

# THE CRIMINAL SETTLEMENT THROUGH CUSTOMARY LAW FROM RESTORATIVE JUSTICE PERSPECTIVE

**Ahmad Syaufi, Lambung Mangkurat University, Banjarmasin**  
**Aurora Fatimatuz Zahra, Muhammadiyah University of Yogyakarta**  
**Mursidah, SMA Negeri 8 Banjarmasin**

## ABSTRACT

*In traditional societies, conflicts that arise as a consequence of life relations between community members are generally sought to be resolved through deliberation and peace so as not to cause resentment, shame, guilt, or which can make new conflicts. The whole process of resolving the conflict is pursued solely so that the balance and peace of the community is restored. This article provides an analytical report on how to resolve a case through the customary law in Indonesia. The essence of conflict/dispute resolution in customary law is to bring about peace in a comprehensive sense. One mechanism for resolving criminal cases through the customary law as a community tradition in Indonesia to uphold custom which is used as a customary law tool for the many tribes in Indonesia in the process of deliberation to resolve a problem. The decision produced through the deliberation mechanism is an alternative effort in finding a solution to resolve problems that occur in the community if there are conflicts or disputes between citizens in accordance with the concept of restorative justice.*

**Keywords:** Criminal Case, Customary Law, Deliberation, Dispute Settlement, Restorative Justice.

## INTRODUCTION

Nowadays, the use of criminal justice procedures as a means of distributing justice is often considered unfair to all parties. One of the contributing factors is that the current criminal justice procedures is full of strict formalities, procedures, bureaucracy and methodologies, and there is still a process that is the same for all types of problems or one for all mechanism, even positivism or legalistic views still dominates the law enforcers (Tyesta et al., 2020). So that justice distributed through criminal justice institutions is given through bureaucratic decisions for the public interest. Therefore, it tends to be substantial-rational justice. So, it is not surprising that the justice obtained by modern society is nothing but bureaucratic justice, while the legal objectives achieved are prioritizing legal certainty, without being balanced with two other legal ideals, namely justice and legal benefits (Suparman, 2010; Susanto, 1996). This condition is very contrary to the desire of the people who seek for restorative justice in every settlement of criminal cases (Kuswandi, 2016). The problem is the number of prisoners or detainees in Indonesia which exceeds the capacity of prison or state detention centers. The number of prisoners or detainees in June 2020 has reached 228,225 people, while the capacity of prison or detention 132,645 people. So, there are surplus of 95,850 people. This condition results in the

vulnerability of prisons or detention to security and order disturbances, escape of prisoners or detainees, illegal levies, extortion, drug trafficking, threats of sexual diseases and irregularities. In addition, by the time where there is an increase in number of cases with all forms and variations that enter the court, so the consequences become a burden for the court in examining and deciding cases, that it is difficult to avoid congestion in the judiciary.

In this context, it is certain that efforts to seek justice can no longer only rely on the state, but must be sought through competitive social relations and cooperation. Because justice provided by the state is not necessarily even often not in accordance with the will of the justice seekers themselves, because basically everyone needs and pursues their interests and a wide range of acceptability for a sense of justice. This kind of justice will never be found in the grand design of the Indonesian criminal justice system today. Seeing the reality that exists in order to achieve fair procedural justice and restorative justice in resolving criminal cases, it is only possible to achieve it through the agreement of the conflicting parties. One of the ways is through the concept of resolving criminal cases based on local wisdom in indigenous and tribal peoples in Indonesia based on cosmic, magical and religious nature. Completion of criminal cases through the mechanism of customary law has long been recognized and has become a tradition of the people in many parts of the world (Chirayath et al., 2005; Meron, 2005; Cryer, 2006; Fletcher, 2007).

In traditional societies, conflicts that arise as a consequence of life relations between community members are generally sought to be resolved through deliberation and peace so as not to cause resentment, shame, guilt, or which can make new conflicts. The whole process of resolving the conflict is pursued solely so that the balance and peace of the community is restored. In traditional societies the settlement of criminal cases through peace is still alive because peace has a very high value. For this reason, in the effort to resolve criminal cases it is time to pay attention to the settlement mechanism through customary law. In an effort to develop and renew criminal law in Indonesia, it is necessary to study, how to solve criminal cases through customary law in the perspective of restorative justice.

### **Criminal Law Enforcement**

Criminal law enforcement is essentially a part of criminal politics which is essentially an integral part of social policy, and then this policy is implemented into the criminal justice system. According to Muladi (1995), the criminal justice system has multiple functional dimensions. On the one hand, it functions as a community facility to detain and control crime at a certain level (crime containment system), on the other hand the criminal justice system also functions for secondary prevention, namely trying to reduce crime among those who have committed a crime and those who intend committing a crime through the process of detection, criminal prosecution and execution. Criminal law is often used to solve social problems, especially in crime prevention. The use of criminal law is in accordance with the legal function as social control which is a process that has been planned in advance and aims to encourage, invite, order or even force members of society to comply with legal norms or legal rules that are in force (Soemitro, 1980).

Peaceful settlement of conflicts and disputes has been developed in the lives of indigenous and tribal peoples in Indonesia. Customary law communities in Indonesia feel that the peaceful resolution of conflicts and disputes has led them to a harmonious, just, balanced and sustained

life (communal) values in society. The peaceful resolution of conflicts and disputes is a means of resolving conflicts (disputes/cases) that is in line with the Restorative Justice approach, which has long been applied by indigenous law communities in Indonesia. These patterns of settlement of conflicts and disputes based on customary law are still alive, developing and recognizing their existence. Restorative Justice is a model approach that appears in the attempt to resolve criminal cases. Unlike the approach used in the conventional criminal justice system, this approach focuses on the direct participation of perpetrators, victims and the community in the process of resolving criminal cases. This view is in fact developing and influencing many legal policies and practices in various countries, such as Canada, New Zealand, and Australia (Manan, 2008).

## **Restorative Justice**

Restorative justice approach is assumed to be the most recent shift from various models and mechanisms that work in the criminal justice system in handling criminal cases at this time. The United Nations (UN) through the Basic Principles outlined considers that the restorative justice approach is an approach that can be used in a rational criminal justice system. This is in line with the view of Hoefnagels (2013) who stated that "*a rational total of the responses to crime*" or that criminal politics must be rational. Restorative justice approach is a paradigm that can be used as a frame of criminal case handling strategy that aims to answer the dissatisfaction with the operation of the criminal justice system that exists today.

Barb Toews (2006) sees that attention to victims is the core values of restorative justice. Although attention to the perpetrators is also not less compared to the previous theory. According to Zulfa (2011), the meaning contained in the concepts of rehabilitation, resocialization, restitution, reparations, and compensation seems only to be part of the concepts contained in the restorative. Tom Cavanagh (2017) stated that restorative justice is a systematic response to acts of irregularities that are emphasized in the recovery of losses suffered by victims and or society as a result of criminal acts.

According to Mark Umbreit (1999) stated that: Restorative justice provides a very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than simply a violation of abstract laws against the state. Those most directly affected by crime—victims, community members and offenders – are therefore encouraged to play an active role in the justice process. Rather than the current focus on offender punishment, restoration of the emotional and material losses resulting from crime is far more important. In the Handbook on Restorative Justice Programs, it states that: Restorative justice is an approach to problem solving that, in its various forms, involving the victim, the offender, their social networks, justice agencies and the community (Dandurand & Griffiths, 2006).

Article 1 point 6 of Indonesian Law No. 11 of 2012 concerning the Criminal Justice System of the Child has used the term restorative justice stating that restorative justice is the settlement of criminal acts involving the perpetrator, victim, family of the perpetrator/victim, and other parties related to jointly seeking a just solution by emphasizing recovery back to its original state, and not retaliation. Completion of criminal cases using a restorative justice approach basically focuses on efforts to transform errors committed by the perpetrator with remedial efforts. Included in this effort is the improvement of relations between parties related to

the event. This is implemented with the existence of actions that are a picture of changes in the attitude of the parties in an effort to achieve a common goal of improvement.

### **Peaceful Dispute Settlement in Customary Practices**

The tradition of resolving conflicts and disputes in customary law communities tends to use "*traditional patterns*" or in other terms it is often called a pattern of "*kinship*". This pattern is applied not only for civil matters but also criminal cases. In contrast to the positive law that separates the realm of private law and criminal (public) law, there is no differentiation in customary law so that the resolution of all conflicts and disputes arising is resolved through the same institutions and mechanisms.

The term "*dispute*" for indigenous peoples is not only intended for civil cases, which focus on individual interests, but disputes are also used for criminal acts (crimes or violations). The meaning of disputes for indigenous and tribal peoples is aimed at social imbalances. That is, if there is a dispute in civil law, or a crime and a violation in criminal law, then the customary law community feels an imbalance that occurs in the life of indigenous and tribal peoples. Therefore, the community will resolve the dispute through the customary law mechanism (Muhammad, 1995).

Settlement of conflicts and disputes in customary law communities is based on the views of life adopted by the community itself. Indigenous peoples have a democratic nature in which common interests take precedence, without neglecting or harming individual interests. The atmosphere of free domination and social justice goes hand in hand with communal and mutual cooperation in indigenous law communities. Democratic behavior is imbued with the principle of universal customary law. This value is in the form of general power, principle of deliberation, and representation in the customary government system

The tradition of resolving customary law conflicts and disputes is based on the values of the philosophy of togetherness (communal), sacrifice, supernatural value, and justice. In the customary law the common interest is a philosophy of life that permeates the heart of every member of society. Customary law communities in their consciousness always attach importance to communal interests, and prevent interventions of individual interests in their social lives. Conflicts and disputes that occur between individuals and between groups, in the view of indigenous and tribal peoples are actions that interfere with common interests and therefore must be resolved wisely by using a pattern of customary settlement (Surya, 2012).

The sacrificial philosophy in resolving conflicts and disputes is an emphasis in indigenous law communities. The parties to the conflict/dispute, both in the private and public spheres, are willing to sacrifice individual interests for communal interests. Settlement of disputes with customary patterns reflects the value of communality that must be accepted by conflicting individuals, with the awareness that they are part of the others. Customary law decisions taken in resolving conflicts and disputes are umbrellas that maintain the values of togetherness and equality. Therefore, the parties to the conflict/dispute are willing to step back and sacrifice in order to maintain the values and order of customary law that they uphold. Willingness to sacrifice for communal interests and refrain from dominating individual interests will receive more respect and ethical value from indigenous law communities. On the other hand, those who do not consider communal interests and are far more interested in individual interests tend to get negative ratings from indigenous peoples, and can lead to customary sanctions (Abbas, 2011).

## Settlement of Criminal Crime through Customary Law

Supernatural philosophy of resolving conflicts and disputes in indigenous law communities is identified in the form of ritual ceremonies. The goal is that the disputing party needs to get recognition from the supernatural in its settlement. Therefore, the sincerity of the parties to sit together, to resolve conflicts and disputes that plagued them, and to be facilitated by traditional leaders is the will of the Almighty. The existence of spiritual values obtained from ritual ceremonies indicates that the resolution of conflicts and disputes gets approval and monitoring from the supernatural. The parties are not free to fight again after their dispute is resolved through customary patterns (Muhammad, 1995). The philosophy of justice that wants to be upheld in resolving conflicts and disputes among indigenous peoples is communal justice. Communal justice is justice where no one feels disadvantaged by the decision taken by the leader or traditional figure in resolving conflicts/disputes. This justice is very important to be upheld as a joint of the order of life of indigenous peoples. Customary law is applied in order to uphold community justice. The values and dignity of indigenous peoples are very much determined by the degree to which the values of communal justice are realized. The higher the value of communal justice, the stronger and nobler the position of the customary law community (Abbas, 2011).

The fourth philosophy is what underlies the tradition and resolution of conflicts and disputes in indigenous law communities. In addition, each region has cultural themes that are essentially the same substance, namely upholding a culture of deliberation. For example, in Aceh there is a court whose nature is only as a separation board, the power is given to the village head. If there are parties to the dispute, the village head acts by reconciling the disputing parties. In the land of Gayo, the village court was placed above the responsibility of the kings. The village court in Batak land was in the hands of the head of the city center or king of Padusunan. In South Tapanuli, this power was given to the head of the curia, but since 1916 by the district head. In Minangkabau society, there is a customary institution that works motivated by a culture of consensus. In the meeting the parties to the dispute voluntarily softened their attitudes and opinions, and at the same time accepted and understood the opinions of others (Saptomo, 2010). The concept of deliberation is basically in line with the interest-based bargaining technique, which is the style and technicality of modern negotiations that are popular and applied in various countries.

Settlement of conflicts and disputes in the customary law community as described above is determined by the values of customary law, traditional leaders, and customary institutions. The values of customary law are the norms that become the standard of the behavior patterns of customary law communities. This value is also a guideline for traditional leaders in carrying out their duties in resolving conflicts/disputes. Customary leaders are people who have "*customary charisma*" and understand customary laws obtained from generation to generation. They are a reference for resolving conflicts and disputes in indigenous law communities. Customary law is in their hands, and they inherit customary law and enforce it in the lives of indigenous peoples. Those who understand and master customary law norms are called traditional leaders who tend to be leaders in indigenous law communities. Meanwhile, customary institutions are institutions that have certain duties and functions, who maintain customary law in society (Muhammad, 1995).

The essence of conflict resolution/dispute in customary law is to realize peace in a comprehensive sense. The peace meant here is not only for the parties of perpetrators and victims, but peace for the community as a whole which is permanent. The settlement of conflicts and disputes through customary law mechanisms that are carried out through deliberation generally uses a broader approach to mediation, negotiation, facilitation and arbitration compared to positive law in Indonesia. In practice, traditional leaders generally use this approach together to resolve private and public conflicts/disputes.

## CONCLUSION

The essence of conflict resolution/dispute in customary law is to realize peace in a comprehensive sense. The peace meant here is not only for the parties of perpetrators and victims, but peace for the community as a whole which is permanent. One of the mechanisms for resolving criminal cases through customary law as a tradition of the people in Indonesia is by using the customary law facilities of the tribes in Indonesia to uphold custom as a result of the process of deliberation in joint discussions with the intention of reaching a decision as a solution to a problem. The decision produced through the mechanism of deliberation is an alternative effort in finding a way out to solve problems that occur in society if there are disputes between citizens or acts of abuse or violations of customary norms or fights or traffic violations, then the community tends to settle peace. The results showed that tribal customary law is in line with the concept of restorative justice.

## REFERENCES

- Abbas, S. (2011). *Mediation in the perspectives of sharia law, customary law, and national law*. Jakarta: Prenada Media Group.
- Cavanagh, T. (2017). *Restorative justice*. Retrieved from [www.restorativejustice.org/](http://www.restorativejustice.org/)
- Chirayath, L., Sage, C., & Woolcock, M. (2005). *Customary law and policy reform: Engaging with the plurality of justice systems*. World Bank.
- Cryer, R. (2006). Of custom, treaties, scholars and the gavel: The influence of the international criminal tribunals on the ICRC customary law study. *Journal of Conflict and Security Law*, 11(2), 239-263.
- Dandurand, Y., & Griffiths, C.T. (2006). *Handbook on restorative justice programmers*. New York: United Nations.
- Fletcher, M.L. (2007). Rethinking customary law in tribal court jurisprudence. *Michigan Journal of Race and Law*, 13(1), 57-69.
- Hoefnagels, G.P. (2013). *The other side of criminology: An inversion of the concept of crime*. Springer Science & Business Media.
- Kuswandi. (2016). The idea of the criminal justice system of Indonesia (Response to the treatment of act no. 8 of 1981 (KUHP) on victims of crime). *Justitia Journal*, 5(1), 1-9.
- Manan, B. (2008). Restorative justice. In R. Rizky, (Eds.), *Reflections on legal dynamics (Series of thoughts in the last decade)*. Jakarta: Perum Percetakan Negara Indonesia.
- Meron, T. (2005). Revival of customary humanitarian law. *The American Journal of International Law*, 99(4), 817-834.
- Muhammad, B. (1995). *Principles of customary law*. Jakarta: Pradnya Paramita
- Muladi. (1995). *Selected essays of the criminal justice system*. Badan Penerbit Universitas Diponegoro.
- Saptomo, A. (2010). *Law and local wisdom: Revitalizing the traditional law of the archipelago*. Grasindo.
- Soemitro, R.H. (1980). *Legal issues in society*. Alumni.
- Suparman, E. (2010). Perceptions of justice and legal culture in dispute resolution. *Paper presented at the National Seminar on the Utilization of Legal Sociology in the Period of Global Development and Restructuring, Faculty of Law, UNDIPS, Semarang*.

- Surya, H., (2012). *The role of seneubok elders in resolving land boundary disputes within indigenous communities*.
- Susanto, I.S. (1996). Judicial and democratic institution. *Paper presented at the National Seminar on the Utilization of Legal Sociology during Global Development and Restructuring, Faculty of Law UNDIP, Semarang, 12-13 November*.
- Toews, B. (2006). *The little book of restorative justice for people in prison: Rebuilding the web of relationships*. Simon and Schuster.
- Tyesta, L.A., Saraswati, R., & Arif, F. (2020). Implications of legal positivism of the promotion of children's rights on national law. *Journal of Advanced Research in Law and Economics*, 11(1), 661-678.
- Umbreit, M.S. (1999). Avoiding the marginalization and McDonaldization of victim offender mediation: A case study in moving toward the mainstream. In *Restorative juvenile justice*. Criminal Justice Press.
- Zulfa, E.A. (2011). *A paradigm shift in punishment*. Jakarta: Lubuk Agung.