

SETTLEMENT OF TRADITIONAL DELICES AND TRADITIONAL FINE BY THE DAYAK KALIMANTAN INDONESIA TRADITIONAL JUSTICE INSTITUTION

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The development of the National Legal System is always carried out as an effort to strengthen the legal system in Indonesia as an implementation of the amendments to the 1945 Constitution Article 1 paragraph 1 that Indonesia is a constitutional state or *rechstaat*. The efforts taken are (Majelis Permusyawaratan Rakyat & Jenderal, 2012):

First, the development of legal substance, both written law, and unwritten law has a mechanism to form a national law that is better suited to the development needs and aspirations of the community.

Second, the improvement of the legal structure to be more effective is continued;

Third, the involvement of all components of society who have high legal awareness to support the formation of the aspired national legal system.

Recognition and respect for customary law by the state is reflected in Article 18 B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This means that customary law is recognized for its existence as long as the customary law is still alive. and by the development of society and the principles of the Unitary State of the Republic of Indonesia.

In the field of the criminal justice system, recognition of the existence of customary law is stated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, namely: "Judges and Constitutional Justices are obliged to explore, follow, and understand legal values and feelings. justice that lives in society " (Rakyat & Jenderal, 2012) . This becomes an entry point for a judge to explore, follow, and understand customary law (laws that live in society) and make it a basis for consideration in examining and deciding cases handled. Therefore, positive law that is good and has high enforceability must comply with *the living law*.

Article 2 paragraph (3) and Article 58 of Law Number 48 of 2009 concerning Judicial Power, mean that the only recognized judiciary is the state court, and no other court is recognized in the national justice system. However, since the enactment of Emergency Law Number 1 the Year 1951 concerning Temporary Measures to Organize Unified Power Structure and Procedures of Civil Courts (Number 9), gradually *LN.1951Inheemsche Rechtspraak* (Indigenous court / Adat Court) and *The Zelfbestuur Rechtspraak* (Swapraja Court) was removed, except for the village court (*dorpsjustitie*).

This means if there is a customary dispute (violation of customary offenses), the one who should try is the district court, not the customary court. However, in reality, not all of the judges in examining and deciding customary cases know and understand the values that live in the local customary law community. Therefore, judges in deciding cases (customary cases) must be obliged to explore and understand the values of law and justice that live in a society (applicable customary law). It is intended that the judge's decision better reflects the sense of justice according to the local customary law community (Manarisip, 2013).

Since the enactment of Law Number 4 of 2015 Article 135 concerning the Customary Judiciary Institution of North Kalimantan Province, specifically for the Province of North Kalimantan, customary courts have been established and enforced to settle customary cases (customary offenses / customary criminal law) in addition to the state court which has been in effect nationally so far. Furthermore, efforts to strengthen the position of customary courts and its implementation for indigenous peoples in North Kalimantan Province.

Customary criminal law in general contains legal rules which are mostly unwritten but have legal consequences for anyone who violates these laws, within the area of customary law applies. Customary law still has a strong influence within the Dayak Pua Customary Law Community. Long Lasan Village is one of the villages where the majority of the population is the Dayak Pua Customary Law Community (Muslih, 2017).

Almost all customary offenses are handled by the Dayak Pua Customary Law Community in Long Lasan Village through the applicable customary law because the Dayak Pua

Customary Law Community, especially in Long Lasan Village, views the Customary Justice Institution as an alternative in handling their customary offenses, and as a form of law that They are most effective in handling customary offenses because they believe that the Customary Criminal Law that they maintain and enforce can provide satisfaction with a sense of justice, and restore balance, peace in life and values that live in their Customary Law Community.

Some opinions of legal experts regarding customary law communities:

- a. gives the term legal community or a legal partnership, namely an organized human union, residing in a certain area, having rulers, and having tangible wealth or intangible (Haar, n.d.).
- b. provides an understanding of customary law communities (*adatrechtsgemeenschap*), namely legal communities whose members feel bound to an order based on the belief that they all come from the same descent or come from one land where they live. the same one (Bushar, 2006).
- c. provides an understanding of customary law communities, namely social units that have the features to be able to stand on their own, namely having a legal entity; ruling unit; and environmental unity based on common rights to land and water for all its members (Hazairin, n.d.).
- d. mentions the term legal alliance, which is a group of people who are bound as one unit in an orderly arrangement that is eternal, and has leadership and wealth, both tangible and intangible, and inhabit or live in a certain area. In formal juridical terms, the meaning of customary law communities is contained in the Regulation of the State Minister for Agrarian Affairs / Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Solving Problems of Customary Rights of Customary Law Communities, namely a group of people who are bound by their customary legal order as citizens with a legal alliance due to similarities. residence or based on the descent (Article 1 point 3) (Saragih & Goecke, 2007) .

The elements that characterize a customary law community, namely (Soepomo, 1996):

- 1) Organized human groups and are bound by common ancestry (*genealogical*) or territorial equality (territorial);
- 2) Residing in a certain area/region (having territory);
- 3) Have a rule of living together in the form of customary law;
- 4) Have customary rulers/leaders and institutions; and
- 5) Having wealth, both tangible and intangible.

According to (Wignjodipoero, 1990), the main characteristic of customary law communities is that they are a group of people, have their wealth apart from individual wealth, have certain territorial boundaries, and have certain powers.

According to (Saragih & Goecke, 2007), two factors bind members of a legal union, namely genealogical and territorial, which in turn produce three main types of alliances, namely genealogical, territorial, and genealogical-territorial legal alliances. In a genealogical society, there are two kinds of alliances, namely unilateral and bilateral/parental, and one special form is added, namely alternated (alternating). In a unilateral society, its members are based on the lineage of one party, namely the paternal or maternal side. If the line is from the mother's side, then society is a matrilineal society, and if it is the lineage from the father's side, then the society is patrilineal. Furthermore, in a bilateral society, the members draw lineages from both the paternal and the maternal side, whereas in an alternated society, the members draw alternating lineages following the form of marriage of their parents.

Besides understanding the customary law community, it is also necessary to understand the customary criminal law. Ter Haar argues that what is meant by customary criminal law or a violation is a one-sided act which by another party is explicitly or secretly stated as an act that disturbs the balance.

Ter Haar's statement, by Hilman Hadikusuma, argues that customary criminal law is a law that shows events and actions that must be resolved (punished) because those events and actions have disturbed the balance of society. In contrast to the positive criminal law prevailing in Indonesia today, these incidents and acts are punished because of the existence of a written law that regulates them. As long as these events and actions are not regulated in law, they cannot be said to be criminal. This is called the hope of legality as stated in Article 1 paragraph (1) of the Criminal Code, which reads, "An act cannot be punished, except for the strength of the criminal rules in the existing legislation, before the act is committed."

Meanwhile, the customary criminal law focuses on "disturbed balance". As long as the balance of an indigenous community is disturbed, it will receive sanctions (Laudjeng, 2003). Customary criminal law does not recognize the principle of legality as well as positive law

because in addition to provisions such as positive law because apart from the simple legal provisions, customary criminal law does not recognize codification. In other words, customary criminal law does not recognize writing even though several indigenous peoples in Indonesia are familiar with the codification of customary law. For example, the Book of Kuntara Raja Niti (Lampung), Manawa Dharmasastra, Religious Chess, Awig-a wig (Bali), the Javanese Babad Book (Old Javanese), and so on.

So, as long as the act causes a shock to the balance of an established customary community, it can be said to violate the law. Soepomo elaborated in more detail that there is no structural difference between an act that can be convicted and an action that only has consequences in the civil area. That is, between "criminal law" and "civil law" whose different structures are differentiated in positive law, customary criminal law does not differentiate between these structures. Whether it is a criminal or civil issue, as long as it "disturbs the balance" of society, it is categorized as an offense or a criminal act.

Meanwhile, (Van Vollenhoven et al., 2013) argues that customary criminal law is a living law, followed and obeyed by indigenous peoples continuously, from generation to generation. Violation of these rules of order is considered to cause shocks in society because it is considered to disturb the cosmic balance of society. Therefore, the offender is given customary reactions, custom corrections, or customary Sanskrit by the community in consultation with the customary leaders or administrators.

(Mulyadi, 2008), concluded that customary criminal law is an act that violates the sense of justice and appropriateness that lives in society, thus causing disturbances of peace and balance of the community concerned. Therefore, to restore peace and balance, customary reactions occur as a form of disturbance to negate or neutralize a side condition due to a violation of custom.

The legal basis for the application of customary criminal law in legislation, namely (Muslih, 2017):

1. The 1945 Constitution after its re-enactment since the Presidential Decree 5 July 1959. According to article II the transitional rules of the 1945 Constitution state that "all state bodies and regulations that are still valid as long as a new one has not been made according to this Basic Law".
2. Article 18b (2) of the 1945 Constitution Article 18b (2) "The state recognizes customary law community units and their traditional rights as long as they are still alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law.
3. *Indische Staatsregeling* (IS) article 131 paragraph b sub b. According to these provisions, their customary law applies to both the Indigenous Indonesian Law group and the Foreign Eastern group. Here shows the power of customary law that applies to Indigenous Indonesia.
4. Law No. 4 of 2004 on the Basic Law of Judicial Power, does not mention customary law. However, according to Article 17 paragraph 2 Law Number 19 the Year 1964 and according to the explanation of Article 10, it has stated that there is a written law and an unwritten law. So the law that is not written here has the meaning of customary law. In addition to the above article, although it has been revoked now and replaced by Law number 14 of 1970 in the general explanation section 7, it has also mentioned unwritten Customary Law which means Customary Law.

The definition of customary justice, "*judiciary*" (*rechtspraak*) means "discussion of law and justice" which is carried out by the trial system (deliberation) to resolve cases outside the court and/or before the court. If the discussion is based on customary law, then it is called "Adat Law Court" or "Adat Court". Justice according to (Hadikusuma, 2014), is an act that determines whether something is by law and justice or that resolves something by law and justice. According to Law no. 4 of 2015 concerning Article 135 concerning the Indigenous Judiciary Institution of North Kalimantan Province, the customary court is a peace court within the customary law community, which has the authority to examine and adjudicate customary civil disputes and criminal cases among the members of the customary law communities concerned.

The customary judiciary can be carried out by family members, the community individually, by family/neighbors, head of relatives or customary leaders, village heads, or by administrators of association organizations, in the peaceful settlement of customary offenses to restore the balance of disturbed communities. Customary justice is the peaceful settlement of disputes outside the state court (official) without being based on written regulations in the form of state legislation, but based on customary law which is carried out in a family manner, by way of deliberation to reach a consensus between the parties involved in the dispute.

Delik Adat, the term "Adat Delicten Recht" comes from Ter Haar, which is defined as any disturbance to material or immaterial objects belonging to an individual or a social group. In indigenous peoples, these disturbances cause negative reactions demanding restoration of the disturbed cosmic balance. (Wignjodipoero, 1990), argues that offense is an act that violates feelings of justice and decency that live in society, disrupting the peace and balance of society to restore it, resulting in customary reactions. So, the customary offense law is the whole unwritten law that determines the existence of customary violations along with all efforts to restore the balance disturbed by these acts.

According to (Van Vollenhoven et al., 2013), customary offenses are "actions that should not be done", even though in reality the incident or the act was only minor inconsistencies. Some opinions have been put forward, customary offenses are all forms of actions that are contrary to the customary order of the customary law community which is carried out by a person, a group of people who have caused shock and caused a reaction from the community in the form of customary sanctions to the offender.

The elements of customary offenses, according to (Hadikusuma, 2014), in the customary law of offense there are 4 (four) important elements, namely:

- a) There are acts committed by individuals, groups, or administrators (Leaders / Officers) of the Customs themselves.
- b) The act is contrary to the norms of customary law.
- c) The action in the field can cause shock because it disturbs the balance in society.
- d) The community reacted to this act in the form of customary sanctions.

Types of customary, according to Van Vollenhoven, are:

Offenses most serious	Types of offenses Type of offenses against the legal interests of the community and family
<ul style="list-style-type: none"> • Deeds of humiliation • Opening the secrets of society • Acts of burning • Personal insulting • acts of witchcraft or witchcraft • Acts of incest 	<ul style="list-style-type: none"> • Pregnant outside of marriage • Escape a woman • Adultery
Types of customary offenses that are common	Types of offenses are considered offenses but other tribes are considered regular
<ul style="list-style-type: none"> • Murder 	<ul style="list-style-type: none"> • Buying and selling of humans (Belgian slaves) and beheading
Types of offenses against property	
<ul style="list-style-type: none"> • Theft 	

Of Dayak Pua

Customary Laws Dayak Pua customary law is a law made by indigenous peoples through deliberation together. Customary law is a sanction for violation of customs and actions that violate customary law, by anyone who violates it indiscriminately. Customary law is the law of the customer community, to assist the government in resolving a problem that arises in the community which can be resolved by the customary administrators in each village within the customary law area of each indigenous tribal child.

Other definitions regarding Customary Law in the Dayak Pua Customary Law are; Customary law is a law that has existed since the days of our ancestors, and customary law is a law that has existed since the origin of the Dayak Pua Tribe. From this explanation, it can be concluded that the Customary Law in the Dayak Pua Customary Law Community is a law that has existed for a long time and has been in effect in the life of the Dayak Pua Customary Law Community since the origin of the existence of the Dayak Pua Tribe itself.

Dayak Pua is one of the Dayak Kayan sub-tribes on the island of North Kalimantan. Bulungan Regency, which is located in the province of North Kalimantan, is an area where the Dayak Pua Customary Law Community exists, and one of the areas included in Bulungan Regency, namely Long Lasan Village as one of the villages where the majority of the population is the Dayak Pua Customary Law Community.

History of the Dayak Pua customary institution The Dayak Pua

The customary institution is a legal institution created by indigenous peoples through collective deliberations. Customary law is a sanction for violation of customs and actions that violate

customary law, by anyone who violates it indiscriminately. Customary law is the law of the customer community, to assist the government in resolving a problem that arises in the community which can be resolved by the customary administrators in each village within the customary law area of each indigenous tribal child. Customary Law in Dayak Pua Customary Law Customary law is a law that has existed since the days of our ancestors, and customary law is a law that has existed since the origin of the Dayak Pua Tribe. From this explanation, it can be concluded that the Customary Law in the Dayak Pua Customary Law Community is a law that has existed for a long time and has been in effect in the life of the Dayak Pua Customary Law Community since the origin of the existence of the Dayak Pua Tribe itself (Thontowi, 2015).

a. The area where the Dayak Pua customary law applies

The area where the Dayak Pua customary law applies is only in the district of Peso, which is the village of Long Lasan. The Dayak Pua Customary Law Community that has existed since the days of the ancestors of the Dayak Pua Customary Law community, and is valid until today as described in the Dayak Pua Customary Law document.

b. Structure of customary institutions The structure of customary

Institutions or the arrangement of customary instruments that exist in the Dayak Pua Customary Law starting from the highest to the lowest levels are as follows:

1. Chairman of Customs
2. Deputy Chairman of Adat
3. Administrators of Adat
- c. The function of customary

Institutions Customary institutions is an institution formed by the government and has the following functions:

1. Making customary law regulations by its authority
2. Resolving problems that arise in the community community
3. Maintain harmony and order
4. Preserving and cultivating the customs of Long Lasan Village
5. Check and prosecute violations adat The

Settlement of customary offenses through customary judiciary institutions in the village of Long Lasan.

Recognition and respect for customary law by the state is reflected in Article 18 B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This means that customary law is recognized for its existence as long as the customary law is still alive and by community development and the principles of the Unitary State of the Republic of Indonesia. The Dayak Pua Customary Institution is a legal institution created by indigenous peoples through collective deliberations. Customary law is a sanction for violation of customs and actions that violate customary law, by anyone who violates the Dayak pua community indiscriminately. According to (Soepomo, 1996), customary law is "law that is not written in the legislative law (*unstatutory law*), which includes living regulations which, although not documented by the authorities, are nonetheless carried out and respected by the community based on their beliefs these regulations have legal force".

The Dayak Pua community in Long Lasan Village views customary judiciary institutions as an alternative in handling customary offenses, and as the most effective form of law in dealing with customary offenses because the Dayak Pua people believe that the customary laws they have maintained and enforced until now can provide satisfaction with a sense of justice, and restore balance, peace in life and values that live in the Dayak Pua customary law community itself.

The customary offense is an act that violates the sense of justice and appropriateness that lives in the Dayak Pua community, so that it disrupts the peace and balance of the community concerned to restore the peace and balance, resulting in customary reactions. And these customary reactions are actions aimed at restoring the disturbed magical serenity and negating or neutralizing an unlucky condition caused by a violation of custom. (Haar, n.d.) defines an offense as any disturbance of balance, every disturbance of material and immaterial goods belonging to the life of a person or the unity (unity) of people, which causes customary reactions, balance will and must be recoverable. The type and magnitude of the reaction are determined by the relevant customary law, usually, the form of the reaction is a payment of an offense in cash or goods.

The settlement of customary offenses through the customary institution of the Dayak Pua, the trial is carried out in a customary lamin open to the public, by prioritizing deliberation in making decisions, in the trial process if the offender is found guilty, he will be subject to customary fines by the applicable customs regulations. The form of settlement of customary offenses through the Dayak Pua customary institution by prioritizing deliberation in decision making, the decisions are taken can

give satisfaction by the customary values that live in the Pua Dayak community, in its resolution it can restore balance, tranquility in life and living values within the Dayak Pua customary law community itself.

Barriers to the settlement of customary offenses through the customary judiciary

The Dayak Pua Customary Institution is a legal institution created by indigenous peoples through collective deliberations. Customary law is a sanction for violation of customs and actions that violate customary law, by anyone who violates it indiscriminately. If an offense occurs in Long Lasan Village there will be a customary reaction for the offender and it will be tried in the customary lamin when the customary court is held, the perpetrator of the customary offense must be present at the trial to participate in the trial process, in the trial if the offender is found guilty, he will be subject to sanctions custom both in the form of goods and in the form of money. However, in the customary offense settlement process, the obstacles that are the obstacles in the settlement of customary offenses that occurred in Long Lasan Village are as follows:

- a. Delay in the trial due to the absence of one of the disputing parties The implementation of the customary trial will be delayed if both parties involved in the offense are not present. However, the essence of customary law if it is delayed, the customary law will continue until the perpetrator is found. The presence of the perpetrator is to reinforce the action carried out by providing information. The perpetrator is also ready to accept court decisions regarding sanctions and fines that must be accounted for. The perpetrator's absence can be caused due to embarrassment over the offense committed. The perpetrator fled out of the village on the customary land to avoid the customary court process. Examples of cases that are rife in the Dayak tribal legal community in Kalimantan are offenses against domestic violence (KDRT) and adultery.
- b. The cost of customary fines is quite high.

The cost of customary fines becomes an obstacle in the process of resolving customary offenses. However, behind the high cost of fines that have been determined by the customary head of the Dayak tribe is an effort of ultimum remedium. In line with the principle embraced in criminal offenses is so that offenses are feared by the community and the development of offenses in society can be minimized.

The efforts made by the customary judiciary to resolve customary offenses. The customary

chief of the Dayak tribe in Kalimantan continues to disseminate information to the community about customary offenses and customary fines by the customary criminal law regulations. Customary institutions are an option for resolving customary offenses against the Dayak customary law community. Community trust in customary law is highly respected because it is believed to have human values and justice. As the most effective form of law in dealing with customary offenses because the Dayak people believe that customary laws that have been maintained and are valid until now can create a sense of justice, and restore balance, peace in life and it is hoped that positive values will continue to live and grow in the legal community. customary Dayak up to any time.

Conclusion

The customary law communities of the Dayak Tribe in Kalimantan Indonesia prefer to resolve criminal and civil issues through customary judiciary institutions using Dayak customary law instruments. The choice taken is to meet the demands of society regarding justice. The effect of implementing customary law according to the Dayak tribe community does not cause denda and hatred because the decisions made by the Dayak tribal chiefs in applying sanctions are humane and just decisions. Besides that, the Dayak tribe people really respect the tribal chief and the decisions that have been set.

The penalties given to the perpetrators are heavy sanctions accompanied by high fines. The consideration of the Dayak chiefs is that with strict sanctions and fines accompanied by the presence of the community to witness the imposition of sanctions is an effort to provide a deterrent effect to the perpetrators of the offense. Common forms of offenses include domestic violence, adultery, bringing someone's wife, stealing and fraud.

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