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## Application of Customary Sanctions in the Settlement of Criminal Cases in the Malay Community of Indragiri Hilir, Riau

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### Abstract

Settlement of cases through formal justice and using positive law has a weakness because the orientation in punishment is more focused on the perpetrator (Offender oriented) so that the suffering or loss of the victim is ignored, in addition to the procedure for resolving criminal acts through criminal law, it is not possible for victims to participate actively determine how the conflict will be resolved. even the attitudes and actions of law enforcement officers often cause other suffering for victims (secondary victimization). To overcome these problems, the idea arose to reimpose the settlement of criminal cases using customary law, in line with this idea, this study aims to explore the values of local wisdom (customary law) with Indragiri Hilir which are still used to resolve criminal cases that occur in the community, the type of research carried out is normative-empirical legal research (applied law research). but more importantly useful and beneficial for the recovery of suffering or loss of victims.

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## INTRODUCTION

The application of the principle of legality in Indonesia creates problems for law enforcement. The settlement of criminal cases through formal justice has an impact on two things, namely the accumulation of cases that cannot be resolved by the criminal justice sub-system and the existence of overcapacity in correctional institutions. This overcapacity problem has become a common phenomenon in all prisons in Indonesia<sup>1</sup>

Another thing that is also a problem is that there is still a limited ability of state institutions to provide quick access to justice for the community, the distance to access to formal justice, high costs and lack of understanding of formal justice and the limited range of

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<sup>1</sup> Angkasa, "Over capacity Narapidana di Lembaga Pemasyarakatan, Faktor Penyebab, Implikasi Negatif, serta Solusi dalam Upaya Optimalisasi Pembinaan Narapidana", *Jurnal Dinamika Hukum*, Vol. 10 No. 3, Fakultas Hukum Universitas Jenderal Soedirman Purwokerto, (2010)

police services are often obstacles for the community to resolve problems. faced through formal institutions.<sup>2</sup>

Settlement of cases through formal institutions, assumes that justice in criminal law has been upheld if the perpetrators of criminal acts have been sanctioned in accordance with the rules of criminal law.<sup>3</sup> the victim's loss or suffering is considered to have been paid for or recovered by the perpetrator by undergoing and accepting the sentencing process. However, if you pay close attention, the substance and procedure for the settlement of criminal acts through criminal law that has been carried out so far has almost not brought any benefit to the recovery of the suffering of the victim.

Settlement of cases through formal justice and using positive law has a weakness because the orientation in punishment is more focused on the perpetrator (Offender oriented) so that the suffering or loss of the victim is ignored, in addition to the procedure for resolving criminal acts through criminal law, it is not possible for victims to participate actively determine how the conflict will be resolved. even the attitudes and actions of law enforcement officers often cause other suffering for victims (secondary victimization).<sup>4</sup>

To overcome these problems, the idea now arises to reimpose the settlement of criminal cases in a way that usually applies among community groups, which is called local wisdom.<sup>5</sup> Experts also often instill local knowledge.<sup>6</sup>

The existence of this customary law is recognized by the state, this can be seen in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, namely the State recognizes and respects customary law community units and their traditional rights as long as they are alive and well. in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law. Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads that cultural identity and the rights of traditional communities are respected in line with the development of the times and civilization. Article 32 paragraph (1) of the 1945 Constitution

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<sup>2</sup> Muhar Junef, "Penerapan Sanksi Adat Kepada perusahaan dan Pihak lain dalam peradilan Adat", *Journal Widya Yustisia*, Vol. I Nomor 2 Februari (2015), (99)

<sup>3</sup> Muladi and Barda Nawawi Arief, *Teori-teori dan kebijakan Pidana*, Alumni, (Bandung: Alumni, 1992) 144

<sup>4</sup> G. Widiartana, *Victimologi Perspektif korban dalam Penanggulangan Kejahatan*, (Yogyakarta : Cahaya Atma Pustaka, 2014) 136

<sup>5</sup> Erdianto Effendi, *Hukum Pidana Adat, Gagasan Pluralisme dalam Hukum Pidana dan Penerapan Hukum Menurut Keyakinan Hukum*, (Bandung : PT Refika Aditama, 2018) 24

<sup>6</sup> Marcus J. Pattinama, "Pergentasan Kemiskinan dengan Kearifan Lokal, *Jurnal Makara Sosial Humaniora* Vol.13 No. 1, Juli 2009, (1-12) 3-4

of the Republic of Indonesia which states that the State shall promote Indonesian national culture in the midst of world civilization by guaranteeing the freedom of the people to maintain and develop their cultural values.<sup>7</sup>

The three legal bases emphasize that the constitution mentions customary law as a community right and its existence is guaranteed by the constitution. The constitution provides space for customary law to contribute to bringing order to its indigenous peoples. The existence of customary law is still very much needed, the restorative paradigm which is reflected in the application of customary law in resolving criminal acts that occur in the community actually views crime not as an act that violates criminal law as state law, but also considers crime as an act that causes harm to the victim. Consequently, the process of resolving each case through customary law always considers the victim, so that the sanctions imposed are not only useful for the perpetrators and the wider community but are also useful for recovering the suffering or loss of the victim. Because Victims are not only interested in upholding the law, what is more important is that they want to be helped out of their predicament.<sup>8</sup>

Based on the explanation above, the researcher is interested in examining Malay customary law in Indragiri Hilir Regency, which is currently often used as an alternative for resolving criminal cases outside the formal courts. The results of this study are expected to be input for law enforcement officials in resolving cases, so that the sanctions imposed are not only useful for the perpetrators, but more importantly useful and beneficial for the recovery of the suffering or losses of the victims.

### **Customary Sanctions and Criminal Case Settlement Models According to the Indragiri Hilir Malay Customary Law, Riau**

As a state of law, the Indonesian Constitution guarantees that access to justice is a human right that must be respected and its fulfillment guaranteed, every citizen has the right to obtain redress for the violation of rights he has suffered and the state is obliged to provide protection and fulfillment of these rights. However, in reality, there are still limitations in the ability of state institutions to provide quick access to justice for the community. The geographical condition of Indonesia which is an archipelagic country causes some areas to be

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<sup>7</sup> Ferawati and Dasrol, "Mediasi Penal Penyelesaian Perkara Pidana Pada Masyarakat Desa Tanjung Alai Kecamatan XIII Koto Kampar, Riau", *Melayunesia Law Journal*, Volume 2 Nomor 1, (Desember 2018) 131

<sup>8</sup> Satjipto Rahardjo, *Hukum dan Masyarakat*, (Bandung : Angkasa, 1980) 143

far from access to formal justice, the cost to go to formal justice is expensive, the limited range of police services is often an obstacle for the poor and marginalized to resolve conflicts they face through formal institutions.<sup>9</sup>

In addition to the problem of limited capacity of formal institutions in providing access to justice for the community, positive law in Indonesia also has limitations to be used as a source of resolving conflicts that occur in society, there are several conflicts that often occur in traditional societies, but are not regulated in positive law. Thus, thinking is needed to find other alternatives in an effort to resolve conflicts in society. One of the ideas is the strengthening of informal justice, for example implementing customary law.

Indragiri Hilir is one of the areas in Riau which until now still applies customary law in daily life, even in resolving conflicts that occur in the community. Customary law was chosen as the legal basis in resolving criminal acts because customary law does not conflict with the will of the community. In accordance with what Eugen Erlich said, that a good law is a law that lives and is in accordance with people's consciousness.<sup>10</sup> Likewise, Fritjof Capra's opinion that favors the East over the West, thus proposing the need to re-examine the values of Eastern civilization.<sup>11</sup> Recognition and respect for indigenous peoples shows an awareness that there are still Indonesian people who live unique lives, conditions with positive values, norms, customs, but with very poor conditions.<sup>12</sup>

The settlement of criminal cases outside of criminal law is in line with the idea of restorative justice, namely an alternative or other way of criminal justice by prioritizing an integrated approach to perpetrators on the one hand and victims/communities on the other as a unit to seek solutions and return to the pattern of good relations in society.<sup>13</sup> When a conflict occurs in the community, the habits of the Malay people of Indragiri Hilir do not immediately bring the conflict to be resolved through formal courts, but first it is resolved through customary courts, involving traditional leaders, community leaders to resolve the conflict. The

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<sup>9</sup> Muhar Junef, *Op.cit* , 99

<sup>10</sup> Airil Safrijal, Penerapan Sanksi Adat dalam Penyelesaian Perkara Pidana, *Kanun Jurnal Ilmu Hukum* , No.59, Tahun XV, April (2013) 151

<sup>11</sup> Fritjof Capra sebagaimana dikutip Satjipto Rahardjo, "hukum Progesif, kesinambungan, merobohkan dan membangun," *Jurnal Hukum Progresif* ,Vol. 2 No. 1, Program Doktor Ilmu Hukum Universitas Diponegoro Semarang, April (2016) 6

<sup>12</sup> Wandu, Eksistensi Pengakuan Hukum Adat dalam Politik Pembangunan Hukum Pemerintahan Daerah di Indonesia, *Jurnal Mahkamah*, Fakultas Hukum Universitas Islam Riau Vol.5 No. 1,(2013) 48

<sup>13</sup> Kuart Puji Prayitno, Restorative Justice Untuk Peradilan di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto)."*Jurnal Dinamika Hukum*, Fakultas Hukum Universitas Jenderal Soedirman, Purwokerto, hal .409.Vol 12 No.3, (2012).409.

table below will describe the types of criminal acts that are often resolved through customary courts as well as the forms of sanctions and patterns of settlement of these criminal cases.<sup>14</sup>

Table 1

Criminal Acts (Delict) Against the Body (Body) and Customary Sanctions

No	Criminal Acts	Customary Sanctions
1	Pesecution	Perpetrators or their families are charged with medical expenses for the victims until they recover.
2	Fighting/Battling	The perpetrators or their families are required to pay the cost of treatment and care for the victim until the victim recovers.
3	Domestic violence	The form of settlement and the sanctions imposed are adjusted to the form of violence and the consequences and causes of domestic violence
4	Traffic Accidents that cause injuries	Perpetrators who are deemed wrongly sentenced to bear the cost of medical treatment and care for the parties who are victims of the accident (Settlement through the Malay customary law mechanism is only chosen if the parties involved in the accident are “local” residents or natives of the area, if it involves people outside the area then the solution is left to the police)
5	Traffic Accidents that cause death	Perpetrators who are found guilty are sentenced to pay funeral expenses and hand over a sum of money to the families of the victims (provided that both parties involved in the accident are “local” residents or natives) If the parties involved in the accident are not “local” residents/original residents of the area, then the settlement effort is left to the police.

<sup>14</sup> Interview with Mr. Said Usman, (Tokoh Adat) Khairiah Mandah Village, Indragiri Hilir, 23 June 2020

Table 2

Criminal Acts (Delict) Against Assets (Objects) and Customary Sanctions		
No	Criminal Act (Delict)	Customary Sanctions
1	Theft crime	<p>Pay the fine (Dam) and the settlement method is adjusted to the nominal/value of the item stolen, the background or reason for committing the theft. The usual forms of punishment are:</p> <ul style="list-style-type: none"> <li>- The perpetrator's hair is shaved / bald (in the case of being caught red-handed)</li> <li>- Carrying stolen goods and paraded around the market or around the village (in the case of being caught red-handed)</li> <li>- Return the stolen goods but if the stolen goods have been sold, they will be replaced with similar goods or replaced with money equal to the stolen goods.</li> <li>- Customary fine (DAM) in the form of one goat</li> <li>- If the theft is motivated by the economic inability of the perpetrator, then it is the responsibility of the community to find a solution, for example giving the perpetrator a job.</li> <li>- For a certain period of time, the perpetrators of the theft are under the supervision of local traditional leaders</li> <li>- If it turns out that the perpetrator is later found to have committed theft again, the perpetrator is expelled from the village, because the presence of the perpetrator is considered disturbing the community and tarnishing the good name of his family.</li> </ul>
2	Owners of animals/livestock whose animals or livestock damage the neighbor's yard, field or garden (other people)	Pay a fine (DAM) whose nominal amount is adjusted to the losses suffered by the owner of the yard, field and garden.
3	Item Destruction	The perpetrator or the perpetrator's family is required to pay compensation for the goods that have been damaged.

Table 3

## Criminal Acts (Delict) of Morals and Customary Sanctions

No	Criminal Acts (Delict)	Customary Sanctions
1	Adultery committed by people who are not married (single)	<ul style="list-style-type: none"> <li>- Perpetrators are required to invite people in the village to eat as well as apologize</li> <li>- Paying a customary fine (DAM) in the form of one goat or one buffalo (this fine is adjusted to the economic capacity of the perpetrator/family). This fine is intended to clean up a village whose balance has been damaged.</li> <li>- The perpetrator is married</li> </ul>
2	Adultery committed by people who are bound by marriage (Infidelity)	The perpetrator was expelled from the village because it was considered not only detrimental to his good name, but also involved the good name of his hometown, expulsion from the village was intended so that the perpetrator's relatives or hometown were free from "disgrace" and it was hoped that after being expelled from the village the perpetrator could realize his mistake and change himself into a good person.
3	Dating (acting together in a lonely place)	Invite the villagers to eat and apologize

Table 4

## Criminal Acts (Delict) Damaging the Environment and Customary Sanctions

No	Criminal Acts (Delict)	Customary Sanctions
1	Cutting down mangrove trees around residential areas or cutting down mangroves with a diameter of less than 6 inches	Perpetrators are subject to a fine (dam) for replacing the felled mangroves with mangrove seedlings, provided that cutting down 1 tree replaces it with ten seedlings).
2	Catching female crabs that are laying eggs or catching crabs weighing less than 150 grams per head	Paying customary fines, providing fish seeds to be cultivated by community members (the number of seeds is adjusted according to the decision at the customary meeting).
3	Catching fish using	Paying customary fines, providing fish seeds to be

	non-environmentally friendly fishing gear	cultivated by residents (the number of fish seeds is adjusted to the decision of the customary meeting). Build roads or public facilities.
4.	Repeat the action at points 1-3	Paying customary fines (Dam), is subject to social sanctions in the form of exclusion from social activities.

From the description of the table above, it can be concluded that Malay customary law considers crime/violation as an act that causes harm to the victim and to the surrounding environment, in its solution it does not only focus on giving sanctions to the perpetrator. The process of resolving each case through Malay customary law always considers the interests of the victim and the interests of the community, so that the sanctions imposed are not only useful for the perpetrators but are also useful for recovering the suffering or losses of victims and the wider community. with the term "dam", Becker and Posner suggest that fines have several advantages over imprisonment.<sup>15</sup> The use of criminal fines can avoid the social costs of maintaining prisons, avoid unnecessary detention and avoid useless waste of human capital in prisons.<sup>16</sup>

In contrast to the settlement of criminal acts through formal justice and using positive law, it has a weakness because the orientation in punishment is more focused on the perpetrator, so that the suffering or loss of the victim is ignored. actively participate in determining how the conflict is resolved. Even the attitudes and actions of law enforcement officers often cause other suffering for victims. The table below will show the difference if the crime in the table above is resolved through formal justice by applying positive legal rules.

**Table 5**  
**Criminal Acts and Sanctions According to Positive Law**

No	Criminal Acts	Sanctions
1	Persecution	Imprisonment and fines

<sup>15</sup> Joel Waldfoer, Are Fines and Prison Terms Used Efficiently? Evidence on Federal Fraud Offenders,” *Journal of Law and Economics*, Vol. 35, April (1995) 107

<sup>16</sup> Steven D Leviit, “ Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentence Instead of fines”, *International Review of Law and Economics*, vol. 17 (1997) 179-180



2	Fighting/Battling	Imprisonment
3	Item destruction	Imprisonment and fines
4	Domestic violence	Imprisonment and fines
5	Traffic Accidents	Imprisonment and fines
6	Theft crime	Imprisonment Adultery committed by people who are bound by marriage (Infidelity)
7	Has cattle that damage other people's gardens and yards	Not punished
8.	<ul style="list-style-type: none"> <li>- Adultery committed by people who are not married (single)</li> <li>- Adultery committed by people who are bound by marriage (Infidelity)</li> <li>- Dating (acting together in a lonely place)</li> </ul>	<p>Not punished</p> <p>Imprisonment</p> <p>Not punished</p>
9.	Illegal logging	Imprisonment and fines (the settlement is sometimes long and there is difficulty in finding evidence so that the perpetrator is difficult to punish)
10.	Illegal Fishing	Imprisonment (the settlement is sometimes long and there is difficulty in finding evidence so that the perpetrator is difficult to punish)

From the table above, it can be seen that a criminal act is defined as an act of violating the rule of law established by the state to maintain order, peace and security in social life. Settlement of cases focuses on imposing sanctions on the perpetrators, the suffering and losses of victims are compensated with the threat of sanctions imposed on the perpetrators, so that all wishes of the victim related to the settlement of the crime that befell him are not accommodated in the rule of law. the form of sanctions imposed is imprisonment while the fine is only an alternative sanction, of course this will have an impact on the problem of

overcapacity of the correctional institution, this is different from the settlement using customary law which always considers the victim aspect.

## CONCLUSION

The criminal case settlement model according to the Indragiri Hilir Malay Customary Law can be used as another alternative in efforts to resolve criminal cases, because the approach used in the process of punishing the perpetrator focuses on the suffering or loss experienced by the victim/community. Settlement of cases by applying customary law (living law) can result in many variations in forms of punishment, for example the payment of compensation for damages caused by criminal acts to changes in individual behavior that threaten societal norms.

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