

ALIGNMENT OF THE CONCEPT OF CUSTOMARY CRIMINAL LAW WITH THE CONCEPT OF RESTORATIVE JUSTICE IN NATIONAL CRIMINAL LAW

M.A. Siregar¹, Edi Ikhsan²

Doctoral Program in Law, Faculty of Law, University of North Sumatra, Indonesia

*Correspondence: mhd.azhalii@gmail.com

Abstract

Customary law has long been ignored by our society because we are too enthusiastic about the criminal and civil laws adopted since the Indonesian colonial era. Although so-called modern law cannot prevent the limitations of its application in various regions throughout Indonesia, customary law can actually be a considerable substitute. Theoretically, this can be formally implemented in various regions in Indonesia by fulfilling several criteria in accordance with the principles used by national law. A major change in the orientation of criminal law is a shift in the concept of justice, from justice based on retribution to justice that is restorative justice. The protection and restoration of the rights of victims and the wider community is considered as important as the punishment and/or rehabilitation of criminals. Based on the Police Regulation of the Republic of Indonesia No. 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice, the aim is to realize that the case resolution process is not only aimed at punishing or humiliating someone, but rather at trying to obtain the truth which is useful to help restore harmonious relationships between perpetrators, victims and society. This is actually nothing new in the archipelago because the Indonesian people are already familiar with it in their customary law and its authority has recently been approved in statutory regulations.

Keywords: Customary Criminal Law, Restorative Justice, National Criminal Law

INTRODUCTION

In Indonesia itself, whose population is ranked 4th in number in the world, there must be many tribes that will form a culture. It is important for us to maintain the cultures that exist in Indonesia, because as technology and information develop, it makes it easier for cultures from outside Indonesia to enter, which in the future it is feared that this will make our own nation's children forget their true identity.

This research discusses getting to know culture through a legal anthropology approach. Legal anthropology itself is a science that studies humans and their culture specifically in the field of law. The legal culture in question is the power used by the authorities to regulate society so that it does not violate the social rules that have been internalized by the society itself.

Laws here are needed even though there are rules or norms in society, so that there is order in human life through written laws with real sanctions in addition to norms and rules whose sanctions are more social or hereafter in nature. Each community group has provisions that must be followed and obeyed by its citizens to achieve prosperity. These provisions are always based on a philosophy of life which is the noble value of society itself. These noble values and inner strength have been ingrained and are the soul of society itself. The problem formulation in this writing is:

1. How Developments in Settlement of Criminal Cases Using Customary Law?

2. How is customary crime and restorative justice harmonized according to PERKAP No. 8 of 2021?

METHOD

A method is a way of working to understand the object that is the target of research in the science concerned. Meanwhile, research is part of the process of developing knowledge using certain methods with the aim of finding out what is and has happened and solving the problem or an activity of searching for the truth. So, if these two terms are combined into a definition, the meaning is a way of working or a scientific effort to understand, analyze, solve and express a problem based on a certain method.

The research method contains a description of the method or method used to obtain data or information. This research method functions as a guideline and basis for procedures for carrying out research operations to write a scientific work that researchers carry out. This research uses normative research methods which require a population and sample.

The type of research used is normative legal research. Normative juridical research refers to legal norms contained in laws and regulations, and norms that exist in society. Analytical descriptive is a method used to describe a condition or situation that is occurring or taking place with the aim of providing data as precisely as possible regarding the object of research so as to be able to explore ideal things, then analyze them based on legal theory or applicable legislation.

The study raised in this research explains the relevance of customary law, which is basically a legal product based on national culture in resolving criminal cases as seen from PERKAP No. 8 of 2021 concerning the handling of criminal acts based on restorative justice.

RESULTS AND DISCUSSION

Development of Customary Criminal Law and Emerging Issues

Paying attention to the meaning of criminal law on the one hand and customary law on the other, if the construction of thinking is like that, then there is no such thing as what we call customary criminal law. To assess what is meant by criminal law, three central issues in criminal law must be looked at, namely what acts are prohibited, criminal liability and criminal law.

the term customary criminal law as a translation of the term "customary delictenrecht." The definition of customary criminal law places greater emphasis on the level of blameworthiness of an act in the view of indigenous peoples, such as "wrong" or "unconscionable" in the communities of Lampung and South Sumatra. Customary Criminal Law is a law that indicates events and actions that must be resolved (punished) because these events and actions have disturbed the balance of society. So it is different from Western Criminal Law which emphasizes what events can be threatened with punishment and what kind of punishment, because the event is contrary to statutory regulations. If Western Criminal Law emphasizes the existence of a cause so that a person can be threatened with punishment, then Customary Criminal Law emphasizes the existence of "consequences" so that a person and his relatives must be responsible for those consequences. So, even though

the cause is a strange event, there is no provision. or its prohibition, if the consequences bring harm and conflict with the party affected by the consequences, then the party causing the consequences must be responsible for his actions in accordance with Western Criminal Law even though the consequences are contrary to the party affected, if the event does not conflict with the law then The party who caused the harm cannot claim the loss or the authorities cannot act against the person causing the result. Furthermore, a customary offense is an act that must not be carried out, even though in reality the event or act is only a small contribution. So, what is meant by a customary offense These are all actions or events that conflict with propriety, harmony, order, security, a sense of justice and legal awareness of the community concerned, whether these are the result of someone's actions or the actions of the traditional rulers themselves. Customary Criminal Law is comprehensive and incorporates provisions that are open to differentiating judicial issues with requests for reaction or corrective action. Meanwhile, a customary offense occurs when customary rules are violated and the balance of society is disturbed. Starting from this understanding, it is clear that the actual meaning of Customary Criminal Law does not rely on a positivistic perspective which assumes that what is meant by law is the Law. If that perspective is applied, then it is impossible for there to be a Customary Criminal Law. However, if the law is interpreted more broadly, not limited to laws, then it can be said that there is customary criminal law.

The difference between the paradigm of criminal law as positive law and customary law as a paradigm of social law is actually a classic debate between the positivist school of thought and the school of legal and cultural history. Law plays a role in society in two ways, namely as a means of social control and as a means of social engineering. The use of law as a means of social engineering in a simple society will also lead to simple social changes. But on the contrary, the use of law as a means of social engineering in wider society will give rise to wider social change as well. Social change by legal change. Social changes in urban communities will certainly be more complex than social changes in rural communities.

This fact is in line with the view of the historical school of thought pioneered by Karl von Savigny which stated that the more complex a society, the more complex its laws, and the simpler a society, the simpler its laws.

In today's developments in legal regulations, the boundaries of criminal law or other areas of law are increasingly thin and are not simply reprehensible. In general, the difference between criminal acts and violations of civil law and state administrative law lies in the severity of the act, the level of blameworthiness, and the size of the victim.

These considerations are the basis for criminalizing actions as criminal acts. The House of Representatives as representatives of the people is asked for opinions and considerations to determine whether an act is a criminal act which, if implemented, would deprive human rights.

Determining an act as a criminal offense must take into account the following principles:

- a) Criminal law must be used for development purposes
- b) Actions that are intended to be prevented or remedied by law;

c) The crime must be an undesirable act, namely an act that causes material and spiritual harm to members of the community;

The use of criminal law must take into account the principles of costs and results. It is necessary to take into account the amount of costs incurred and the results expected to be achieved. The use of criminal law must also pay attention to the capacity or working capacity of law enforcement agencies, that is, there should be no overload of duties. Bassiouni, as quoted by Salman Luthan, also revealed the limitations that need to be considered in the use of criminal law in society, namely:

- a) Balance of means used in relation to the results to be achieved:
- b) Cost analysis of the results obtained in relation to the objectives to be sought,
- c) Assessment or assessment of the objectives to be sought in relation to other priorities in allocating human resources:
- d) The social influence of criminalization and decriminalization is related to or viewed from secondary influences.

An act that is not actually a crime will become a criminal act when the violation of that act is given criminal sanctions, and this determination rests with the state authorities, in this case the President and the DPR. Ideally, if an act is deemed so reprehensible and so dangerous for society, then the state should also criminalize the act, which if violated can be subject to criminal sanctions. However, in practice, there are many acts which are designated by the state as criminal acts while in society they are just ordinary acts, or conversely, acts which in society are considered disgraceful acts in the legal system are not criminal acts.

As a middle way, Mochtar Kusumaatmadja initiated another "legal system" which was later called the theory of development law, which essentially recognized that the applicable law was still positive law which was being drafted by the state, but the values adopted were traditional and religious values. . Laws are formed by taking into account the values that exist in society.

At first glance, this is similar to the character of the school of legal and cultural history. State law is linear with religion and community customs. Law only institutionalizes or formalizes something that society believes to be law. The problem then is which societal and religious values are the reference, because Indonesia is a very large country with a very high level of heterogeneity. In the field of civil law, legal policies are pursued that are pluralist unification. Even though the state forms law, in state law the law of society is recognized and given a place to live. Similar thinking in turn is also shared by criminal law.

Furthermore, in Law No. 8 of 2021 concerning the Handling of Criminal Offenses Based on Restorative Justice, customary criminal law rules have also been accommodated following the regulatory pattern in the Basic Agrarian Law and the Basic Marriage Law, which adhere to the principle of unification in legal pluralism.

In principle, criminal law tries to avoid pluralism because in public law all people should have equal status before the law. Everyone is subject to and under the same legal jurisdiction. With regard to the idea of pluralism in criminal law as adopted by Law No. 8 of 2021 concerning the Handling of Crimes Based on Restorative Justice, in several regions the idea of establishing what are called "customary villages" has emerged in several regions.

Legal thinkers, regional policy makers and non-governmental organizations, is dreaming of enjoying the harmony of Indonesian society in the past. Old people and young people are so obsessed with the spirit of restorative justice which prioritizes resolving disputes through win-win solutions.

If the state in this case only acts as a regulator that "merely" formalizes society's legal beliefs, then in the future there will certainly no longer be any conflict between society and the state in viewing the law. Something that is disgraceful to society will also be disgraceful before state law. On the other hand, something that is reprehensible before state law will also be disgraceful before society. The state does not need to be busy making laws that drain state finances. It is enough that the state stands behind maintaining the social order that is rooted in society, except in certain cases that have no equivalent in society. There is also no more debate about who has the right to land, there is also no debate about whether someone is corrupt or not, because state law is none other than community law, community law is state law.

The issue of ignorance about applicable legal rules contains two sides to the dilemma. On the one hand, Indonesian law adheres to the principle of legal fiction where everyone is assumed to know the law. On the other hand, in criminal law the principle of *geen straf zonder schuld* (there is no crime without fault) applies, where only people who will and witen (know and realize the blameworthiness of an act) can be held criminally responsible.¹

Harmonization of Customary Crime and Restorative Justice is seen from PERKAP No. 8 of 2021

Another customary solution is through mediation or arbitration. Arbitration is more widely used in resolving civil cases. Meanwhile, mediation is an effort to resolve disputes between the parties by mutual agreement through a mediator who is neutral and does not make decisions or conclusions for the parties but supports the facilitator in carrying out dialogue between the parties in an atmosphere of openness, honesty and exchange of opinions to reach consensus. , the problem-solving negotiation process is a process in which an impartial and neutral outside party works with the disputing parties to help them obtain a satisfactory agreement.

Resolving conflicts by means this corresponds to principle *Restorative justice*, where restoration or improvement is road alternative to bridge perpetrators of violations, victims and the community. In the process, restorative justice involves dialogue and negotiation. In restorative justice, criminal behavior is still seen as violation of the law, however the main thing is also seen as a violation of societal norms, where there is a damaged relationship between the perpetrator, victim and society.

Restorative justice is interesting, because it views crime as something that can cause harm and states that justice should compensate for the harm caused, as well as restore relations between all parties. To achieve this, individuals must be willing to take responsibility for their behavior and accept responsibility to compensate for the losses incurred. A timely restorative approach will provide intervention in recovery and

consequences that can satisfy people that justice has worked well in restoring balance to society caused by crime.

The police as the first line of the criminal justice system play an important role in the mediation process. With their discretionary authority, the police can become facilitators of mediation between victims of perpetrators and the community. Meanwhile, mediators are appointed based on an agreement between the police and traditional institutions. Mediators can also be brought in from the court, so that the court is also involved in the mediation process which is carried out outside the court.

Philosophically, the content of the Legislative Regulations above aims at the principle of balance, as seen in Article 1 paragraph 3 of PERKEP No. 8 of 2021, resolving criminal acts through peace by prioritizing the restoration of the original situation which is realized in the form of restorative justice with formal standards (legal certainty). and material benchmarks (value of justice). By recovering the condition of the disputing parties, the relationship that was good before the dispute occurred will be maintained and maintained and it is hoped that social relations and legal relations will continue to be well developed. This is stated in the Republic of Indonesia State Police Regulation Number 8 of 2021 concerning Restorative Justice. Article 1 paragraph 3: Restorative Justice is the resolution of criminal acts by involving the perpetrator, victim, perpetrator's family, victim's family, community leaders, religious leaders, traditional leaders or stakeholders to jointly seek a just resolution through peace by emphasizing restoration of the situation. beginning.

In practice, if customary law is applied, the nuance of the Criminal Justice System is a nuance that moves between the crime control model and the due process model. Community behavior that tends to respect customs more can suppress or reduce evil behavior (crime conduct). The police as a component of the SPP will be able to carry out efficiency that emphasizes speed in resolving conflicts, because before entering criminal justice, the police are the main gate that should be able to resolve the conflict outside of justice by involving the community, victims, perpetrators and traditional institutions. This can provide protection to the community and control crime.

The application of customary law also reflects the protection of victims' rights which are regulated by customary law. However, on the one hand, the suspect's rights are not ignored, this is a justification for the due process model where state power is limited in order to guarantee individual rights legally. In this way, SPP can become a representative of the community and protect the community. Another example is that the police can arrest the perpetrator of a crime, but not immediately take him to court. The police, in collaboration with traditional institutions, can ask the court to act as a mediator if the method chosen for the traditional settlement is mediation. The police monitor the progress of mediation between the conflicting parties so that if there is no resolution produce Only then will the police be able to carry out actions regulated by national law, namely by carrying out an investigation and preparing an investigation report (BAP) to be submitted to the prosecutor's office and ultimately processed in accordance with applicable national law.

CONCLUSION

Customary Criminal Law is comprehensive and incorporates provisions that are open to differentiating judicial issues with requests for reaction or corrective action. Meanwhile, a customary offense occurs when customary rules are violated and the balance of society is disturbed.

Examining the problem of society living with its own system of norms on the one hand, and the state living with its own legal system which sometimes conflict with each other. Disgraceful according to law does not necessarily mean disgraceful according to customary law, or vice versa, disgraceful according to custom does not necessarily mean disgraceful according to law. Positivist anthropologists easily conclude that even though it applies in society, if it does not apply in the state's legal system then it is not law.

REFERENCES

- Soerjono Soekanto, Ringkasan Metodologi Penelitian Hukum Empiris, (Jakarta; Indonesia Hilco, 1990), Hal: 106
- Mukti Fajar ND dan Yulianto Ahmad, Dualisme Penelitian Hukum Normatif dan Empiris, (Yogyakarta; Pustaka Pelajar, 2012), Hal: 19
- Zainuddin Ali, Metode Penelitian Hukum, (Jakarta: Sinar Grafika, 2009), Hal:105.
- Hilman Hadikusuma, Hukum Pidana Adat, Alumni, Bandung, 1986, Hal. 17
- Soerjono Soekanto, Sosiologi Suatu Pengantar, Raja Grafindo Persada, Jakarta, 1999, Hal.167
- Salman tuthan, Kebijakan Kriminalisasi dalam Reformasi Hukum Pidana, Makalah dalam Jurnal Hukum FH Uli Vol 6 No. 11, Yogyakarta, 1999, Hal. 12
- Mochtar Kusumaatmadja, Konsep-konsep Hukum dalam Pembangunan Kumpulan Karya Tulis, Alumni, Bandung, 2006, Hal. 88.
- Anton FK Susanto, Yimulecre Mulan: Bangsa yang Aesoh dolam Duku Penettian Hukaam Trondformotf-Portisipotif, Logo? Putiluhung, Bandung, 2011.
- Joni Emirzon, Alternatif Penyelesaian Sengketa Di Luar Pengadilan (Negosiasi, Mediasi dan Arbitrase), (Jakarta: PT Gramedia Pustaka Utama, 2001), hlm. 69.