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Research Article

The Existence of Decisions of Customary Institutions in the Settlement of Criminal Cases in Indonesia

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Abstract.
Article 5 paragraph (1), Article 10 paragraph (1), and Article 50 paragraph (1) of Law 48 of 2009 on Judicial Power paved the way for the recognition of customary criminal law, in which the existence of the adapt community and adapt law is recognized and guaranteed by the constitution. However, since customary criminal law is based on the philosophy of harmony and cosmic balance within society, it would be difficult to find common ground regarding the principle of legality within the Criminal Code. This study aims to identify the influence of customary institution decisions in criminal case proceedings. This research uses a socio-legal methodology that has descriptive and analytical characteristics. This research uses qualitative interactional analysis. The results of this study indicate that, prior to the enactment of Prosecutors' Regulations on Restorative Justice, the customary institution decision has cemented its existence as a source of law to decide criminal cases. The enactment of Prosecutors' Regulations on Restorative Justice has shifted it into one of the reasons for the public prosecutor to consider dropping criminal charges based on restorative justice. The regulation will require the involvement of community leaders or representatives to terminate criminal proceedings.

Keywords: customary institutions, customary law, criminal cases, restorative justice.

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Published 24 February 2023

Publishing services provided by Knowledge E

Selection and Peer-review under the responsibility of the 2nd ICPSH 2022 Conference Committee.

1. Introduction

In Indonesia, customary law belongs to its legal substances, which means that its existence has been recognized as a part of the Indonesian legal system. This recognition is given by the constitution, specifically in the provisions of Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) which states " *The State shall recognize and respect entities of the adat law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws*." The extent of adat law includes regulating criminal offenses (customary criminal law) and is closely related to the issue of *ius constitutum* that leads

to legal pluralism, which means that there is more than one set of legal systems that applies in society.

Sequentially, the issue of legal pluralism would raise an interesting question to wit, how to make these two sets of legal systems complement each other instead of negating each other during the case resolution process? Besides the constitution, Article 5 paragraph (1), Article 10 paragraph (1), and Article 50 paragraph (1) of Law 48 of 2009 on Judicial Power reaffirm the recognition of customary criminal law, therefore giving further protection to the adat community and adat law. In this regard, with the customary law being a component of legal substance, therefore must be given reasonable care for its development to be able to cover the socio-cultural diversity of the Indonesian community.[1] However, the criminal law system in Indonesia still adheres largely to the concept of criminal law from the colonial era. Meaning that there is going to be a contradiction to Article 1 Paragraph (1) of the Criminal Code (KUHP) regarding the principle of legality, especially the emphasis on requiring written rules to determine whether an offense has happened as justification for punishing someone for their action. Consequentially, this principle would leave no room for customary criminal law, because inherently it is a type of law that isn't written in the Indonesians Legislation.

In response, Muladi during his inauguration speech as a professor at Diponegoro University stated that there is a clear judicial framework to bridge for the actualization or recriminalization of customary criminal law, namely substantive unlawfulness, be it in positive or negative function, according to Article 5 Paragraph (3) sub. B Emergency Law Number 1 of 1951 on Temporary Measures to Organize Unitary Powers and Procedures for Civil Courts and Basic Laws on Judicial Power.[2] In addition, several other jurisprudences place customary criminal law as a source of unwritten law for examining and deciding customary cases. However, it would be difficult to find a common ground between the legality principle of the Criminal Code with the practice of customary criminal law, because on one hand customary criminal law is based on the philosophy of harmony and cosmic balance within society, while on the other hand principle the legality principle prioritizes legal definition of crime; the punishment should fit the crime; the doctrine of free will; death penalty for some offense; does not rely on empirical research and a definite sentence, all of which are the characteristics of classical school.[3]

The criminal justice system in Indonesia, in general, is still dominantly retributive in nature, which focuses on punishing the perpetrators. Punishment is mainly aimed at retaliating against an offense whilst fulfilling the demands of public outrage toward the perpetrators' actions. Over time, an alternative to retributive punishment has started developing, especially an idea that emphasizes the importance to find solutions that are

able to improve the situation, reconciling the parties involved, and restoring harmony within society while also still holding the perpetrators accountable. This theory is known as restorative justice.[4] The concept of restorative justice puts forward the idea of bringing together the perpetrator with the victim or the community to find solutions and restore good relations among people within the society.[5] In this regard, over time, the Government of Indonesia has attempted to change the paradigm and orientation of law enforcement. This measure has become part of the National Medium-Term Development Plan (RPJMN) 2020-2024. In Chapter VIII: Strengthening Political Stability, Law, Defense, Security and Transformation of Public Services, regarding Policy Direction and Strategy of the National Law Enforcement Section, a few of the directions and policies are as follows:

1. Improvement of the criminal and civil law systems with main strategies are specifically related to **the application of restorative justice**. This measure is done by optimizing the use of regulations available in laws and regulations that support Restorative Justice,
2. Optimizing the role of customary institutions and institutions related to alternative dispute resolution, prioritizing efforts to provide rehabilitation, compensation, and restitution for victims, including victims of human rights violations.

The Prosecutors Office of the Republic of Indonesia had issued a policy that best portrays restorative justice implementation. As the one which holds the *dominus litis principle* in the criminal law system, it made a legal breakthrough by issuing the Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 on The Termination of Prosecution Based on Restorative Justice (Hereinafter Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice). Prior to the enactment, this regulation was propagated from the prosecutorial discretion made previously by the public prosecutor. The policy made is in accord with Article 139 and Article 140 of the Criminal Procedure Code while also displaying the implementation of the principle of opportunity from the Attorney General. So, it can be inferred that the implementation of the principle of opportunity which was embodied in the Policy of Termination of Prosecution Based on Restorative Justice uses the concept of quasi-dismissal (*quasi-seponering*).

Previous research, among others: first, research conducted by Rantau Isnur Eka (2021) found that the existence of the Customary Law Court in the legal system in Indonesia is very important to provide solutions related to legal problems in general that intersect. with the interests of indigenous peoples and stakeholders. Indigenous Peoples themselves. The basis for the existence of the Customary Court has been

recognized for its existence in the Indonesian Legal System which can be traced to its existence from several existing laws and regulations.[6] Second, research conducted by Shavira Hermala Meidy (2022) shows that the application of the Indonesian state to customary law communities is recognized in writing through Article 18B paragraph (2) of the 1945 Constitution. So that violation that occur in customary law areas are tried with the applicable customary criminal law. Based on the legal sources above, it can be concluded that the position of customary criminal law in Indonesia has received recognition, so that the application of customary sanctions imposed on perpetrators of customary violations does not conflict with state norms. As long as customary law is still alive and developing in the midst of the layers of indigenous peoples.[7]

From there, in this paper, the author will focus on discussing the kind of influence the customary institution decisions have especially toward criminal case proceedings and how the implementation is related to the implementation of the application of criminal case settlement based on restorative justice in the Prosecutor's Office.

2. Method

This research uses a socio-legal methodology with descriptive and analytical research characteristics.[8] This research will not only describe the content of a text but also deepen the context included in all the processes starting from the making until the implementation of the law. Socio-legal research is an attempt to explore and at the same time analyze a problem by not only covering studies of legal norms or doctrines but also seeing how a norm is implemented in real life.

This research will use interactional with qualitative analysis to analyze the problem logically and systematically. The qualitative method is a research procedure that produces descriptive data in the form of written or spoken words from people and observed behavior.[9] The author will use primary data obtained directly from the Deputy Attorney General for General Crimes, head of Toba Samosir District Attorney, head of Bulukumba District Attorney and secondary data through literature and document studies.

3. Results and Discussion

3.1. Customary Criminal Law's Standing in Indonesian Criminal Law

Indonesian constitution has explicitly given recognition to customary law, namely through the provisions of Article 18 paragraph (2) of the 1945 Constitution. Consequently, the same amount of recognition and respect should also be given to all the structures

and institutions related to customary law, which in this case includes the judiciaries that exist and are owned by indigenous peoples.[10] In the Indonesian legal system, several other regulations have also given recognition to the existence of the customary law system, both criminal and civil law. Specifically, for the criminal law system, the regulations in question are:

1. Emergency Law Number 1 of 1951 on Temporary Measures to Organize the Composition, Powers, and Procedures of Civil Courts;
2. Law Number 48 of 2009 on Judicial Power.

Looking at several provisions inside these two acts, the legislative branch has made a juridical foundation to accommodate the actualization of customary criminal law for criminal court proceedings. Article 5 paragraph (3) sub b. Emergency Law Number 1 of 1951 also states that "*the civil material law and even for a certain amount of time the civil criminal material law which until now applies to the subjects of Swapraja regions and people who were previously tried by the Customary Court, still applies to the subjects....*". It also regulates that if a person is found guilty according to customary law but has not served their sentence yet, then that person's action must still be considered a criminal act which is punishable by a penalty of not more than 3 months in prison under the Criminal Code. It means that violation of customary law equates to a criminal act punishable under the Criminal Code.

In addition, the provisions of Law Number 48 of 2009 on Judicial Power also give further standing for the existence of living law in society, these provisions can be described as follows:

1. Article 4 Paragraph (1) states that " *the court judges according to the law without discriminating against people* ". The phrase " *according to the law* " leaves room for a broad interpretation, and therefore could include formal and material legalization. This article could be seen as instructions for judges to always consider both written regulations and laws that live in a society to uphold justice;
2. Article 5 Paragraph (1) states that " *judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice in society* ". This means that to decide cases the judge has an obligation to explore the values of justice, especially those that live and develop in society, do not just parrot what the laws say. This is necessary in order to present substantive justice that will be felt by the community;
3. Article 10 Paragraph (1) states that " *the court is prohibited from refusing to examine, hear and decide on the cases that have been submitted on the pretext that the*

law does not exist or is unclear, but on the contrary is obliged to examine and adjudicate", the phrase " *law* " in this case specifically means written law. However, judges are still obliged to examine and adjudicate cases that have been submitted, even though there are no written laws that regulate it. Meaning that in such cases the judge is obliged to search for an unwritten rule which is *living law*;

4. Article 50 Paragraph (1) states that " *a court decision must contain not only the reasons and groundwork for the decision made but also contains articles of relevant legislation or unwritten source of law that are used as groundwork for adjudicating* ". From this provision, we can infer those unwritten rules, in this case, are the values of local wisdom or the *living law* within society. Therefore, in the decision-making process, judges must also pay attention to the values of justice that live in a society in upholding justice.

Based on the descriptions above, the position of customary criminal law in the Indonesian criminal law system is indeed one of the sources of law.[11] This is due to the fact that customary criminal law has gained recognition constitutionally while also used as a reference in resolving legal issues, whether it is for judges' considerations in deciding cases or resolving disputes that arise among indigenous peoples. Furthermore, Lilik Mulyadi adds that customary criminal law ideally functions to support national law and not the other way around. It means that customary law should not be above national law because local wisdom must be in line with national law. So, from there, customary criminal law is as a source for the formation of national criminal law.[12]

3.2. The Existence Decisions of Customary Institutions and Its Influence in Deciding Criminal Cases in the Criminal Justice System Prior to Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice

The existence of customary institutions that are equipped to decide customary criminal cases can be found throughout Indonesia. For example, Minangkabau has customary criminal law called the *Nan Duopuluah Law*, which is then divided into two parts, the Nan Salapan Law and the *Nan Duobaleh Law*. The Nan Salapan Law regulates criminal acts, while the Nan Duobaleh Law regulates matters related to evidence of violating the Nan Salapan Law.[13] The customary offenses regulated in the Nan Salapan Law are:

1. *Dago-dagi;*
2. *Sumbang-salah;*
3. *Samun-sakal;*

4. *Maling-curi;*
5. *Tikam-bunuh;*
6. *Kicuh-kecong dan tipu-tepok;*
7. *Upas-racun; and*
8. *Siar-bakar.*

Of the eight forms of customary criminal offenses, *sumbang-salah* and *dago-dagi* are still being resolved through customary institutions. An instance of cases that have been tried by the *Kerapatan Adat Nagari* in Minangkabau happened in 2004 when *Kerapatan Adat Nagari* East Payakumbuh issued customary sanctions to A. M. Dt. Panduko Sati. He was found guilty of committing "*dago-dagi* " for the demolition of a traditional house. Another instance is when Kerapatan Adat Nagari Pasaman issued customary criminal sanctions against a widow in the form of "*dibuang sepanjang adat*" (ostracized from the community and forbidden from participating in social activities, while still allowed to live in their own place of residence.) for being found guilty of promiscuity, due to the fact that every morning men can be seen coming out from the widow's house.

In addition to cases of Minang custom, the recognition of the decisions made by customary institutions can also be seen in the Supreme Court Decision Number 984 K/Pid/1996 January 30^{th}, 1996. They judged that if the adulterer had been sentenced with customary sanctions or received any form of punishment from Custom Community Elders, where customary law is still respected and thrives, the court has to dismiss the charges. This decision shows that the Supreme Court recognizes the existence of customary criminal law in Indonesia as a source of law.

Other instances are Supreme Court's Decision Number 1644 K/Pid/1988 on a case in Kendari, Southeast Sulawesi. This case began with someone committing immoral acts in Parauna Village, Unaaha District, Kendari City which was then handled by Tolake Customary Chief. He sentenced the perpetrator with "*Peohala"*, customary sanctions in the form of obligation where the perpetrator must pay with a buffalo and a piece of shroud. The perpetrator did in fact comply with the customary sanctions, meaning that the case has been resolved through traditional institutions. However, the case was still being processed by the police and ends up being tried in the District Court. The Judges decide that the defendant was found guilty of committing a customary crime of rape. During the hearing of a court case, the judges also rejected the defendant's defense that the District Court should not try this case again because it had been resolved through a customary institution, therefore *nebis in idem*. During the appeal, the High Court decided to uphold the decision of the District Court in which the defendant was

found guilty of "*siri'* adat". However, during the cassation, the Supreme Court decided otherwise, to wit Supreme Court Justice found that the defendant had indeed served his sentence by complying with customary sanctions to pay for a buffalo and a piece of shroud. Hence, the Supreme Court overturned the District Court and the High Court's decision on the grounds that both the District Court and the High Court do not have the power to sentence the defendant because the defendant has been sentenced with customary sanctions by traditional institutions and has also served his sentence.

The above cases show the existence of customary criminal law in the Indonesian criminal justice system and its standing as a source of law for Judges to make their decision within the scope of the national criminal justice system.

3.3. Customary Institutions Standing According to Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice

Regarding the application of restorative justice, empirically the concept of restorative justice has actually been known in customary law, for example, in Javanese custom, there is an institution called "*Rembug Desa*". This institution aims to resolve violations against customary norms that occurred within society. Conceptually, the perpetrators, victims, and the community are being represented by traditional leaders to hold a forum aimed to find the best solution regarding the violation of the customary offense happening. The concept of this settlement will consider the impact of violations against the victim and the ability of the perpetrator to make reparation for the victim in the decision-making process. Similar institutions can also be found in Minangkabau, West Sumatra, known as the "*Kerapatan Adat Nagari*".[14] Based on several examples that have been explained in the previous chapter regarding the implementation of the concept of restorative, the dispute resolution process at the customary level still prioritizes the recovery of victims for what they have suffered because of the violation and the participation of the parties involved. Interestingly this method of resolution shares the same characteristics with the concept outlined in the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice. According to this regulation, the aim of the termination of proceedings is to best restore the situation to its original state. It begins with an apology from the perpetrator (and the perpetrator's family) to the victim (and the victim's family) while being witnessed by local community leaders, both religious leaders and/or traditional leaders.

The termination of prosecution based on restorative justice is a form of prosecution discretionary by the public prosecutor which also the implementation of the *dominus litis*

principle (principle of controlling the case).[15] This principle allowed public prosecutors to have the authority to control cases from an investigation process including whether a prosecution could/should be carried out. It means that public prosecutors have the authority to discontinue/terminate the prosecution due to the lack of evidence or for the sake of law (Article 140 Paragraph (2) of the Criminal Procedure Code). Analyzing Article 139 and Article 140 paragraph (2) of the Criminal Procedure Code, the phrases ”determine” and ”decide” are the legal basis that give authority to the public prosecutor to exercise prosecution discretion. It should, however, consider both *rechtmatigheid* and *doelmatigheid* to determine whether a case should proceed to the Court. Thus, this regulation is a concrete example of *quasi-dismissal (quasi-sepoonering)*, because in this case the authority of the dismissal process is only owned by the Attorney General to serve the public interest.

Ergo, the decisions of customary institutions that bring the value of local wisdom values can be used to implement Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice, especially during discussion forums among the victim, the perpetrator, and representative of the local community (religious leaders/traditional leaders) with the Prosecutor as the facilitator. Article 8 paragraph (2) of the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice, which states ” *if it is deemed necessary, peacebuilding can involve the families of the Victims/Suspects, community leaders or representatives, and other related parties* ”, is a clear indication for law enforcement to involve local wisdom. Hence, termination of prosecution according to this regulation requires the involvement of community leaders or representatives.

Next, the actualization of the values of local wisdom is also displayed through the decision of customary institutions in Toba Samosir. Not only that but this decision is also made in line with the restorative justice approach referred to in the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice. The case in question is the destruction of the property done by Dompak Sitorus. The approach used by the local community is called '*Martonggo Raja*', a stem from the thought that the Batak people are descendants of the king. The practice is best described in its original language as “*Met met bulung ni jior, um met-metan bulung ni bane bane. Denggan marhata tigor, um denggan do marhata dame*” (it's better to say straight, it's better to say peace). The practice involves group discussion among the local community which is then communicated to the prosecutor to pursue peacebuilding if they deemed it necessary. It shows that the settlement process consists of forgiveness from the victim and compensation for the victims.[16]

Other instance happened in South Sulawesi, at the Bulukumba District Attorney's Office in Kajang for the case of persecution done by Saleh Bin Bukka. During a group discussion, the traditional leaders will provide advice and input based on the Tana Toa Kajang Criminal Law. The law distinguished an offense based on the severity of the impact of the persecution. In this case, because the offense is only mild abuse, traditional leaders suggested that this case should be reconciled under Tana Toa Kajang legal system while the use of the customary criminal system should only be used as the last resort/*ultimum remidium*.

Analyzing the 2 (two) cases examined in this paper, the method of implementing the values of local wisdom values according to the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice is through a forum of group discussion among victims, perpetrators, and local community organized by the Prosecutor. Hence the involvement and revitalization of traditional leaders, religious leaders, and community leaders' influence can be utilized in these forums. The aim is to keep the orientation of settlement with the principle of equality among the parties involved during the settlement process. It can also revitalize the existence of local wisdom values and substantial justice that keep on living and growing in society, which has been marginalized by the formality and rigidity of positive law.

4. Conclusion

4.1. Conclusion

Based on the description above, in this case, the author can draw several conclusions, namely:

1. Prior to the enactment of the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice, the existence of customary institutional decisions was used as a source of law in deciding criminal cases, where if someone has been sentenced with customary sanctions, the Supreme Court Decision Number 1644 K/Pid/1988 has explicitly stated that if they have served these customary sanctions then they cannot be sentenced with the national criminal law system.

2. As for after the enactment of the Prosecutor's Office Regulation on Termination of Prosecution Based on Restorative Justice, the decision of customary institutions has become one of the considerations for public prosecutors to discontinue/terminate prosecution on the ground of restorative justice while also involving community leaders or representatives.

4.2. Suggestion

Cultural pluralism has resulted in a large number of indigenous peoples in Indonesia, and with it comes a system called a living law that is still inherent in their day-to-day life. Looking at the position of customary law in Indonesia, its existence is recognized by the constitution and several other laws and regulations. However, in its enforcement, many law enforcers still abandon and even put aside customary law, this is because many law enforcers still adopt the paradigm that the enforcement of positive law primary means to bring justice. It creates a situation where the application of criminal law in Indonesia seems rigid. Nevertheless, the current development of Indonesian criminal law has made an alternative for retributive punishment with the idea that emphasizes more to the importance of solutions that are able to improve the situation, reconcile the parties and restore harmony to society while also still holding the perpetrators accountable. This theory is known as restorative justice. Some concepts of the implementation of restorative justice emphasize the sense of justice that grows in the community by exploring the values of local wisdom, therefore it is necessary to improve the customary criminal laws standing in the Indonesian legal system. These local wisdom values are used as the basis for the development of national law, namely in the Criminal Code Bill.

Conflict of Interest

The author states that there is no conflict of interest related to the writing or publication of this article I created.

Acknowledgement

The author would like to thank the Secretariat of the Law Science Doctoral Program which has assisted in writing this article.

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