



## The relation of restorative justice concept in customary justice: A brief overview in Indonesia

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### Abstract

Indonesia has implemented the principles and characteristic of restorative justice in customary justice. Almost all part of the territory of Indonesia, every ethnic group are accustomed to resolving their problem and conflicts by using traditional courts, as an alternative to state courts. One of the reasons for the need to reposition the role of customary courts in Indonesia is that the principles of fast and low-cost courts have not been serialized, and that criminal law conducted by the nation is still Perpetrators-oriented. Due to the inherent weakness of the State Courts, some people have begun to reconsider the role of Customary court as another place to obtain justice, especially for the people who are unable to access the State Courts. This study focuses on the relation of the concept of restorative justice in customary justice which is used in several criminal case settlements in Indonesia, especially in Rejang Community in Central Bengkulu Regency, Bengkulu Province. The method used in this study is a Socio-legal Research. From this method, it will be found the relationship between customary justice and restorative justice approaches, starting from the customary justice mechanism at the reporting stage, summons stage, customary trial stage, decision making and/or implementation of the decision of Customary Court.

**Keywords:** court, customary, Indonesia, law, rejang, restorative justice

### Introduction

Every country has a different experience in implementing a Restorative Justice. The term of Restorative Justice in resolving criminal cases is a new thing (Dictionary.com, 2021) <sup>[13]</sup>. As an alternative to the conventional approach, namely the conservative retribution and liberal rehabilitation approach (restorativejustice.org, 2021) <sup>[14, 19]</sup>. The concept of the Restorative Justice has at least several characteristics, namely;

- a. A process where all stakeholders affected by injustice can be brought together
- b. Every party have the opportunity to discuss how they have been affected by the injustice
- c. Giving active responsibility to perpetrators
- d. The parties can decide what to do to repair the loss, as well as an effort to provide restoration to the victims, communities, and the perpetrator themselves to the conditions before the crime occurred (restorativejustice.org, 2021) <sup>[14, 19]</sup>.

The character of the restorative justice approach was developed in various policies of law enforcement agencies in Indonesia, including the circular letter of the chief of Police number: SE/ 81 VII/ 2018 about the application of Restorative Justice. The Indonesian National Police Department (POLRI) stated that 1864 cases were resolved using a restorative justice approach within 100 working days by the National Police Chief, general Pol Listyo Sigit Prabowo (mediaindonesia.com, 2021) <sup>[10]</sup>.

The attorney's officer through the prosecutor's regulation of the Republic of Indonesia number 15 of 2020 concerning termination of prosecution based on the restorative justice approach, has stopped many cases based in the restorative justice approach in practice until now. The attorney General's office terminated 302 cases based in restorative justice. The details are 222 cases in 2020 and 80 cases in January-August 2021, consisting of 73 cases of people and

property and 7 cases related to state security and public order and other general crimes.

The Attorney General for General Crimes explained that there are several requirements for the application of the prosecutor's regulation, including the suspect committing a crime for the first time, the threat of a fine or imprisonment of not more than 5 years, as well as evidence or the value of the loss in the case that not more than Rp. 2,500,000,-. The regulation emphasizes the need for conscience and sensitivity in order to balance the law while still paying attention to the value of justice that lives in society (kompas.com, 2021) <sup>[7]</sup>.

At the court level, the issuance of the Decree of the Director General of the General Judiciary Agency number: 691/DJU/ SK/ PS.00/ 12/ 2020, at December 22 2020. about guidelines for the implementation of Restorative Justice in General Courts. The Supreme Court of the Republic of Indonesia realizes that the restorative justice approach is one way out to solve the problem of overcapacity of prisoners serving time in prisons in Indonesia.

Based on data in the correctional database system on August 5 2019, the number of prisoners and inmates in all correctional institutions (as known as "Lapas") and detention centers (as known as "Rutan") in Indonesia is 250,444 people. This number far exceeds the ideal capacity that can be accommodated by "Lapas" and "Rutan" which in total for only 124,696 people to accommodated. As a result of this overcapacity, it has an impact on the poor health condition and psychological atmosphere of inmates and detainees, it is easy for conflicts between residents of "Lapas" or "Rutan" to occur, guidances is not optimal and does not run according to regulations. Budget would also be swelling due to increased consumption of water, electricity, and food. (sulsel.kemenumham.go.id, 2021) <sup>[12]</sup>.

The restorative justice approach is a new development in the Criminal Law Universe. Without ignoring the mechanisms that work in the formal legal system, settlement mechanisms through deliberation institutions also work in the

community. In various principles and models of restorative justice approach, the dialogue process between the perpetrators and the victims is the basic and the most important part of implementing this type justice. Direct dialogue between the perpetrator and the victim allows the victim to express what he/she feels, expresses hopes for the fulfillment of the rights and desires of the settlement of the criminal cases. Through dialogue, it is hoped that the perpetrator will be moved to correct himself, realize their mistakes and accept responsibility as a consequence of a crime committed with full awareness. From this dialogue process, the community can also participate in realizing the results of the agreement and monitoring its implementation. (Lilik Purwastuti Yudaningsih, 2021) <sup>[8]</sup>.

Long before the term “Restorative Justice Approach” was known, the Indonesia people had already implemented the principles and character of restorative justice in customary courts. Customary court are a court that run in villages. Almost every part of the territory of Indonesia, every ethnic group that inhabits are accustomed to solving problems and conflicts by using their own customary courts as an alternative.

The National Legal Development Agency (also known as “BPHN”) research team also emphasized at least three basic principles for the implementation of the Customary Justice, which absolutely must not be ignored in the implementation process, namely the Principles of Local Wisdom, Social Justice, and Human Rights. Which explained as follow:

#### 1. Principles of Local Wisdom

Is a principle that underlines its implementation on the basis of traditions that have been maintained and can be widely accepted among the indigenous peoples, from generation to generation. Local Wisdom is recognized as a very important part of community life as a basis for interaction as well as a marker of morality which is recognized as local beliefs.

#### 2. Principle of Social Justice

A principles that prioritize the realization of a sense of justice that considered to be very important to the community, or something that has social significance.

#### 3. Principle of Human Rights

This principle includes a perspective on the universality of human rights, non-discrimination, equality, human dignity, not separating one’s right from another, and placing the responsibility of the nation in effort to promote and protect human rights. (Herlambang P. Wiratraman, 2013) <sup>[1]</sup>.

One of the reasons for repositioning the role of customary courts in Indonesia is that the principles of fast and low-cost justice have not been realized, and that criminal justice conducted by the Nation is still perpetrator’s oriented. Almost all of the attention is directed to perpetrators, especially relating to the protection of the Perpetrator’s rights. (I Ketut Sudantra, 2018) <sup>[4]</sup>.

Due to the weaknesses in the State Courts, some people have begun to reconsider the role of customary courts as another place to obtain justice, especially for people who are unable to access State Court. Re-functioning the Customary Court that have been weakened for years is not an easy job. There is a need for thorough revitalization of the components of the legal system that drives the Customary Justice so that it can function again as expected. (I Ketut Sudantra, 2018) <sup>[4]</sup>.

## Problems

Regarding the background from the introduction as described in the previous section, the problems that arise and need an explanation, which will be answered in this research, is how is the relation of the concept of the Restorative Justice in Customary Courts that used in several settlements of criminal cases in Indonesia, especially in the Ethnic communities like Rejang Ethnic in Bengkulu Tengah Regency, Bengkulu Province?

## Research Review

### Restorative Justice Approach Concept

The restorative justice approach refers to how to respond to crime, or other unlawful acts, facing injustice or conflicts. The main focus of this approach is repairing the damage caused by unlawful acts by prioritizing recovery, and realizing the welfare of everyone involved. This reflects a more relational theory of justice as it emphasizes the restoration of respect, equality, and dignity to relationships affected by the crimes. (www.unodc.org., 2021) <sup>[18]</sup>.

Restorative Justice is called “Restorative” because it uses a restorative process, which is a process that returns rights, ownership, and decision-making for those who are directly affected by an adverse event, namely perpetrators, victims, their supporters, and the wider communities that aims to involve directly in resolving the losses. (Judges, Prosecutors, Lawyers) (www.unodc.org.,2021) <sup>[18]</sup>. One of the basic principles of restorative justice is that all efforts must be made to provide solutions to repair or restore the balance that was damaged by these despicable acts. (restorativejustice.org, 2021) <sup>[14, 19]</sup>. The keyword in the Restorative Justice approach is deliberation between the parties involved which is oriented toward restoring to its original state.

### Customary Justice Review

In particular, the term customary justice has also been recognized for its existence before Indonesia’s independence, at least through the laws and regulations of the Dutch East Indies government. At the time, there were five types of courts, namely the Governor’s Court (*Gouvernements-rechtspraak*), Indigenous Court or Customary Court (*Inheemsche Rechtspraak*), Self-Government Court (*Zelfbestuurrechtspraak*), Religious Court (*Gods- dien stigeRechtspraak*) and Village Court (*Dorpjustitie*) (Hilman Hadikusuma, 1989) <sup>[3]</sup>. At the time, *Inheemsche Rechtspraak* was a court that conducted by European Judges as well as Indonesian Judges, which does not use the name of the King or Queen of the Netherlands, and are not based on the European legal system, but were based on the customary law system established by the resident with the approval of the Director of Court in Batavia. This court uses procedural law or its own formal law specifically in the form of resident judicial regulations, for example, the *Musapat Aceh Besar* and *Singkel* regulation (also known as “Peraturan Musapat Aceh Besar dan Singkel”) (1934), South and East Kalimantan Meeting Regulation (Also known as Peraturan Kerapatan Kalimantan Selatan dan Timur) (1934), *Gantarang*, *Matinggi*, and *Laikan* Regulation (Also known as Peraturan Gantarang, Matinggi dan Laikan) (Sulawesi Selatan 1933) (Herlambang. P. Wiratman, 2003). In the Emergency Law (Undang-Undang Darurat) number 1 of year 1951, it is stated in the article 1 Section (2) that the minister of court is

mandated to gradually abolish two court, which is all the Self-Government Court (*Zelfbestuursrechtspraak*) and all the Customary Court (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*) (Herlambang. P. Wiratraman, 2003).

According to Sudantra, Customary Court as the *inheemsche rechtspraak translation* has a different situation to the Village Court (*dorjustitie*), so with the abolishment of *inheemsche rechtspraak* authorities, doesn't really affect the Village Court (*dorjustitie*) (I Ketut Sudantra, 2018) <sup>[4]</sup>.

According to Hedar Laujeng quoted by I Ketut Sudantra, he define that Customary Court as a judicial system that was born, developed and practiced by ethnic and customary communities in Indonesia, based on customary law, where the judiciary is not part of the State Court system (I Ketut Sudantra, 2018) <sup>[4]</sup>.

Furthermore, Sudantra provides a benchmark for Customary Court as a judicial system that lives and is practiced in Customary Law Community Unit in Indonesia, with several criteria, namely:

1. Customary Court are courts that were born, developed and practiced by the Customary Law Community Unit in Indonesia;
2. Customary Court based on Customary Law;
3. Customary Court are not part of the State Court System;
4. Customary Court have the authority to adjudicate customary cases, both in the form of disputes and violations of customary law;
5. Customary Court have the authority to adjudicate cases between members of Customary Law Community Unit. (I Ketut Sudantra, 2018) <sup>[4]</sup>.

In Rejang Customary Law, there is also known as the form of settlement of customary violations, which is equivalent to the customary court, which called the "Jang" Customary Court in the regional language of the Rejang ethnic group. The Jang Customary Court is a dispute resolution mechanism in the Rejang ethnic communities to create balance and encourage coercive power for residents to submit to the rules that live in the community. (Pramasti Ayu Koesdinar, 2021) <sup>[11]</sup>.

### Rejang Customary Law Review

Most of the Rejang people live in several regencies in the provinces of Bengkulu and South Sumatra. In Bengkulu Province, the Rejang ethnic is domiciled in Bengkulu Utara Regency, Kepahiang Regency, Rejang Lebong Regency, Lebong Regency, and Bengkulu Tengah Regency. In Bengkulu Tengah Regency, it is spread in several sub-districts, namely; Pematang Tiga District, Bang Haji District, Pagar Jati District, Merigi Sakti District, Merigi Kelindang District, and taba Penanjung District. While the other 5 sub-district are inhabited by the Lembak and Serawai ethnic groups.

The Rejang Customary Law that applies to the Rejang ethnic communities has begun to attract the attention of legal expertise since 1783 when the book "History of Sumatra" by William Marsden was published. William Marsden has an interest with the Rejang ethnic *Aceh Ancient of Melayu (Malay)*, Lampung (*lampon*), Minangkabau (*Minangcabow*), and Batak (*Batak*) (William Marsden, 1783). There are many debates about the origin of Rejang people, one of which was written by John Marsden, a

British resident in Lais in 1775-1779 reported that *empat petulai* which is (*joorcalang*), *Berem mani* (Bermani), *Selopo* (Selupu), dan *Toobey* (Tubai) was the ancestor. According to historical data and *Tembo-Tembo Rejang* (also known as history of Rejang) as well as folklore, it is said that Rejang people resides their territory in Lebong (Silvia Devi, 2016) <sup>[17]</sup>.

In the past, Rejang people had a traditional institution called "Kutai Natet" which was led by a village chief (Potai) consisting of the "Ketuai Sukau", the elderly male group, "Tukang Lungus" (a shaman-like people), and scholars. In "Kutai Natet", a trial is held to resolve each cases. In the past it was also known that customary law was very strict, as in anyone who violated the law would be immediately killed. Currently it is no longer enforced, but the customary law of "Membunuh Membangun" which means the perpetrator can pay a fine with a certain amount of gold or silver. (Silvia Devi, 2016) <sup>[17]</sup>.

### Rejang Customary Law in Bahasa Rejang is called *Hukum Adat Jang*

Is a norm that grows and obey by the customary law Community Unit, in order to create peace, which produce tranquility and happiness, which will incur sanctions for those who violate it. Customary law contains family values, mutual cooperation, deliberation, consensus, priority, magic, religion, wisdom, in solving any problems that arise in society. (Silvia Devi, 2016) <sup>[17]</sup>. The principles of Rejang Customary Law included:

1. *So Samo Kamo Bamo* is the basic principle that recognizes the existence of common rights, the principle of kinship and prioritizes the interest of the people
2. *Tiep-tiep ade de do pengenea adat makau te'ang ngen sudo* is the act and the resolution of disputes in ethnic group should not be done in a hiding or be hidden manner.
3. *Adat tulung menulung* and *adat Rian Batau Mbatau* is an act of mutual help in term of goodness both within the family and with other ethnic group.
4. *Bebania Inde Beneu Bemulan Inde Jalai* is a figurative strategy to find the true point of the problems in order to resolve the disputes that occurs.
5. *Pendok Dik Sudo Panjang Gik Igai* is a term to state the problems that have been resolved through customary courts will not cause derivative problems both in this world and in the hereafter.
6. *Betimbang Samo Benek, Bekilo Samo Kelengan* is a decision of conscience in making a decision on a problem at hand, so that the decision that taken are not only fair, but also have been carefully and deeply considered for the harm and benefits, and can be accounted for to God.
7. *Mu'eak Kakane Ade, Beripit Kakea Ne Coaini* is the principle in imposing material sanction on a case by considering the economic capacity of the disputing parties or the perpetrators.
8. *Bepatet Bekenek, Bejenjang Tu'un* explaining the dispute resolution process must follow the rules that have been outlined such as climbing the stairs one by one, so everyone must not rush or overstep the existing rules. (Pramasti Ayu Koesdinar, 2021) <sup>[11]</sup>.

## Research Method

The method used in this research is a socio-legal study. From this method, the relationship between customary justice and restorative justice approaches will be found. Then, using a socio-legal approach, problems related to customary justice and restorative justice approach will be found. As a legal research method, socio-legal is a form for meeting other research with law, reason that the field of the study of law is always unable to fulfill itself. Satjipto Rahardjo had previously seen this tendency and said that essentially law is an interdisciplinary study and requires assistance from other field of expert. (Satjipto Rahardjo, 2006: 7) <sup>[15, 16]</sup> and (Satjipto Rahardjo, 2006: 54) <sup>[15, 16]</sup>.

## Result and Discussion

### The relation of the Concept of Restorative Justice in Customary Court used in several settling criminal cases in Rejang ethnic group in Bengkulu tengah Regency, Bengkulu Province, Indonesia.

The Restorative Justice approach can actually be carried out in various forms and types of criminal cases settlement, but in its implementation, it is currently only implemented for certain cases. Restorative justice approach uses to resolving violations in the environmental field, according to Tony F. Marsall's quote, explaining that restorative justice is a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies (Iman Imanuddin, 2019). Restorative Conferencing Model can be a means of bringing together the interest of perpetrators, victims (society and the environment) and related authorities such as the Ministry of Environment. Law enforcement officials such as the police, for example, carry out restorative justice in the settlement of cases at the investigation stage, which is based on the Circular of the Chief of the Indonesian National Police (Also known as "Kapolri") number SE/2/II/2021 dated February 19, 2021. This circular requires the fulfillment of certain conditions. As the formal requirements, such as a letter of reconciliation (*Akte Dading*) from both parties, namely the complainant and the reported party, a recommendation for a case title that approves the use of a restorative justice approach, and the perpetrator does not object to responsibility and compensation. (kompolnas.go.id, 2021) <sup>[6]</sup>.

In practice, the restorative justice approach led by the police, prosecutors, and courts is usually carried out by handling over the peace process to the parties. As a condition for stopping investigations, prosecutions and court decisions, signing peace letter by the parties will served as evidences. In practice, the parties ask for help of a third party to make peace (Village officials or tradition functionaries) in the village wheree the victim lives.

Based on the research that researcher have done on several models of resolving customary violations committed in two ethnic communities in Bengkulu Province, namely the Rejang ethnic community and the Malay ethnic community (Herlambang, 2012), that can be drawn some of its similarities in principles that underlie the mechanism, procedures, and stage of customary deliberations which are customary courts, as follow:

- a. Restorative Justice is carried out with the voluntary submission of the parties.
- b. Customary Justice are led/mediated by Customary Law Functionaries. Customary law Functionaries are

community leaders and tradition leaders that has experiences in deciding customary violations, and considered as elders. Those who naturally have the main task and function to enforce customary law norms. Various terms are used to denote this function, such as "Penghulu Adat", "Ketua Adat", "Tokoh Adat", "Kepala Adat", and "Perangkat Adat". Customary functionaries refer to the plural number, meaning that in a community there are more than one person. Compared to Soepomo, the Traditional chief is the father of the community, leading the alliance as the head of a large family, and a leader of the association of Life. (Soepomo, 1979)

- c. The trial procession was carried out openly and declared open to the public.
- d. The place where the Customary trial process take place is determined in accordance with the principle of flexibility. Can be conduct at Village Hall, mosque, the house of customary law functionaries or Village officials, or other public places.
- e. Customary trial are held immediately after reporting to resolve a case. The longest held for the trial is to conduct in the next day after the event of customary violation occured. This is in accordance with the principle of "Fast trial and low-cost".
- f. The trial procession carried out with the presence and participate by the victim and perpetrator, and in certain cases represented and attended by the family of the perpetrator and the victim's, as well as the village officials where the perpetrator and victim resides.
- g. Customary justice is carried out based on evidence. In Rejang regional language, there is a saying that "berbekas jejak naik, berbekas pula jejak turun", which means traditional court will find the evidence to solve the problems. In the regional language it is known as the adagium "Ayam kumbang terbang malam, hinggap di kayu rimbun daun".
- h. There's an admission of guilt from the perpetrator and declares responsibility for his actions. In Bahasa Rejang, there is adagium that sound like this: "mengipar sayap, menukat paruh".
- i. Sanction are imposed by taking into account the seriousness of the violations committed, the social, and economic conditions of the perpetrators and victims. In Bahasa Rejang known as "*Terang salahnya, ditilik rupa, pandang jenisnya, kecil salah kecil hutang, besar salah, besar hutangnya*". With this principle, it is very likely that the sanctions or reactions imposed by the customary functionaries will be accepted by both parties.
- j. The cost incurred as a result of customary justice are taken from a small part of the fine and or compensation imposed on the perpetrator or their family.
- k. Customary court decisions are recorded and signed by customary law functionaries, both parties, and will be reported to the village chief to be registered in the village register.
- l. The implementation of customary justice decisions is carried out in a ceremony of salvation and prayer, together after the parties forgive each other. This process is actually an effort to reintegrate the parties and their families as well as community acceptance of the re-existence of perpetrators and/or victims in the community.

Based on these facts, we can see that there is a link or relationship between the Restorative Justice Approach and its practice as well as the basic principles of customary Justice in Indonesia. This shows that Customary Justice is the embodiment of a Restorative Justice Approach in Indonesia.

At the reporting stage, it can be revealed that the customary court is a judiciary whose existence is still recognized in Indonesia, this is evidenced by the police's refusal to accept reports and conduct investigations to accept report and conduct investigations, like an acts of fight between residents in the village. In addition, the reason for the refusal is that the settlement of violations of customary norms "Begaseak" is the competence of the customary court and the settlement of customary court is considered to be more comprehensive in restoring balance in society.

At the stage of summoning the customary apparatus which is the Village customary functionaries, can be revealed that there is a collegial collective principle and the principle of deliberation and most importantly the realization of the principle of fast and low-cost court by setting a trial day quickly.

At the customary trial stage, it can be revealed that there is a fact that the implementation of customary justice in the Rejang ethnic group is carried out by involving both parties, along with their families, tradition functionaries and the community represented by community leaders. At this stage the inspection is carried out openly and all residents can see the process. Customary court are held on the basis of the voluntary submission of both parties and their respected families. Customary court is carried out by listening to statements of the parties and other parties whose aware of the dispute. Customary functionaries can confirm the perpetrator's willingness to commit the wrongdoing and their desire to take the responsibility for restoring the balance damage by the act.

At the decision-making stage, it can be revealed that the decisions made by the customary apparatus are taken after considering the conditions of the perpetrators and victim, so its very likely that the decision can be implemented. The decision of the Assembly in customary court contains the obligation of the perpetrator to apologize as a condition of peace and restoration of harmony in the interaction between the parties and their families. Perpetrators also voluntarily pay compensation, treatment, fines in the form of money or certain good. The perpetrators also voluntiralu pay compensation, treatment, fines in the form of money or certain goods (in the ethnic group its called "Punjung").

At the stage of implementing the decision of the customary court, it can be revealed that the ceremony was held. This ceremony is called *Tepung Setawar*, (*tepung tabea/ setawar sedingin*), a form of sanction given to perpetrators of customary violations with the aim of cooling the emotions of both parties and their families. The implementation of the sanctions is carried out with a banquet and a prayer together which is attended by the parties involved and traditional apparatus which includes community leaders and religious leaders. Both parties are asked to sign a peace agreement letter which contains a statement that the perpetrator and the victim have forgiven each other and continue with a statement to become brothers in arms. In addition, in the peace agreement letter, the perpetrator made a statement to not to repeat the acts.

## Conclusion

The Restorative Justice Approach and its practice as well as the basic principles of Customary Justice in Indonesia has a similarities. This means that customary justice is the embodiment of a restorative justice approach in Indonesia. Its implementation can be found, which is at the reporting stage, the summoning stage, the customary trial stage, the return of the decision stage, as well as during the implementation of the customary court decision stage.

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