


Application of Customary Criminal Penalty On Cases Involving Women

Hadibah Zachra Wadjo¹, Elsa Rina Maya Toule², Astuti Nur Fadillah^{3*}

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

 : astutifadillah@gmail.com

Corresponding Author*

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Abstract

Introduction: Violence against women is still taking place. Nowadays, issues involving women are increasingly becoming one of the crucial issues in society, not only at the national level, but also at the global level.

Purposes of the Research: The purpose of this study is to find out about the application of customary criminal penalties to cases involving women.

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 penalties for violators in Negeri Amahai, Negeri Haruru, Negeri Nua Nea, Negeri Rutah, and Negeri Souhoku, Negeri Tamilouw highly respects traditional values, which always protect their regions. The customs of their ancestors, until now still exist in people's lives. In fact, until now, the existence of indigenous peoples in several countries in Central Maluku is still maintained, and customary law is maintained by the people of Central Maluku because customary law is pure and can reduce conflicts and erase the stains contained in society.

1. INTRODUCTION

Indonesia is a country with very many ethnic and cultural patterns as well as race, language variety, and others¹. The 1945 Constitution Article 18B verse (2) confirms that the State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia (NKRI) as regulated in the law. Indonesian criminal law that applies today is still largely a criminal law inherited from the Dutch colonial era, especially the codificative criminal law known as the Criminal Code (KUHP). In the Criminal Code, various general rules are formulated which form the basis for the enforcement of criminal law rules in Indonesia. As long as it is not stipulated otherwise in the law, the general rules contained in the Criminal Code must be followed in the practice of criminal justice. One of them is the rule on the principle of legality. The formulation of the principle of legality is contained in the provisions of Article 1 paragraph

¹ Luthfi Ramadhan, Nurul Hajjan, and Margo Hadi Pura, "Posisi Hukum Pidana Adat Dalam Hukum Pidana Indonesia Dan Penyelesaian Perkaara Pidana Melalui Hukum Adat," *Supremasi : Jurnal Pemikiran Dan Penelitian Ilmu-Ilmu Sosial, Hukum & Pengajarannya* XVI, no. 2 (2021): hal. 204.

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(1) of the Criminal Code which stipulates: "an act cannot be punished, except based on the strength of the provisions of existing criminal legislation".²

Along with the development of science and culture, people's behavior in the life of the state and society is increasingly becoming complex and multi-complex. Such behavior when viewed from the legal side of course there is behavior that can be classified based on norms and there is behavior that is not in accordance with norms.³ Indonesia is a country (*rechtsaat*), where every applicable provision is always guided by a system that applies nationally. However, in addition to national enforcement in the community, a system also grows and develops, which originates from the habits that exist in the community. This habit will later develop into a provision called custom.⁴ Settling conflicts by deliberation to make peace as soon as possible develops as customary law.⁵ Customary criminal law develops in a hereditary way from one generation to the next in indigenous peoples who are influenced by the existence of various religions and the times.⁶ Customary criminal law still shows its figure and existence as a living law in society (the living law).⁷ Customary law offenses or customary criminal law or customary law violations are customary law rules that regulate events or wrongdoing that result in (punishment) so that the balance of society is not disturbed.⁸

Customary justice can be the most important institution because it is closest to the daily life of the people whose existence never dies, although in some places it tends to weaken. Customary justice, both in its simple form and solidly institutionalized, is still used by indigenous peoples as a means to resolve various cases/conflicts and problems due to violations of the code of conduct, both among communities and with nature and the surrounding environment.⁹ The nation of Indonesia, which consists of various tribes, already has its own customs, which include culture, traditions, customary government systems and even customary rules.¹⁰

Indonesia is a country where several regions still uphold the noble values that live in the midst of its people. The use of law that lives in the midst of society to bring order and harmonize life in it. Including the Maluku islands. According to Charles Zerner who has

² Elwi Danil, "Konstitusionalitas Penerapan Hukum Adat Dalam Penyelesaian Perkara Pidana", *Jurnal Konstitusi* 9, no. 3 (2012): hal. 585.

³ Islah, Nella Octaviany Siregar, and Ade Ardinata, "Sanksi Pidana Adat Terhadap Pelaku Tindak Pidana Melarikan Anak Perempuan Dibawah Umur Di Desa Selat Kabupaten Batanghari," *Wajah Hukum* 5, no. 2 (2021): hal. 541, <https://doi.org/10.33087/wjh.v5i2.703>.

⁴ Abdul Rahman Upara, "Penerapan Sanksi Pidana Adat Terhadap Pelaku Tindak Pidana Zina Ditinjau Dari Hukum Pidana Adat Dan Hukum Pidana Nasional Pada Masyarakat Adat Tobati Di Jayapura," *Legal Pluralism* 4, no. 2 (2014): hal.144.

⁵ Trisno Raharjo, "Mediasi Pidana Dalam Ketentuan Hukum Pidana Adat," *Jurnal Hukum* 17, no. 3 (2010): hal.493, <https://doi.org/10.20885/iustum.vol17.iss3.art8>.

⁶ Galuh Faradhilah Yuni Astuti, "Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Di Indonesia," *Pandecta: Research Law Journal* 10, no. 2 (2015): hal. 197, <https://doi.org/10.15294/pandecta.v10i2.4953>.

⁷ Danil, "Konstitusionalitas Penerapan Hukum Adat Dalam Penyelesaian Perkara Pidana", hal. 585.

⁸ Taufan Dirgahayu Kurnia and Erwin Syahrudin, "Konsep Tindak Pidana Zina Menurut Hukum Pidana Adat Dan KUHP Dalam Hukum Positif Di Indonesia," *Jurnal Pendidikan Dan Konseling* 4, no. 5 (2022): hal. 113.

⁹ A Jaelani, A Purnawati, and Maisa, "Penerapan Konsep Restorative Justice Dalam Proses Penyelesaian Tindak Pidana Adat Ngata Toro," *Jurnal Kolaboratif Sains*, 2019, hal. 1699, <https://jurnal.unismuhpalu.ac.id/index.php/JKS/article/view/700>.

¹⁰ Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Jurnal Hukum PRIORIS* 6, no. 3 (2018): hal. 229.

been quoted by Nicola Frost in his journal entitled *Adat Di Maluku: Nilai Baru atau Eksklusivisme*¹¹ illustrates that in Maluku, the traditional system of regulating access to natural resources, called *sasi*, was co-opted and manipulated by colonial officials. One of the consequences of ratification of customs is the lack of popular knowledge of it. This knowledge is only owned by a handful of 'experts' in the community. Because it has been codified and become written knowledge, custom is the responsibility of a few people who represent the whole community. By looking at the background above, the author is interested in conducting research on the Application of Customary Criminal Penalties in Cases Involving Women.

2. METHOD

The type of legal research carried out in a normative juridical manner is a normative juridical where the law is conceptualized as what is written in laws and regulations (law in books) or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.¹² This normative legal research is based on primary and secondary legal materials, namely research that refers to the norms contained in the legislation.¹³

3. RESULTS AND DISCUSSION

Article 5 of the CEDAW convention deals with discrimination against women related to culture. There is still a negative stigma against women in society so that it is a polemic to this day. Women are still having their honor and dignity degraded. Women have always been identified with people who are gentle and warm-hearted. And along with the development of the current era, there is a slight shift in the stigma of women in society. Not a few women currently stumble into legal problems, both as perpetrators and as victims of a crime. Violence against women is still taking place.

Customary criminal law is a living law and will continue to live, as long as there are humans and culture it will not be abolished by legislation, if a law is enacted that will abolish it will be useless, in fact the criminal law legislation will lose its source of wealth by because customary criminal law is more closely related to anthropology and sociology than statutory law.¹⁴ The existence of Customary Criminal Law in the community is a reflection of the life of the community and each region has different Customary Criminal Laws in accordance with the customs that exist in the area with unwritten or codified characteristics. This unwritten source of criminal law needs attention.¹⁵

This research was conducted in the Central Maluku area, among others Negeri Amahai, Negeri Haruru, Negeri Nua Nea, Negeri Rutah, dan Negeri Souhoku dan Negeri Tamilouw. Culture in Maluku consists of hundreds of sub-tribes, which can be indicated from local language users who are known to be still actively used as many as 117 of the

¹¹ Nicola Frost, "Adat Di Maluku: Nilai Baru Atau Eksklusivisme Lama?," *Antropologi Indonesia*, no. 74 (2004): hal. 3, <https://doi.org/10.7454/ai.v0i74.3506>.

¹² Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2012), P. 118.

¹³ Soeryono Soekarto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1984), P. 20.

¹⁴ Jaelani, Purnawati, and Maisa, "Penerapan Konsep Restorative Justice Dalam Proses Penyelesaian Tindak Pidana Adat Ngata Toro," hal.1701.

¹⁵ Stevania Bella Kalengkongan, "Kajian Hukum Pidana Adat Dalam Sistem Hukum Pidana Indonesia," *Lex Crimen* VI, no. 2 (2017): hal. 30.

number of local languages that ever existed around 130. 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. The legal basis for the application of customary law in Indonesia, among others: (1). Elucidation of the 1945 Constitution. In article 18 B verse (2) of the 1945 Constitution of the Republic of Indonesia: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and state principles. Unity of the Republic of Indonesia, which is regulated by law"; (2). Act No. 5 of 1960 concerning the UUPA Article 2 verse (4) of the UUPA regulates the delegation of authority back to the customary law community to exercise the right to control the land, so that the customary law community is the implementing apparatus of the state's right to control the land in its territory; (3). Act No. 4 of 2004 concerning the Basic Provisions of Judicial Power, and (4) Act No. 32/2004 concerning Regional Government, is more focused on affirming the rights of indigenous peoples to manage their political and governmental systems in accordance with local customary law provisions.

The thinking habits of the Maluku indigenous people who rely on intellect and reason are always based on convergence and not divergence. That is, the way of viewing something (object) is always in pairs, such as land, sea, women, men, top-down and so on. With this perspective, customary behavior that has been preserved and maintained since ancient times continues to this day, including those that are still strong, such as the state government system, community structure, kinship system, marriage system, property division system, land law, *dati* system, *sasi* system, inheritance system, will system and so on.¹⁶

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. According to Cooley cited by Jenny Koce Matitaputty Soa is a collection of one-sided hereditary groups, namely houses that are formed at a certain time and enlarge when new arrivals are added and decrease when there is an extinction. Soa has a very important role in building a country (village).¹⁷

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 penalties for violators in Negeri Amahai, Negeri Haruru, Negeri Nua Nea, Negeri Rutah, and Negeri Souhoku, Negeri Tamilaou strongly upholds

¹⁶ Jenny K Matuankotta, "Negeri Dalam Bingkai Masyarakat Hukum Adat Di Maluku," *Jurnal SASI* 11, no. 4 (2005).

¹⁷ Jenny Koce Matitaputty, "Totem : Soa Dan Peranannya Dalam Kehidupan Masyarakat Adat Negeri Hutumuri - Maluku," *Society* 9, no. 2 (2021): hal. 451, <https://doi.org/10.33019/society.v9i2.358>.

traditional values, which always protect their regions. The habits of their ancestors, until now still exist in people's lives. They also apply the values that live in the community in solving problems, conflicts, frictions that occur in the community by using their customary law. The same is true for solving problems involving women.

In direct interviews with kings/officials and indigenous peoples in several countries in the Central Maluku region. In Negeri Rutah¹⁸ they had applied customary punishment for the perpetrators, in the form of whipping 9 times using rattan wood, but the perpetrators objected so that the customary officers who carried out the executions were reported by the perpetrators to the police. Since then, the customary criminal penalties are no longer enforced. Negeri Tamilouw¹⁹ apply criminal penalties such as the perpetrators getting a penalty to go around the village while shouting "Jang iko beta" in Indonesian it can be interpreted "Don't follow my behavior" the perpetrators shout and are accompanied by their distinctive musical instruments.

Negeri Amahai²⁰ one of the existing customary criminal penalties is the whipping punishment, interestingly in Negeri Amahai to form a division in solving problems in their country. Negeri Souhoku²¹, for in this country there is a penalty in the form of hitting the wall for those who commit violations or crimes. Negeri Nua Nea²² in applying customary law, it does not distinguish the types of crimes or violations for the perpetrators, as well as the perpetrators, both women and men, as long as they commit violations on their land, they must receive penalties. What's interesting is that when someone commits a violation or crime which then harms others, they voluntarily meet with the customary authorities and after that they undergo penalties in this case they perform a ritual to atone for the mistakes that have been made by the perpetrators. The perpetrators of this violation or crime will be followed by a continuous sense of guilt that makes them fall sick if they do not perform traditional rituals. In addition, the source explained that if what the perpetrator did was a serious crime then they would take it to the legal realm and report it to the authorities for legal proceedings.

Customary criminal law and Indonesian criminal law, will be sustainable because the law that develops is law that comes from the community and the law does indeed contain the values contained in society and becomes a living law in society. Customary criminal law as an unwritten provision provides space for law enforcers to refer to the values that live in society. In the case of violence against women, it can be said that conflict occurs when it involves women and the perpetrator and a dispute occurs when the victim has brought the case to a third party. The family always objected if women in their families became victims of crime. For indigenous peoples, if women become victims, the family has the right to sue the perpetrators in paying the customary fines that have been agreed upon in the meeting or deliberation held by the customary stakeholders. Likewise, if the perpetrator is a woman, more or less there is no difference, because of the application of customary law to restore balance in society. In contrast, if the perpetrator commits a serious violation, the customary holder and the victim's family can report the case to the authorities, such as the perpetrator who kills another person.

¹⁸ Tim Peneliti, "Wawancara Dengan Raja/Pejabat Negeri Rutah" (Maluku Tengah, 2022).

¹⁹ Tim Peneliti, "Wawancara Dengan Raja/Pejabat Negeri Tamilouw" (Maluku Tengah, 2022).

²⁰ Tim Peneliti, "Wawancara Dengan Raja Amahai" (Maluku Tengah, 2022).

²¹ Tim Peneliti, "Wawancara Dengan Raja Negeri Souhoku" (Maluku Tengah, 2022).

²² Tim Peneliti, "Wawancara Dengan Masyarakat Adat Negeri Nua Nea" (Maluku Tengah, 2022).

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.

The development of technology such as information that is so fast is also one of the obstacles in the application of this customary criminal sanction. Considering the case of whipping that occurred in one area and then went viral, so that the general public who did not know about the existence of customary criminal penalties then speculated if whipping and customary criminal penalties violated Human Rights (HAM), so that the perpetrators also had the same rights and obligations. Must be met by the state during the judicial process. The application of penalties cannot be carried out because there is no regulation in the form of a State Regulation that can provide legal certainty, both in the form of penalties, the method of imposition, and the institution that has the authority to implement it.

4. CONCLUSION

In fact, until now, the existence of indigenous peoples in several countries in Central Maluku is still maintained, and customary law is maintained by the people of Central Maluku because customary law is clean and can reduce conflicts and erase the stains contained in society. Customary law is maintained because the process of resolving cases in customary law is deliberation/consensus, and always puts forward the principles of kinship, the principle of peace, the principle of harmony, the principle of sincerity, and can reconnect the broken ties between the perpetrators of the crime and the victims and create a balance in society as a whole. Obstacles faced in the enforcement of customary law in Central Maluku are the lack of serious attention from the government in enforcing customary law, and the level of understanding of customary leaders towards customary law is still less concerned, and there are still people who do not understand customary law itself. even though the position of customary law has a clear position in the law. Customary law for the people in Central Maluku is a light or guide or direction in life together in society. There is no such thing as a win-lose settlement with customary law, the principle of win-win, and settlement with customary law can be tied back to a good relationship even though it is almost broken but can still reconnect the sense of brotherhood in indigenous peoples. And the rights of women involved in the law can be protected.

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