



RELATIONSHIP TO CUSTOM LAW AND NATIONAL LAW TOWARDS RESTORATIVE JUSTICE

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ABSTRACT

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The assessment of governance and the distribution of justice in Indonesia is a crucial topic to discuss. Firstly, because Indonesian society is diverse and heterogeneous. Both, the complexity of laws and issues surrounding the terms 'lex' (legislation, regulations) and 'ius' (law, recht). And thirdly, the opinion of Apeldoorn that there is law outside of legislation. The Republic of Indonesia is a legal state (rechtsstaat). In this regard, the state should ensure the enforcement of justice by implementing and upholding existing laws, including customary law. This perspective of legal centralism is assumed to signal the demise of "non-state" judiciary. However, behind the Principle of Judicial Power Implementation by State Courts, there exists an "unwritten constitution," which is the people's will regarding justice in the name of the law that exists in society. Whether one likes it or not, non-state judiciary will emerge as a manifestation of the need and legal awareness regarding order and tranquility that cannot always be achieved by state judicial bodies. In this study, the adopted legal concept refers to the fact that outside of state courts, there are also non-formal judicial systems that operate based on customary laws within the community.



INTRODUCTION

Customary law, which used to be a living law capable of providing solutions to various social problems in Indonesia, is slowly fading away. Currently, many problems arise in Indonesian society when customary law collides with positive law. The development of the Indonesian legal system which tends to prioritize civil law and common law, as well as Indonesian legal politics which tends to codify and unify laws, hastened the loss of customary law institutions.

The legal concept adopted refers to the fact that outside the state courts, there is also a non-formal justice system that operates based on rules of conduct in resolving disputes according to customary law that lives in society.

Therefore, the issue of the distribution of justice is not only related to efforts to equalize opportunities to obtain justice through the establishment of formal courts and their mechanisms, but also related to the suitability between the forums and the disputes they face, as well as the arguments for community organizing based on customary law. The complexity of the judiciary as an institution that provides justice is characterized by various theoretical and legal concepts. On the one hand, there is the legalistic-positivistic group as mentioned above.

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With the thought that disputes are resolved through the agreement of all parties involved and not just stopping disputes legally by realizing formal justice. But more important than that is to create peace, brotherhood and efforts to return society to order and tranquility in accordance with the feelings and awareness of the law that lives in the community concerned. In this case "Social Healing", the results of the deliberations are held with or without involving state law enforcement officers (non-state justice system). According to Mardjono Recsidipoetro, the non-state justice system refers to the thought of restorative justice with the main objectives, such as:



To restore public health, meet the needs of victims, repair damage done, and get perpetrators to contribute to these repairs."

The restorative justice model seeks non-punitive and humane solutions to the conflict inherent in victims of crime.

Here it says once again the effort to resolve disputes through an all-inclusive agreement and eradication of the illicit traffic of Narcotics 1988 (United Nation Convention Against Illicit Traffic on Narcotic Drugs and Psychotropic Substances, 1988). which is called the Stinggil Court or Serambi. Meanwhile, legal cases in rural areas are settled in the Unified Court which is presided over by the customary head. These village-level courts have survived to the present day under various names such as the customary court or the Village Peace Institute. Until now an institution like this is still alive with its function and authority to repair damaged social relations due to violations of customary law that occur in society by implementing and upholding law and justice.

The neglect of the existence of customary law as a source of law in Indonesia, partly due to the assumption that customary law is very traditional and cannot reach developments in the era (globalization and technology). This research examines which areas of customary law are still relevant in overcoming the problems faced by the Indonesian nation in the era of globalization, and what is the urgency of customary law as the basis for national legal development policies.

METHOD.

This research is an empirical legal research. Empirical Legal Research is a legal research method that uses empirical facts taken from human behavior, both verbal behavior obtained from interviews and real behavior carried out through direct observation. Empirical research is also used to observe the results of human behavior.⁸

To strengthen the analysis of the discussion, this research is complemented by normative legal research using a statutory approach.



The statute approach in legal research, according to Peter Mahmud Marzuki, is: "conducted by examining all laws and regulations that are related to the legal issue being handled". The results of the study are an argument to solve the issues at hand.

This research uses one group pre test and post test design. This design only involves one experimental group, the dependent variable is measured (pre-test), then given a stimulus, and the dependent variable is measured again (post-test). Basically the data collection design carried out in this study is as follows:

1. Primary data,

Namely data obtained from direct interviews with respondents. Interview (Interview), namely conducting data mining with in-depth interviews with Police officers, District Government and the Community handling this case. The author uses controlled free interviews (controlled interviews), namely interviews using an interview guide in the form of questions related to the problem and the method of asking questions is left entirely to the flexibility of the interviewer to eliminate stiffness in the interview process.

2. Secondary data

It is data obtained through library research, namely collecting data from references that support this research (conducting literature studies in the form of documents, literature, articles related to the problem). Then synchronization is carried out so that data is obtained as input material to complete the problem analysis in this study.

Data analysis is a process of organizing and sorting data into categories and basic descriptive units, so that themes are found and working hypotheses can be formulated, as suggested by the data. 11 Data analysis was carried out qualitatively. It is hoped that this activity will make it easier to analyze the problems to be discussed, interpret and then draw deductive conclusions. 12 In the end, it can answer the problems of this research.



"According to Togar M. Sianipar, the circulation of narcotics in the country almost covers big cities and a number of villages, and as a place for transactions are usually places of entertainment (discotheques, karaoke), campuses, hotels, apartments and youth gathering places.

In addition, through the development of information and communication technology, the spread of narcotics has reached almost all regions of Indonesia, down to remote areas that were previously untouched by narcotics trafficking, gradually turning into centers of narcotics distribution. Likewise, children who were initially unfamiliar with these illicit goods have turned into addicts who find it difficult to let go of their addiction.

ANALYSIS AND RESULTS.

The description above only offers a few examples from the many countries that are trying to apply the paradigm of restorative justice in their handling of criminal cases. It is very interesting to see developments in the application of proven restorative justice approaches today.

Meanwhile, Hooker explained that the universal elements of the two concepts can be seen that restorative justice, seen from the regulator, has been translated as a mechanism for handling criminal cases outside the criminal justice system as well as philosophical criminal prosecution which gave birth to new forms of criminal sanctions for conventional types of crimes. . The description above only offers a few examples from countries that are trying to apply the paradigm of restorative justice in their handling of criminal cases. It is very interesting to see developments in the application of restorative justice approaches that are proven to date on the basis of customary law and its systems as follows:



The distribution of duties is often a function of an actual or alleged genealogical relationship; Communities, defined on either genealogical or territorial basis, almost always have greater rights over the distribution of land than individual occupants or owners. Mutual assistance and gotong royong institutions exemplify the attitude of individuals subject to the same set of obligations; All customary law (adat has the preservation of harmony between people and nature).

The concept of Indonesian customary law in institutional customary justice also has a concept that can be described as the root of restorative justice. In Indonesia, the characteristics of customary law in each region/province are generally very supportive in the implementation of restorative justice. In relation to violations or violations of customs, and the mechanism for solving them, customary law has its own views. This includes actions that disturb the peace of life or violations of propriety in society. The following are some examples of violations of customary law: Action events of the parties in society;

- a. Actions that cause balance disorders;
- b. Disturbance of balance causes a reaction;
- c. The reaction that occurs serves to return from the disturbed state to the disturbed state back to original state.

This concept is very different from the notion of crime or delict in the sense of criminal law. Based on this definition, the characteristics of customary law can be stated as follows:

- a. Comprehensive and integrated. Its comprehensive and integrated nature is due to the cosmic nature of customary law background, which are interrelated with one another. As a result, one cannot be separated from the other. Likewise in the field of law, there is no separation between civil and criminal violations, violations of religion or decency, as well as trials.



- b. Open. Violation of customary provisions is intended to maintain a sense of justice in accordance with the perception of public awareness and observance of time, place and circumstances

("desa", "kala", and "patra" for Balinese). As a developing society it will affect the development of settlements the provisions in customary law

as these provisions are formulated on the basis of consensus.
- c. Distinguishing problems. Customs violations do not look at problems solely from actions and consequences, but also consider the background and who is responsible. This view, will provide a new type of settlement and legal action for a criminal act.
- d. Justice on request The process and examination of cases that violate customary law are based on request/or no request, and complaints from someone who is injured or treated unfairly.
- e. Action reaction or correction. Legal officers act based on customary reactions; by taking steps to solve crimes not only against the perpetrators, but also imposing criminal acts on family members or actors

other laws, or laws relevant to society, aim to restore balance to its original state by organizing traditional ceremonies and so on.

In the traditional view, there are no legal circumstances supporting the use of force to ensure compliance. The application of customary sanctions is an attempt to return the space (location) to a state of undisturbed public order. Customary sanctions are an attempt to restore the disturbed balance. Therefore, in the past, judicial activities including the criminal justice system could not be separated from religious activities, cultural and governmental activities, as well as the economy and other life.



CONCLUSION.

1. The Criminal Procedure Code does not recognize the concept of restorative justice, but restorative justice can be used as a consideration by judges in issuing their decisions. This is because there is a principle of freedom of judges as contained in the Law on Judicial Power, especially what is related to this writing is Article 5 paragraph (1) "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice." justice in society.
2. Restorative justice that is realized through this restorative effort should be accommodated by judges as a basis for mitigating criminal offenses or as a basis for eliminating crimes, especially in cases of crimes committed by children, that the action that should be imposed is: returning to parents, guardians or parents foster; hand over to the state to participate in education, coaching, and job training; or submit it to the Ministry of Social Affairs, or Social Organizations engaged in education, development, and job training.
3. In carrying out statutory orders, imposing prison sentences on children is a last resort (*ultimum remedium*), for this reason the best decision is in the form of action to return the accused child to his parents to be educated and nurtured accordingly, it is necessary for the judge to make an effort in passing the decision in cases of child delinquency.

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