

THE RESTORATIVE METHOD FOR DEVELOPMENT URGENCY OF CUSTOMARY

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ABSTRACT

The study of the administration and distribution of justice in Indonesia is a very important matter to discuss. very important to discuss. First, because Indonesian society is still a pluralistic society. Secondly, the complexity of the law and the issues surrounding the terms 'lex' (legislation, regelgeving) and 'ius' (law, recht). And thirdly, Apeldoorn's opinion that outside the laws there is also law. The Republic of Indonesia is a state of law (rechstaat). In this case, the state should also ensure the upholding of justice by applying and enforcing the existing, including in enforce existing laws, including customary. The implementation of the law can take place normally and peacefully, but it can also be due to violations of the law. also due to violations of the law. In this case, the law that has been violated must be enforced.

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1. INTRODUCTION

The Customary management which was originally a lively activity behavior and able to provide solutions to the various problems of Indonesian society. in various problems of living in Indonesian society, is increasingly fading in existence. its existence is fading. Currently, in society, there are many problems faced by Indonesian indigenous peoples when adat is confronted with the positive.

The development of the Indonesian System which tends to prefer civil law and common law systems and the politics of Indonesian law which leads to law system and Indonesian legal politics that lead to legal codification and unification, accelerated the disappearance of customary law institutions.

The concept of law that is adopted refers to the fact that outside the state judiciary there are also there is also a non-formal judiciary that is established and works based on the rules of behavior in resolving disputes based on customary law that lives in the community. Here the judiciary is studied as a component of a complex societal system and not as a single source for the distribution of justice. as the sole source of justice distribution, as in legalistic positivistic legal thinking.

Thus, the issue of justice distribution is not only related to efforts to equalize opportunities to obtain justice, through equalization of opportunities to obtain justice, through the establishment of formal courts and their tools, but also with the its tools, but also with the right pairing of forum and dispute, and with the postulates of social structuring based on customary law. The complexity of the Judiciary

The judiciary, as a justice-giving institution, is characterized by a variety of legal theories and concepts. On the first side stands the legalistic-positivistic group mentioned above. The legalistic-positivists want the judiciary to work based on the rules of law.

Meanwhile, on the other hand, there are pragmatic groups who want institutions judiciary works on the basis of legal values and justice that live in society. By Therefore, the description below will allude to various thoughts on legal concepts and theories about customary law, judiciary and judges. Thinking about access to justice (access to justice) actually does not refer to "punitive justice" (justice which refers to sentencing). But brought to a new insight, namely "participatory justice" (justice which refers to togetherness).

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 effort return society to order and peace in accordance with feelings and legal awareness that lives in the community concerned. In this case "Healing Social", the results of deliberations are held with or without involving enforcement officers state law (non-state justice system). Non-state justice system in view

Mardjono Reksidipoetro, referring to the thought of restorative justice (restorative justice) with the main objective, such as:

- a. To restore the health of the community, meet victims' needs, repair the harm done, and request the offender to contribute to these repairs"
- b. The restorative justice model attempts non-punitive, humane solutions to the conflict inherent in crime end victimization.

The concept of dispute settlement with this agreement, arises not only as a reaction to the traditional ways applied in the system "punitive justice", both oriented to the "crime control model", as well as "due process". model". However, it is an effort to revitalize and actualize the role of peace institutions been there before. Historical facts have recorded that the Indonesian nation has cultural repertoire in the form of a social and legal system concerning justice, judges and justice. Just as For example, the history of the Mataram kingdom since the 17th century has had a royal court institution which is called the Stinggil Court or Serambi. While legal cases in rural areas resolved in the Unified Court led by the customary head. The village level court survived until now with various names such as the customary court or Village Peace Institute. Until now institutions like this are still alive with functions and his 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 one of the sources of law in Indonesia, one of which is due to the assumption that customary law is very traditional and cannot be one of them is because of the assumption that customary law is very traditional and cannot reach the times (globalization and technology). reach the times (globalization and technology). This research examines which areas of customary law are still relevant in addressing the problems faced by the Indonesian nation in the era of globalization, and problems faced by the Indonesian people in the era of globalization, and how is the urgency of customary law as a basis for national legal development policy as the basis for national legal development policy

2. LITERATURE REVIEW

Customary Management

Hardjito Notopuro defines Customary Law as unwritten law, customary law with distinctive characteristics that guide people's lives in the community. customs with distinctive characteristics that guide people's lives in organizing justice and community welfare and are familial in nature. organizing the system of justice and community welfare and is familial in nature.

Meanwhile, van Vollennhoven described Customary Law as a set of rules of behavior for indigenous and foreign Easterners that have sanctions (because they are legal), and in a state of not being dik diked. law), and is not codified.

In general, the recognition of customary law can be seen from Indonesia's legal politics, which is found in contained in the 1945 Constitution of the Republic of Indonesia article 18B paragraph (2) which states: "The State recognizes and respect the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society. as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia which are regulated by law".

Unitary State of the Republic of Indonesia which is regulated by law". However, in its development of Indonesian law tends to move more towards western law (civil law and common law) which has implications for Indonesian legal politics which has implications for Indonesian legal politics that deny customary law, which is actually more relevant. more relevant. For example, dispute resolution between indigenous peoples in one region, should be resolved through the role of customary community resolution institutions and not the District Court. instead of the District Court. The crucial problem that arises as a result of the sidelining of customary law is the conflict between indigenous peoples and the State Court. conflict between indigenous peoples and the public interest, which is the burden and obligation of the state. the burden and obligation of the state.

National policy

Indonesia's legal system is a system that applies in Indonesia as a source of for courts, judges, to formulate decisions, and also at the same time includes the values or ideals that underlie it. includes the values or ideals that underlie it. Every nation has its own legal system every nation has its own legal system, along with the value system that underlies it, including Indonesia. Understanding adequate understanding of the sources or materials derived from legal sources in Indonesia is a concrete component of the legal structure or building of the Indonesian legal system, which includes laws and regulations, legal decisions, and values.

Indonesian legal system, which includes laws and regulations, court decisions, customs, as well as other non-positive rules, that every legal issue must be resolved within the framework of the prevailing legal system, or within the framework of the applicable legal system, or with reference to that source. The current legal system in Indonesia is a unique legal system, a legal system built from a process of discovery, development, and development.

legal system built from a process of discovery, development, adaptation, and even compromise of several existing systems. several existing systems. The Indonesian legal system not only emphasizes local characteristics, but also accommodates local principles. local characteristics, but also accommodates general principles adopted by the international community. international community. Indonesia's legal system is a combination of European legal systems continental legal system, Anglo-Saxon legal system, customary legal system, and Islamic legal system.

3. METHOD

This research is 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. human behavior, both verbal behavior obtained from interviews and real behavior conducted through direct observation. which is done through direct observation. Empirical research is also used to observe the results of human behavior.

To strengthen the analysis of the discussion, this research is also complemented by normative legal research with a statutory approach. normative legal research with a statutory approach. According to Bahder Johan Nasution, normative legal research or study is basically: "to explain the law or looking for the meaning and source of value of the law, only legal concepts are used. and the steps taken are normative steps". The statutory approach (statute approach) in legal research, according to Peter Mahmud Marzuki, is: "carried out by examining all laws and regulations related to the legal issues being handled". legal issues being addressed". The result of the review is an argument to solve the issue at hand. to solve the issue at hand.

This study used a one group pre test and post test design. This design only design only involves one experimental group where the dependent variable is measured (pre-test), then given a stimulus, and the dependent variable is measured again (post-test). stimulus is given, and the dependent variable is measured again (post-test). Basically, the design is observed continuously between seeing how the Urgency of Customary Law in the Development of National Law

4. RESULTS AND DISCUSSION

The Urgency of Customary as Foundation for National Development

The existence of customary law as the living law of the Indonesian people is increasingly being marginalized. Customary law, which was originally a living law and able to provide solutions to various problems in the social life of the Indonesian people, is increasingly fading in its existence. At present, in empirical reality, various problems are faced by Indonesian indigenous peoples when customary law conflicts with positive law. For example, when the traditional rights of the people face the interests of investors through state law.

The development of the Indonesian legal system which tends to prefer civil law and common law systems and Indonesian legal politics which leads to the codification and unification of laws has accelerated the disappearance of customary law institutions. It is even undeniable that currently, related to economic activity, positive law is transformed towards the Islamic legal system (sharia). It can be said that in business activities such as company law, financing law both in banking, capital markets and insurance as well as contract law, a dual legal system applies, namely conventional and sharia. With regard to the existence of sharia principles in economic activity, the author argues that in fact customary legal institutions relating to economic activity have many views in common with sharia principles, including prioritizing the principle of balance, prohibition of unlimited exploitation and sustainable development. Thus, at this time apart from customary law, sharia principles are also the source for the formation of national law.

The increasingly marginalized existence of customary law as a source of law in IndonesiaIndonesia, partly because of the notion that customary law is very traditional and cannot reach developments in the era (globalization and technology). The implications of Indonesian legal politics are also felt in solving problems in communities that deny customary law, which is actually more relevant. For example, the rise of horizontal conflicts, between indigenous peoples in one area, should be resolved through the role of indigenous peoples settlement institutions. A crucial problem that arises in daily life is the difference in perception between land tenure by the community based on customary rights and the public interest

which is the burden and obligation of the state. Another example is the notion that the basis for the merits of being punished for an act is extended to the realm of customary law values.

The history of the enactment of law in Indonesia has noted that many legal experts have studied customary law as a living law in Indonesian society. Van Vollenhoven, for example, stated that if "a person wants to get knowledge and information about the laws that live on this earth, precisely because of the diversity of their forms in the past and present, then the entire rule of the Indies (read: in Indonesia) is a source that is never dry to learn. This statement contains an acknowledgment that legal pluralism in the customary environment is unique, interesting and a characteristic of Indonesian society. Kusni Sulang (Member of the Palang Raya Dayak Cultural Institute) even emphasized that pluralistic customary law is a blessing. Legal pluralism can be a unifier,

Until now, the pluralism of customary law in Indonesia, which has dynamically developed following the development of its society while still relying on the characteristics of indigenous peoples and participierend coschmish mindsets, has attracted the interest of experts from all over the world to be the object of research. As a reminder, currently related to dispute resolution, both civil and criminal, a method or approach known as a restorative approach is developing, which is similar to the participierend coschmish mindset held by indigenous peoples. The implementation of restoring a state of balance based on the participierend coschmish's mindset, manifests itself in several ceremonies, taboos or rites (rites de passage). This fact shows that customary conceptions and mindsets are not only still relevant, but also an inspiration for other countries to develop laws to fulfill people's sense of justice.

Model Result.

Indigenous peoples have the same pattern in resolving conflicts in the community, namely controlling life in the community and imposing sanctions if violated so that recovery is very effective. Another example, the University of Utrecht is trying to encourage the use of the deliberation consensus model of the Malay customary community in resolving the problems that occur. In Indigenous peoples, dispute resolution through deliberation is a living law and is known in almost every legal circle (rechtskring). Dispute resolution through deliberations always involves the heads of the people (traditional leaders), both in preventing law violations (preventieve rechtszorg) and restoring law (rechtsherstel). On the contrary, Indonesia enforces Law Number 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution as an out-of-court settlement option, which is actually inspired by the development of dispute resolution in countries with a common law system. Furthermore, it can be seen that in the context of codification and unification of law in Indonesia, various laws and regulations refer to the common law, civil law and sharia legal systems

Full acceptance of other legal systems in the formation of legislation in Indonesia in its implementation sometimes creates a conflict with the sense of justice of the people in Indonesia. A concrete example is the field of economic law, especially the capital market, for example, many develop types of anonymous agreements such as collective investment contracts, trusteeship agreements, brokerage agreements, and derivative transactions. Specifically for the practice of derivative transactions, the courts still classify derivative transactions in the capital market as chancy agreements based on Article 1774 of the Civil Code. This erroneous view of derivative transactions can be seen from the derivative cases that occurred in the banking world between Bank Niaga and Dharmala Agrifood, Bank Niaga and Suryamas Duta Makmur, Mayora Indah and Bankers Trust, Bank Credit Lyonnais Indonesia and PT Nugrasentana. The court considers that derivative transactions do not fulfill lawful causes as one of the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code. These case examples prove that acceptance of a particular legal system is sometimes difficult to implement in certain societies.

Considering that customary law is a law that reflects the personality and soul of the nation, it is believed that some of the institutions of customary law are of course still relevant as material in shaping the Indonesian legal system. Customary law that can no longer be maintained will fade over time, in accordance with the flexible and dynamic (not static) nature of customary law. Savigny as quoted by Soepomo emphasized that Customary Law is a living law, because it is an embodiment of the real legal feelings of the people. In accordance with its own nature, customary law is continuously in a state of growth and development like life itself.

In line with Savigny, van Vollenhoven said that "customary law in the past was somewhat different in content, customary law showed development". Furthermore emphasized that "customary law develops and progresses, customary decisions give rise to customary law". Considering customary law as a crystallization of Indonesian culture, researchers believe that an effort is needed to revitalize customary law, and make it part of the source of the formation of national law. With regard to the formation of

national law, Mochtar Kusumaatmadja added that the law must be sensitive to developments in society and that law must be adapted and adapted to circumstances.

Some of the thoughts contained in the theory of living law, including stating that in a process of forming statutory regulations, it is absolutely necessary to pay attention to the values and legal norms that live and apply in society. If the enactment of a law is contrary to the values and legal norms that live and apply in society, of course it will be rejected. In the Indonesian context, the living law of the Indonesian people is customary law.

Customary law can also be used as a source of law by judges if the law so orders. Customary law is a law that is not codified among Indonesians and foreigners (including Chinese and Arabs).

In addition to being classified based on diversity as found in legal environments (*rechtskring*), customary law can also be seen from another perspective, namely from the field of study, namely customary law regarding the arrangement of citizens (state constitutional law), customary law regarding relations between citizens (civil law), and customary law regarding offenses (criminal law). Based on this and to study customary law that is still relevant, used as a source for the formation of national law, researchers first set the following guidelines.

First, the study was carried out by first looking at the legal fields (neutral and non-neutral (sensitive)). What is meant by the field of neutral law is the field of law that is not directly related to human spiritual aspects, such as the law of objects, the law of contracts and the field of economic law, while the field of non-neutral law is the field of law that is closely related to human spirituality such as the law marriage, inheritance law and land law.²⁶ Second, based on customary law which does not impede the development of a just society. Third, customary law, which is still considered relevant, is expected to become a source of unification and codification in certain areas of law. Based on the signs above, the researchers conducted a study of constitutional law and customary civil law.

Organization of Indigenous Peoples (Government) Customary law regarding the composition of the community covers all matters relating to the composition and order in the association of indigenous peoples. Indigenous peoples are united by their respective legal alliances, in which the legal alliances have structures, tools, and tasks. The legal alliance has members who feel themselves bound to one another, who are united and full of solidarity. Legal alliances are formed based on genealogical and territorial factors. Genealogical factors bind people by lineage. Based on lineage, there is a legal arrangement based on the lineage of the father (patrilineal), the lineage of the mother (matrilineal), and based on the lineage of both (parental). The territorial factor binds the members of the legal alliance based on their joint relationship to the same area. Legal alliances based on territorial factors include, village, region, and village unions. Village fellowship is when a shared residence binds a human community above its own area. A regional association is when there are several shared residences in a certain area and always with freedom to a certain degree and each one headed by officials, where the residences are parts of a partnership that has its own boundaries and self-government, as well as its own territorial rights. A village union is when each village association is complete with its own government and area and is located nearby and enters into an agreement to maintain common interests by entering into an agreement to maintain shared interests by holding a government that is cooperative between these governments, where the governance The village heads who joined were not given separate areas.

The demand for nationalism against the Unitary State of the Republic of Indonesia has forced legal alliances based on genealogical factors to not be brought to the surface, apart from that another reason is that the orderly genealogical structure of society is spread over the regions because they do not have their own territory. However, this is not the case with the structure of society based on territorial factors, such as Nagari in Minangkabau and Subak in Bali, until now their existence is still in line with the development of government, even in the era of regional autonomy, the concept of Nagari government has inspired the revitalization of village autonomy. The existence of customary law alliances as a system of government in the region formally juridically has a strong foundation.

Restorative on Local Wisdom Values Restorative

The conventional criminal justice system does not offer justice for society, there is no protection for victims and does not provide benefits to society. Therefore, it has sparked several thoughts to look for other alternatives for handling criminal acts in these countries. The long standing and current implementation of the criminal justice process shows that the system is no longer sufficient to provide protection for human rights nor is it transparent to the public. Every five years, the United Nations organizes its famous "Congress on the Prevention of Crime and the Treatment of Offenders".

The congress discussed the development of crime, handling and handling of criminals; and other related topics. The Congress also welcomes countries to share experiences from a number of programs

developed as well as practice problems that arise. On this occasion, a number of countries also took advantage of the opportunity to build a cooperation framework for crime prevention/reduction, especially for criminal activities throughout the country.

In 1990 and 1995 Non-governmental organizations from several countries sponsored sections of certain Congress meetings to discuss restorative justice. Since then, various interests and programs and policies have been developed with use this approach. At the 1995 Cairo congress, a number of sections discussed sharply and in depth technical issues related to the use of a restorative justice approach in handling criminal cases. The next congress, in 2000, produced the United Nations Basic Principles for Using Restorative Justice Programs in Criminal Matters which contained a number of basic principles for using a restorative justice approach. "Restorative Justice" is an approach model that emerged in the 1960s in efforts to resolve criminal cases. Unlike the approach used in the conventional criminal justice system, this approach focuses on the participation of perpetrators, victims and the community in the process of resolving criminal cases. Despite the fact that this approach is being debated in theory, this view is actually evolving and has an impact on policy and legal practice in various countries.

Currently, the restorative justice approach is considered the most recent shift from various models and mechanisms in the criminal justice system in handling criminal cases. The UN, through its basic principles which have been adjusted, believes that a restorative justice approach is an approach that can be used in a rational criminal justice system.

This is in line with GP Hoefnagels' opinion which states that Criminal Policy must be rational (a rational total response to crime). The restorative justice approach is a paradigm that can be used to frame a criminal case management strategy aimed at addressing the dissatisfaction with the current workings of the criminal justice system.

Restorative justice is a concept that responds to developments in the thinking of the criminal justice system with an emphasis on community involvement and needs victims to be felt, who are felt to be excluded by the mechanism that works in the criminal justice system that is currently being disbursed. On the other hand, restorative justice is also a new frame of mind that can be used in responding to crimes by law enforcement.

The following are some definitions of restorative justice:

Restorative justice is a new framework for responding to abuse and conflict that is rapidly gaining acceptance and support by educational, legal, social work, and counseling professionals and community groups. 4 Restorative justice is a values-based approach to responding to guilt and conflict, with a balanced focus on the aggrieved person, the person causing the loss, and those affected by society.

4. CONCLUSION

The 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. 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 abolishing crimes, especially in cases of criminal acts committed by children, that the actions that should be imposed are: returning to parents, guardians, or foster parents; 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.

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 a decision on the case child delinquency.

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