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## Customary Criminal Liability And The Harm Caused By Perpetrators Of Customary Offenses

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**Abstract:** Customary law is the original law of the Indonesian nation. Every formation of legislation must be based on the values of social justice, one of which is the religious-magical nature of customary law. This research wants to examine customary criminal liability and how to recover losses caused by perpetrators. This research method uses normative juridical research. The results and discussion of this research show that the position of the application of customary sanctions in the national criminal system is recognized as long as it is in accordance with State principles and the formulation of the balance of customary criminal liability must be adjusted to regional characteristics. Where recovery does not only affect bodies or individuals but can also use compensation to carry out certain rituals.

**Keyword:** Responsibility, Criminal, Custom

### INTRODUCTION

The position of customary law is an unwritten original Indonesian law that prioritizes religious elements in its implementation. Law as a tool for social control has an important meaning in society, including the existence of customary law. In addition, the function of law in general, in addition to social control, also serves as a means of resolving disputes that are always faced by all levels of society and humanity.

Further discussing the existence of customary law in terms of national positive law, its position has been expressly recognized through the enactment of Article 18B paragraph (2) of the Undang-Undang Negara Republik Indonesia 1945 which states:

“Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adatbeserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai denganperkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesiyang diatur dalam undang-undang”

Literally and constitutionally, the position of customary law is always prioritized in terms of the formation of laws and regulations to court decisions because the nature of the

scope of customary law, as long as it is recognized and its development is in accordance with the principles of the State, is a legal element that touches the highest balance of society. Therefore, the basis for the formation of positive law is always based on the conception and development of customary law as a counterweight.

Discussing customary law cannot be separated from the religio-magical cultural aspects of the Indonesian nation. Therefore, national law and customary law are primarily a manifestation of the culture of the Indonesian people which is also a characteristic of the Indonesian people. In essence, culture can be realized through the existence of ideas, ideas, values, norms, regulations and culture can also be realized through the activities of human behavior in the community and finally the interaction between humans and nature and surrounding objects.

According to Van Vollenhoven, the meaning of customary law is the overall rules of community behavior that apply and have sanctions and have not been codified. Then customary law places that living rules even though not promulgated by the authorities as the highest means that must be respected and obeyed by the people with the belief that these rules apply as law. It can be said that customary law is born and maintained by the decisions of the community, especially the authoritative decision of the head of the community or the head of adat that helps the implementation of the law or in the case of conflict of interest the decision of the judges in charge of adjudicating disputes, as long as the decision is due to arbitrariness or not in conflict with legal beliefs in society, but one breath and in harmony with that awareness, then it should be accepted, recognized or at least not declared as intolerance.

One of the features and characteristics of customary law is that it has a religio-magical character, namely according to traditional Indonesian beliefs, because each community is covered by supernatural powers that must be maintained in order to remain safe and peaceful. There are no restrictions between the physical world and the supernatural world and no separation between the various layers of life such as human life, nature, spirits of ancestors and the lives of other creatures. The existence of worship, especially of the spirits of ancestors as protectors of customs, is necessary for the happiness of the community.

Norms of behavior are rules that determine the direction of the customary law whether certain human behavior is appropriate or not. Based on this, people can know what they can expect from others. For a common life such rules are absolutely necessary where daily behavior is influenced by many norms that are not listed in the law. Norms that regulate human behavior are legal norms, which also include customary law. In customary law there is also customary delict law and can also be referred to as customary crime or customary offense law.

Customary criminal law is a rule of customary law that regulates events or actions and/or mistakes that result in disruption of the balance of society, so it needs to be resolved so that the balance of society is not disturbed. Thus, what is emphasized in customary criminal law is events and actions that are circumstances that disturb the balance of the unwritten rules in a particular community.

One of the proofs that national law must still respect customary law is the enactment of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which states that judges and constitutional judges are obliged to explore, follow and understand the values of law and a sense of justice that lives in society.<sup>4</sup> The existence of norms, principles and practices of customary criminal law until now is still applied by judges who take as their starting point customary criminal law or consider customary criminal law is still valid.

Principally, both national criminal law and customary criminal law have an important existence aimed at criminal sanctions, namely a punishment aims to resolve conflicts caused by criminal acts and restore balance as before and bring a sense of peace in society. This aspect must be carefully considered where the imposition of customary criminal sanctions as

much as possible fulfills the sense of justice of the community and the restoration of the proper situation.

Firmly, in order to fulfill the element of recovery for customary crimes concretely in law enforcement in Indonesia, ideally it determines the existence of additional punishment in the form of fulfillment of local customary obligations or obligations according to the law that lives in the community. Basically, the additional punishment can be imposed together with the main punishment as a stand-alone punishment or can be imposed together with the additional punishment.

### **Problem Statement**

1. Position of Application of Customary Sanctions in the National Penal System.
2. Formulation of the Balance of Customary Criminal Liability and Losses Incurred by Perpetrators of Customary Violations.

### **METHOD**

This research method uses normative juridical research. The understanding of the normative juridical research method is a doctrinal research that examines and analyzes a legal problem based on the conformity of laws and regulations, the application of legal principles and harmonization of the application of law in the rules of substance. The approach to this research uses a statutory approach and a concept approach.

### **RESULTS AND DISCUSSION**

#### **The Position of the Application of Customary Sanctions in the National Penal System**

The laws that apply in a country are actually a reflection of the life of the nation. Therefore, the actual formation of the law of a State must be derived from the influence and interests of other States. If later it is heard that, the formation of democratic laws but the formation of laws does not at the same time mean that the laws formed immediately run effectively. In this context, for example, the purpose of a law does not lie in how democratic its formation is, but lies in the extent to which what the formation of the law aims to achieve or achieve in society. This means that the advantage of participatory lawmaking is more an effort to improve the democratic character and legal legitimacy of the laws formed.

If the law in a country is a reflection of the life of the nation concerned, then a becomes more sensitive to the times. The globalization of law will still take place in different legal systems though. However difficult globalization may be avoided, States will not simply give up their sovereign functions and in a global system will not take place freely.

Customary law grows from the ideals and minds of the Indonesian people. Thus customary law can be known that historically, since Indonesia consists of a Kingdom spread throughout the territory of the archipelago. Socio-cultural reality is constructed by one poet and then constructed by the next. As for the concept, the development of customary law has regulated in several midwives including:

1. religious, economic and mining fields;
2. Field of work ;
3. Land and agriculture ;
4. Judicial field ;
5. The King Drafts customary rules ;
6. Constitutional arrangements.

Constitutionally, the concept of customary law guided by Article 18D of the 1945 Constitution has elements, namely:

1. The constitution guarantees the unity of indigenous peoples and their traditional rights.
2. Constitutional guarantees as long as customary law is alive;

3. In accordance with the development of society ;
4. Regulated in a law.

Based on the principles and implementation of the provisions of Article 18D of the 1945 Constitution, in judicial practice, customary law can also be implemented through customary criminal which aims to be a means of dispute resolution and recovery efforts. In the dimension of legal theory, customary crime is seen as a living norm where the norm exists in society. Therefore, this dimension means that customary crime in practice is used legal interpretation in the form of sociological or teleological interpretation. The logical consequence is that those who use this interpretation are carried out on legal practice so that they must have a benchmark in positive law as a comparison.

If analyzed based on legal philosophy, then customary crime regulates the values that live in society so that if the indigo is violated there will be a shock to the magical balance and therefore it must be restored

The balance is with customary sanctions. These philosophical values are regulated in the form of norms and principles and applied in legal practice. In the concept of philosophy, philosophical values are regulated in the Law on Judicial Power, especially Article 5 paragraph (1), Article 10 paragraph (1) and Article 50 paragraph (1) which expressly put the dimensions and position of customary crime in the perspective of national criminal law.

When comparing that the position of customary law is compared to the national criminal law as stipulated in the Criminal Code, then constitutionally the position is the same which means that there is nothing lower and higher. Although customary law is unwritten, through the conceptual Article 18B paragraph (2) of the 1945 Constitution, its position has been guaranteed as long as it is still in accordance with the basic principles of the State and its existence is recognized.

The main source of national criminal law is contained in the Criminal Code where the criminal enforcement is located in the position of the principle of legality in criminal law as referred to Article 1 paragraph (1) of the Criminal Code. The basic provisions of legality provide limitations that a person can be convicted after the criminal rules come before the criminal act or more simply no crime without rules prohibited by law. Likewise, customary law also recognizes criminal offenses, expressly stating that the form of crime that must be resolved according to customary criminal law. Reviewed based on the delic element, customary crime has the following characteristics:

1. Carried out on material and immaterial goods;
2. An act that must not be done that is considered to violate the propriety, harmony, order, security, sense of justice and legal awareness of the community concerned as well as the norms that live in society;
3. Belonging to a person or group of people;
4. Eligits customary reactions.

The emergence of customary reactions is caused by customary law itself which is usually a form of customary reaction in the form of payment and / or compensation for actions that are considered violating. The form of payment can be in the form of giving a certain amount of money and goods even not infrequently in some areas the payment is made by giving certain animals.

**Tabel 1. Conceptually, the author provides a distinction between the nature of national criminal law and customary criminal law as follows :**

National Criminal	Customary Crime
The national criminal law can only punish private bodies in the form of humans or persons or persons which means that criminal sanctions in the national criminal law are only applied to a person who has indeed committed a criminal act	Customary criminals or customary offenses are often required to receive customary criminal sanctions, especially when related to acts of reaction or correction in the form of payment of fines or compensation are relatives who commit acts of customary criminal violations

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In terms of <i>dolus</i> and <i>culpa</i> , national crime states that a person can only be convicted if he commits a criminal act intentionally or because of negligence or <i>culpa</i> and has a mistake.	Customary criminal with the application of customary criminal sanctions sometimes there are types of violations that can only be committed intentionally and there can be no <i>culpa</i> in the <i>dlamanya</i> such as incest or theft and sometimes customary law violations that do not require proof of the wrongdoing of the violation
Based on the interests violated, national crime states that all criminal acts or acts are an act that is contrary to the law made by a state so that each offense is a problem experienced by the state and must be overcome by the state	Although the existence of customary offense violations cannot be accounted for, sometimes there are several criminal sanctions that will be imposed on perpetrators of customary violations
Based on the nature of recovery when peace occurs, national penal code makes no distinction over the value of a given item so in theory the theft of a flower is as heavy as stealing a piece of gold jewelry	In customary crime, theft committed against property or trunks that are ancestral inheritance, let alone customary goods, the customary criminal sanctions are more severe than ordinary theft.
In terms of inclusion, in the national criminal law juxtaposes punishment depending on the role of each perpetrator	In customary crime, the perpetrator of participation can be sanctioned the same as the perpetrator of the criminal act or its intellectual actor

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### **Formulation of the Balance of Customary Criminal Liability and Losses Incurred by Perpetrators of Customary Violations**

The view of customary law for the majority of people is still opposed because it considers that customary law is a non-judicial factor so that it is not considered part of the positive legal system in Indonesia. But it cannot be separated from the history of the Indonesian nation which applies customary law as a value that applies to govern society. This view is reinforced by the opinion of Carl Von Savigny who argued that society and law are always in the same development. As a historical juridical phenomenon, the existence of each law is different, depending on the place and time of its enactment. The legal position must be viewed as the incarnation of the soul or spirit of a nation. If we return it to the soul or spirit of the Indonesian nation, then it is the nation's traditional values which are then reflected in the values of Pancasila and those traditional values that then build norms that can be obeyed by the community.

Furthermore, related to the history between law and society, it must be seen that law is not composed or created by people, but rather that law grows and develops together with society. Such a basis is very much in accordance with the needs of current legal development, where law grows and develops together with society. In order to always be in accordance with the purpose of the law for society, the law must be in accordance with the development of society itself. In simple terms, it can be understood that legal relations in society are influenced by people's consciousness to be able to manifest themselves.

Customary law is rooted and in the mind and outlook of the community, and is studied in and inferred based on customs, concepts and general ideas as manifested in the behavior and decisions of traditional or tribal leaders. In the scope of the judiciary as an analogy to how to view the existence of customary law, the Regeerings Reglement (RR), which is the law governing the government of colonies, regulates as Article 75 paragraph (3) states that the authority of judges to set aside customary law, if the law conflicts with the generally recognized principles of justice and in paragraph (6), states that judges to use the general basis of European law as a guideline, if there is no customary law regulation. On the side of the concept of colonial government that feels entitled to regulate its colonial government, of course, the above provisions can only be accepted and interpreted. However, as a nation that has its own legal values that live in society, it is certainly worth considering the recognized principles of justice as mentioned in Article 75 paragraph (3) RR, because in principle justice



between Europeans and Indonesians is not the same. Laws originating from Europe do not necessarily meet the sense of justice in Indonesia, and vice versa. In other words, what should be understood is that the colonial government at that time prioritized customary law as a reference for law enforcement for the Indonesian nation.

Legal reform in Indonesia requires values that live and are inherent in the person and environment of its own society. Indigenous customs and culture, derived from ancestors which become a local wisdom and need to be preserved and maintained. Customary values are considered to have an art that characterizes the Indonesian nation and distinguishes it from other nations. Renewing the criminal law does not mean improving the criminal law but must replace it with a better and ideal and the meaning of replacing it must also be with a product of the country's own culture that contains local wisdom rooted in its community.

Indonesian people have different characteristics because of the patterns of various regions. This is inseparable from the pluralism of cultural customs and customs of each region and society. A habit that is practiced continuously and believed by the locals can convey a good message or change in a person so as to make it an unwritten recognized law. Legal pluralism becomes a unifier and a solution and even creates peace in the association of life in society. Indigenous peoples have the same pattern in resolving conflicts in the community, namely controlling life in the community and imposing sanctions if there are violations along with remedies that become very effective. Conflicts of interest that occur between indigenous peoples in one area should be resolved through the role of indigenous peoples' settlement *lemabaga*.

The course of legal history in Indonesia records that many jurists actually explore customary law as a law that lives in society. Customary law that influences criminal law in Indonesia can develop into customary criminal law (*delictentrecht*) so that customary criminal sanctions have an important scope in solving criminal problems in indigenous peoples. In the sense of the word the existence of customary crime in Indonesia is studied from a normative perspective (*ius constitutum*) it is said that basically customary crime is a living law and will continue to live, as long as there are humans and cultures, it will not be abolished by legislation even though it develops with the times. If there is also a reform of the law that will abolish it, it will be useless and the criminal law will lose its source of wealth, because customary criminal law is more closely related to sociological aspects than legislation.

In short, customary law also regulates dispute resolution procedures, especially if there are actions from someone that disturb the balance and shake peace in society. These violations are also called customary offenses or customary crimes where in customary law applicable to each region, the pattern of resolution takes precedence over how the perpetrators are accountable to the recovery of the circumstances caused by the perpetrators. In the sense that criminal acts that according to circumstances violate customary offenses must be returned in their original state so that losses for these acts can be redeemed through an act and / or payment of fines and compensation, and even perform a certain ritual to atone for wrongs against ancestors in certain areas.

Violation of customary rules of life is seen as causing shock in society because it is considered to disturb the cosmic balance of society. Therefore, violators or perpetrators are given customary reactions, customary corrections to customary sanctions by the community through their traditional leaders or tribes. The role of customary sanctions recognizes the principle of balance, namely balancing between the birth world and the magical world, because every customary crime results in disruption of balance, harmony and harmony in community life resulting in individual and community damage. The disturbance must be restored so that harmony and harmony will be created in society.

The settlement of customary criminal cases through customary institutions becomes very important when it is associated with dissatisfaction with formal court decisions,

especially in terms of justice in deciding a case whose dimensions have customary law patterns. Indigenous peoples are dissatisfied that court rulings have not been able to restore the magical balance arising as a result of a customary violation. Therefore, in the perspective of criminal law, it is necessary to find and analyze academically how alternative legal thinking that allows customary criminal violations to be tried through customary institutions in order to create certainty and restore a fair balance.

Formal settlement of cases in the concept of restorative justice, for example, demands to protect the interests of perpetrators without harming victims. The concept of restorative justice offers a different approach to that commonly adopted in criminal justice practice so far. The handling of criminal cases so far tends to be retributive or retaliatory. While the spirit in restorative justice is a way of deliberation and mediation to restore balance by involving victims and perpetrators as well as their respective families and representatives of the community.

While in the context and purpose of resolving customary criminal disputes through customary institutions has an honorable place in the framework of restorative justice, the problem is that even though in Indonesia many customary laws are restorative solutions as a tool, their existence does not have an adequate place in laws and regulations. In principle, customary law is believed to be able to resolve conflicts that arise in the community and provide satisfaction for the parties to the conflict. Customary criminal law by its religious and magical familial nature where the priority is not a sense of individual justice, but a sense of family or community justice so that the resolution of customary offenses can be carried out peacefully is believed to bring harmony and harmony. Customary criminal law does not intend to indicate what laws and penalties must be imposed in the event of violations, but its purpose is to restore laws that are limping as a result of violations.

## CONCLUSION

The position of the application of customary sanctions in the national penal system is constitutionally no difference in principle. Given that the main basis for the implementation of customary law is Article 18B paragraph (2) of the 1945 Constitution where customary law must remain recognized as long as it is in accordance with the principles of the State and judges according to the Law on Judicial Power must follow and explore the values of justice that live in the community in order to solve the cases they face.

The formulation of the balance of customary criminal responsibility and losses incurred by perpetrators of customary violations is to understand the pattern of regional culture that is disturbed by the balance due to customary violations by perpetrators. In general, the shaky and disturbed balance must be restored not only by sanctioning the body, but also by providing compensation to perform certain rituals to restore the balance of the value of these customs.

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