in the settlement of customary criminal cases the application of restorative justice in the settlement of customary criminal cases cannot be carried out for all types of criminal acts. only some types of crime can be solved through restorative justice. Such as cases of murder, theft, domestic violence, eloping, infidelity, fights between youths, and sasi. In the settlement of cases involving law enforcement officials. as long as restorative justice does not conflict with positive law or customary law, restorative justice can be used to resolve criminal cases that occur.

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