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Implementation of customary penalty for repeat Offenders petty theft offence

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Abstract
Dynamics in dispute resolution through customary processes also continue to occur, these dynamics are a challenge for customary law so that its existence is maintained in the axis of community life as an alternative dispute resolution. One of the problems faced by customary law is the application of customary sanctions against people who repeat the crime of petty theft. The results showed that if the positive law recognises a time limit, namely within a period of 5 (five) years after he received and served the first punishment either fully or partially, customary law does not recognise the time limit for each - each perpetrator who repeats a criminal act, whether the act is committed in a long-time interval or in a close time interval. And the aggravation of punishment against recidivist offenders in the Indonesian Criminal Code is given as much as 1/3 (one third) of the maximum punishment imposed on him, customary law does not recognise the term heavy or light additional punishment that will be given to repeat offenders of customary criminal offences

Keywords: Customary penalty, repeat offenders

Introduction

Humans are social creatures who need each other in this case the human need for social interaction is absolutely necessary because in essence humans are social creatures or *zoon politicon* as stated by Aristotle, Aristotle's view clearly confirms that a human being certainly cannot survive if he does not need other people in living his life [1].

In terms of launching the process of interaction between fellow human beings, "*rules of the game*" are needed so that when carrying out the process of social interaction there are no collisions that can complicate the situation. Because in the process of interaction, every human being has the opportunity to commit a crime so that to avoid this, rules are needed to create peace so that the goals in the interaction are achieved. In other terms, there is an adigium "*Ubi Societas Ibi Ius*" which means that where there is human interaction, there is law.

Repetition of criminal offences is not a strange thing in the world of criminal law, because basically everyone who has committed a crime has the opportunity to commit a repeat offence. Repetition of crime is considered as a continuation of evil intent as stated by Bartolus de Sassoferato, a jurist, who stated that "*humamum enimest peccare, angilicum, seemendare, diabolicum perseverare*" meaning that crime and repetition of crime are considered as a continuation of evil intent so that it can be ascertained that the practice of repetition of crime itself is in the same position or can also be called the practice of crime [2].

A person who commits criminal recidivism when traced further can be caused by several factors such as economic factors, factors weakening the social system and culture as well as other factors such as the lack of work of one of the subsystems of the *criminal justice system* in Indonesia. The lack of sanctions against lawbreakers seems to only aim to provide an "embarrassment" effect, not to provide a deterrent effect to the perpetrators. This can be seen from the enthusiasm of law enforcers to "show" multiple articles in court to ensnare the perpetrators, but the results obtained after that are only "false" successes because they are not supported by sanctions that provide a deterrent effect [3].

The imposition or punishment to the perpetrator aims to get a deterrent effect so that he will think twice about committing an act against the law, but the opposite happens, the perpetrator does not feel the deterrent effect but returns to commit the same crime or other crimes repeatedly, even though juridically he has been punished for the actions he has committed. So, the question that arises next is what about lawbreakers who have lost their sense of shame, which automatically repeats the act because he considers himself a criminal.

Regarding the non-litigation settlement of criminal cases through a restorative justice approach, it directs us to the concept of criminal settlement carried out through the customary trial process. In the technical settlement of cases, customary law in fact prioritises problem solving through peace mechanisms, seeking resolutions to restore the original situation for the disputing parties, but it does not rule out the possibility that violators of customary law are not subject to sanctions. The sanctions given can be divided into several types such as; social sanctions, customary sanctions and fines [4].

Customary law criminal settlement is also accommodated in the latest Indonesian Criminal Code regarding the recognition of customary law as stated in Article 2 in Paragraph (2), which means that customary law has a definite position in the criminal administration system in Indonesia. The imposition of customary punishment in the Indonesian Criminal Code is considered as part of the imposition of additional punishment as explained in Article 66 in Paragraph (1) letter f.

Customary Law is the oldest legal system recognised by the Republic of Indonesia as a legal system that is valid in resolving a problem in indigenous groups Customary Law itself has been known long before Indonesia's independence until today [5]. Therefore, it is not surprising that the Indonesian constitution also affirms the existence of customary law itself.

The 1945 Constitution in Article 18B in Paragraph (2) explains the state's respect for the unity of customary law communities and traditional rights as long as the customary law is still alive and in accordance with the principles of state in Indonesia. In other words, as long as customary laws do not violate the provisions of laws and regulations, these laws are also part of or equal to the position of other laws in Indonesia.

Customary law does not recognise the term "fair", because the phrase fair itself comes from Arabic. Therefore, customary courts do not recognise justice, only that the resolution of a dispute in customary society is not aimed at finding justice, but at restoring balance and harmony to family relationships [6].

Aceh Qanun No. 10/2008 on Customary Institutions in Article 2 paragraph (1) explains that Customary Institutions function as a vehicle for community participation in governance, development, community development, and the resolution of social problems.

The legal system itself is based on the *symbol of Po Teumeureuhom*, which means from the King or those who have power. Then the structure of the law that is carried out must not conflict with the religious authority above them (Acehnese people). Thus, every act of behaviour of the Acehnese people must be based on religious ethics which is often known by the short term "*Adat bak poe teumereuhom hukom bak Syiah Kuala* [7].

This is evidence that customary settlement of both criminal and civil disputes is one of the legally recognised ways of resolving disputes in Indonesia without going through the court process. However, what becomes the next issue is whether non-litigation settlement related to criminal acts pursued through customary trials is an effective step in answering the problem if there is a repetition of criminal acts (*recidivism*).

When traced further in several customary criminal laws that apply in Aceh Province, in general, it is not explained in detail how to handle someone who has committed criminal acts more than once as explained in the concept of punishment in the Criminal Code (KUHP). More specifically, in several Qanuns on Customary Law and in several literatures that explain customary law, no one explains the term *recidivist* and how the rules of punishment given to the *recidivist* perpetrator himself.

There is an example of a case found in the area of Gampong Tanjong, Ingin Jaya District, Aceh Besar Regency, which is one of the villages designated by the Aceh Customary Council in 2017 as a Pilot Customary Village in Aceh Province [8]. Where a criminal who was a local villager had committed a fight and a customary trial was conducted and finally the perpetrator was sentenced to customary punishment to slaughter a goat, but a few years later the perpetrator committed another crime, namely theft and was given a fine of the amount determined in accordance with the customary decision and there was no aggravation given to the perpetrator for the criminal acts he had committed repeatedly in the customary decision by the Gampong Tanjong Customary Council.

Based on this legal phenomenon, the village apparatus explained that no aggravation of punishment or customary sanctions were applied to the same perpetrators because the Gampong Tanjong Customary Justice Council itself as written in the *reusam gampong* tanjong did not recognise the term *recidivist* as known in the Indonesian Criminal Code, In the absence of the term aggravation of punishment to the recidivist perpetrator, in the end, the imposition of sanctions is considered not to have a deterrent effect on the perpetrator, especially if the sanction given is the same fine as the previous conviction, if the perpetrator is a rich person, he will be able to pay all the fines imposed on him no matter how many times he commits a crime.

This is a challenge for customary law on how customary law responds to *recidivist* perpetrators, and the next question is whether the aggravation of criminal sanctions against *recidivists* as applied in the Criminal Code can also be applied in customary law in Aceh Province, especially in Gampong Tanjong and how sanctions should be imposed in customary law to prevent repetition of criminal acts so that the sanctions given can have a deterrent effect on the perpetrators so that in the end they do not repeat customary violations.

The settlement of minor crimes mandated in Qanun Number 9 of 2008 concerning the Development of Customary Life and Customs is expected to provide satisfaction and public confidence to resolve their cases through customary justice mechanisms so that in the end it is also the hope of Law Enforcement Agencies in Indonesia such as the Judiciary, Prosecutors' Office and Police so that cases that can be resolved non-litigation can run well. Based on the description of the problem above, it is interesting to be studied further in the form of scientific writing related to the application of customary punishment against repeat offenders of petty theft.

Research method

The research method is a procedure or way of obtaining correct or truthful knowledge through systematic steps. The use of research methods has implications for data collection techniques and analysis and research conclusions. The method used in this research is the empirical juridical research method, namely research by conducting a comprehensive study by conducting observations and direct interviews at the research location [9].

Data collection techniques in this study were carried out by means of test methods, observation, questionnaires, and interviews. The data analysis in this study was carried out using qualitative and quantitative methods. Qualitative research analysis is research that does not use calculations. Meanwhile, quantitative research analysis includes all types of research based on the calculation of percentages, averages and statistical calculations [10].

Results and discussion

Even though it is limited to minor crimes, in fact the scope of customary law is very broad, starting from accommodating the problems of traditional life, habits to things that can disrupt the balance in social life so that in customary law it is also known as "Customary Criminal". Customary punishment regulates events or wrongdoings that result in disruption of the balance in society so that it must be resolved [11].

In Acehnese customary society, the term customary criminal offence is often referred to as *ganje, bakhe, ginger, evil, broek / goet*, all of which lead to a negative connotation of an act that violates the norms of the local community. Acehnese customary criminal law or customary criminal offences, according to Acehnese customary law, are all forms or types of legal events in which the act disturbs

order, harmony, peace and peace in society both in the physical world and the supernatural world if violated, there will be sanctions. The current aceh customary law is a set of rules that are generally unwritten and a small part has been written or codified in the form of reusam or qanun gampong which contains commands and prohibitions as well as threats of punishment if violated [12].

Regarding the act of repeating a criminal offence or *recidivism*, customary law and Indonesian formal law have very prominent differences in the provision of punishment. In formal law in Indonesia, *recidivism* is regulated in the Criminal Code in Articles 486, 487 and 488. The article explains that *recidivist* offenders must be given additional or aggravated punishment of one third of the maximum punishment imposed if the offender commits the criminal act for the second time after he has been convicted based on a court decision either partially or fully from the first conviction within a period of 5 (five) years, this is expected so that the offender gets a deterrent effect for his actions.

In contrast to what is found in customary law, customary law does not recognise the term "*recidivist*", but in practice customary law also implements the practice of aggravation of punishment as adopted in Indonesian positive law. The aggravation of punishment in customary law in fact prioritises the aspect of social influence by not making a measure of whether a person has repeatedly committed a criminal act, it could be someone who has just committed a crime for the first time but in customary law it is deemed necessary for a convicted person to be given aggravation, so the customary judge panel will give aggravation of punishment to the perpetrator. This is based on the results of field studies and interviews with the secretary of Mukim Pagar Air. There are several characteristics in customary criminal law if examined further, namely:

a. Traditional religious magical, meaning which actions should not be done and which should be done so that every move does not disturb the balance in society, is passed down from generation to generation and is usually always associated with religious principles.
b. Comprehensive and unified, meaning that customary offences do not separate criminal or civil offences.
c. Not *prae-existante*, meaning that it does not adhere to what is stated in Article 1 of the Criminal Code, namely the principle of legality. According to customary law, whether there is a regulation that has been established in advance or whether there is none at all does not make it an obstacle to punish the actions or offences committed by a person. This is because the principle of legality in customary criminal law applies at any time and anywhere to resolve legal events that occur.
d. Not equalising, meaning that if a customary criminal offence arises, the first thing that is considered is the emergence of a reaction or correction and disruption of the balance of society. For example, if the perpetrator of customary crime is a group of customary elders, then the punishment may be more severe than that of ordinary people. So that the aggravation of punishment does not occur only to perpetrators who repeat the crime but can also be based on other customary considerations.
e. Open and flexible, meaning that customary law does not reject changes - changes that come from outside as long as they do not conflict with the legal awareness and religious norms of the local community.
f. The occurrence of customary offences occurs when local rules are violated, resulting in reactions or corrections and the balance of society is disturbed.
g. In the event of a customary offence that disrupts the family balance, the aggrieved party must first make a complaint or notification to the Customary Chief for resolution.
h. Customary reaction or correction, the purpose of the reaction or correction to the event or offence is to be able to restore the balance of society that has been disturbed.
i. Fault accountability, according to customary criminal law, is different from what is understood in western criminal law. In customary criminal law, what is at issue is the "consequences" of the act and who should be held accountable. Not only the perpetrator, the family is also held accountable in this customary criminal law. Unlike the case with criminal responsibility in western law, in western law a person who is not legally capable cannot be held responsible, this is also the case if the criminal act is committed by an insane person, and any criminal responsibility in western law cannot be transferred to another person.
j. The place of application, the place of application of customary law is not national but is limited to the environment of the customary community or customary group itself.

If we look at the nature of customary criminal law above, especially in point 4 (four), it can be concluded that customary law does not see aggravation of punishment as an additional punishment or ballast specifically for recidivist perpetrators, but rather customary law views that aggravation of punishment can be given to anyone who is deemed deserving based on customary decisions and considering the effects and influence of social shocks that occur due to a customary criminal act.

The view of customary law on the concept of aggravation of punishment shows that aggravation of punishment is also sometimes not given to the second act, it could be when the first act or when the third act occurs that aggravation of punishment is given. This proves the flexibility of the concept of settlement adopted in customary law and also states that customary law considers the aspect of social influence very deeply. The aggravation of punishment is the last alternative if a person is deemed necessary to be given an aggravation of punishment in order to make it a lesson and provide a deterrent effect in the hope that the perpetrator does not repeat the act he committed.

Looking at the context of the purpose of punishment, the provision of punishment in customary criminal law is the same as Indonesian positive law, which aims to have a deterrent effect so that the perpetrator does not repeat the criminal act again so that the social balance that exists in the community group can be maintained. Customary law does not see the aggravation of punishment as a decision given to perpetrators who repeat criminal acts, aggravation can also be given to someone who is considered worthy of it, thus customary criminal law has an absolute punishment goal by putting forward the views held by Leo Polak, namely the imposition of punishment in the aspect of retaliation must fulfil 3 (three) conditions, namely: [13]

a. Criminal acts must violate ethics, decency, and objective law.

b. Punishment can only be given if the act has already occurred.
c. There must be a balance between the offence committed by the perpetrator and the punishment imposed.

Customary law, which prioritises aspects of social balance, must make punishment as a retribution and as penance for one's criminal acts that violate ethics and decency, but the balance of punishment between the actions he committed and the punishment given, customary law has a different principle of punishment objectives than in general. In this case, as previously stated, customary law provides punishment with aggravation regardless of the number of times the perpetrator has acted, but if the social shock that occurs is very strong due to the effects of his actions, then even though his actions are classified as light, the punishment given is not necessarily light either. So in this case customary law prioritises the aspect of social influence which is very much guarded.

The above explanation is also reinforced by the results of a case study conducted in gampong Tanjong, Ingin Jaya sub-district, Aceh Besar District, where there was an incident of misunderstanding that caused defamation between one of the community and one of the community leaders (*Keuchik*) in the village. As a result of this incident, the Customary Council of Tanjong village finally made efforts to resolve (mediation) between the two parties and punished one of the community members by giving him the sanction of koeh kameng or cutting a goat. In fact, in this case, if the incident did not involve traditional leaders or community leaders, then the form of punishment for insulting acts was only peusijuek and at the same time mutual forgiveness between the two parties. However, the consequences of the act, which caused a social shock to the community in the village, made it an offence that must be given aggravation.

Similarly, in the context of theft, if the offence of theft is a criminal offence that must be given aggravated punishment due to consideration of the matters described above, then it is possible that the perpetrator of theft as well as theft in the classification of customary crimes, will be given aggravated punishment in consideration of customary decisions. Even though his action is the first time he has ever committed.

The provision of aggravated punishment in customary law leads to preventive legal protection theory which highlights the need for a persuasive and proactive approach in dealing with the challenges of crime and lawlessness. This concept describes a legal strategy that aims for the law not only to respond to criminal acts after they occur, but also to prevent potential violations through various policies and interventions with an emphasis on prevention efforts. Therefore, customary law does not necessarily mean that a criminal offence must be given aggravation of punishment, the customary judicial council will first examine whether or not a person is deemed necessary to be given aggravation of punishment. The aggravation of punishment is an effort to prevent the perpetrator from repeating his/her actions.

In terms of time limitation, while the Indonesian Criminal Code recognises a time limit on the category of recidivist, customary law does not recognise a time limit on a person who repeatedly commits customary criminal offences, whether an act is committed in a short or long period of time. In this regard, if a person, even though he/she has long been and finished serving customary punishment, if within an indefinite period of time he/she again commits an act of customary criminal offence, then the perpetrator is still categorised as a "customary recidivist" who can be given aggravated punishment based on the results of the consideration of the customary assembly.

There is an example of time limitation in the case of the offence of theft found in the area of Gampong Tanjong, this case has been described previously in the background of this research problem. In this case, the theft was committed by an ordinary citizen and previously in a long period of time he had also fought and a trial and customary verdict had also been given to him, but the aggravation of punishment for the second act was not imposed with the reason or consideration that the act did not cause social turmoil in the community because the theft committed was domestic theft. This means that only one family is affected by the offence. However, if the second offence caused a social shock in the village, then the aggravation of punishment would still be given to him.

From the explanations above, it can be concluded that if in positive criminal law in Indonesia, the aggravation of punishment is given only to perpetrators who repeat criminal acts after receiving a judicial verdict for the first criminal act as regulated in Article 486 to Article 488 of the Criminal Code with the hope that the perpetrator will get a deterrent effect for his actions, then it turns out that customary law provides aggravation of punishment based on consideration of whether the act causes social shock in the indigenous community and aggravation can also be given for the third time not the second. This shows that the aggravation of punishment in customary law is also given to perpetrators who repeat criminal acts, both the same act and other customary criminal offences or what is commonly known as recidivism in the Criminal Code, as well as aggravation of punishment can also be imposed on perpetrators who are first-time offenders of "customary criminal offences".

Unlike positive law, customary law does not recognise the term recidivist as referred to in the Indonesian Criminal Code, this is a challenge for future researchers to examine suitable terms for perpetrators who are similar to the recidivist category as referred to in the Indonesian Criminal Code.

Thus, we can conclude that there are striking similarities and differences between the concept of aggravation of punishment adopted in the Indonesian Criminal Code and the concept of aggravation of punishment against perpetrators of criminal repetition in customary law. The similarity is that positive law and customary law both adopt the aggravation of punishment given to repeat offenders or in the Criminal Code referred to as recidivists. However, the difference here is that if the positive law provides special aggravation of punishment to repeat offenders who have received an incracht verdict from the judicial institution for their first act, the aggravation of punishment in customary law can be given to anyone, both for the first-time offender and those who have repeatedly committed repetition, this is based on the consideration of the customary court of the influence of strong social shocks in the indigenous community.

The next difference is, if the positive law recognises a time limit, namely within a period of 5 (five) years after he received and served the first punishment either fully or partially, customary law does not recognise the time limit for each perpetrator who repeats a criminal act, whether the

act is committed in a long-time interval or in a close time interval. And the aggravation of punishment against recidivist offenders in the Indonesian Criminal Code is given as much as 1/3 (one third) of the maximum punishment imposed on him, customary law does not recognise the term heavy or light additional punishment that will be given to repeat offenders of customary criminal offences.

Conclusion

There are striking similarities and differences between the concept of aggravation of punishment adopted in the Indonesian Criminal Code and the concept of aggravation of punishment against repeat offenders in customary law. The similarity is that positive law and customary law both adopt the aggravation of punishment given to repeat offenders or in the Criminal Code referred to as recidivists. The difference is that if the positive law provides special aggravation of punishment to perpetrators who repeat criminal acts who have received incracht decisions from the judicial institution for their first actions, the aggravation of punishment in customary law can be given to anyone, both for the first time offender and those who have repeatedly committed repetition, this is based on the consideration of the customary court of the influence of strong social shocks in the indigenous community. Furthermore, if the positive law recognises a time limit, namely within 5 (five) years after he received and served the first punishment either fully or partially, customary law does not recognise a time limit for each - every perpetrator who repeats a criminal act, whether the act is committed over a long period of time or within a short period of time. And the aggravation of punishment against recidivist offenders in the Indonesian Criminal Code is given as much as 1/3 (one third) of the maximum punishment imposed on him, customary law does not recognise the term heavy or light additional punishment that will be given to repeat offenders of customary criminal offences.

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