

## ANALYSIS OF THE ROLE BASED ON THE CUSTOMARY CRIMINAL JUSTICE SYSTEM OF DAYAK BANGKALAAAN IN THE NATIONAL CRIMINAL JUSTICE SYSTEM

**Darlian Pone, Ade Saptomo, Baharudin, Aminuddin Harahap, Rustam**

Universitas Borobudur, Jakarta, DKI Jakarta, Indonesia

Email: darlian.pone@gmail.com, baharudinfattih2019@gmail.com,  
aharahap71@yahoo.co.id, rustampatia@yahoo.com

### Abstract

This research is motivated by indigenous peoples' belief in customary rules which encourages studies on their legitimacy in the Indonesian legal system. The author collected study samples from the Bangkalan Dayak tribe in South Kalimantan Province as an example of an Indonesian customary village. This study focuses on two formulations of problems, namely the role of the customary criminal justice system in the national criminal justice system and the impact of Dayak Bangkalan customary criminal justice law enforcement when related to the national criminal justice system. This research is a sociological legal research, the legal data collection technique is carried out through literature review, including primary legal data, secondary legal data, and tertiary legal data related to this research. The result of the study is that the state recognizes the existence of customary law communities in accordance with Article 18B of the 1945 Constitution of the Republic of Indonesia. Even though there is no legal framework that can regulate this at the national level, the mandate of regional legislative policy still recognizes the existence of customary courts. This is evidenced by the existence of regional regulations that recognize and protect indigenous peoples. In addition, the results of the study conveyed that the legal implications arising from customary court decisions turned out to be able to be used as legal data in national criminal courts.

**Keywords:** Criminal Justice, Customary courts, National courts

### Introduction

The history of law enforcement in Indonesia, it can be seen that there are many legal experts who study customary law as a law that lives in Indonesian society. Van Vollenhoven said: "If one wishes to acquire knowledge and information about the laws that exist on this earth, the whole of Indian law, because of its various forms, past and present, will be an inexhaustible resource" (Sugiarto, 2021). The declaration states that legal pluralism in the general environment includes recognition that characterizes, attracts and characterizes Indonesian society (Arliman, 2018). Each region had a different legal system, and almost all Indonesian people at that time used customary law.

It is based on the many traditional tribes scattered in the Indonesian archipelago. One of the indigenous tribes that still exists today is the Dayak tribe of Kalimantan Island. Dayak tribes are spread throughout Kalimantan, including the Ngaju Dayak, Paser Dayak, Mendawai Dayak, Bakumpai Dayak, and Meratus Dayak. Divided into several tribes

(Darmadi, 2016). The Meratus Dayak tribe is a Dayak sub-tribe group living in the Meratus Mountains region of South Kalimantan. One of the Dayak tribes in South Kalimantan is called Dayak Bangkalan and is located in Kelumpang Hulu District in Kota Bharu Area. Like other indigenous tribes, the Bangkalan Dayak tribe also attaches great importance to the customary rules set by their ancestors. The Dayak Bangkalan community believes that if cases are not resolved through ordinary institutions, disaster will occur. Many problems, both marital issues, land rights, inheritance rights, and problems between the two parties such as disputes or fraud committed by local communities, are usually resolved through standard legal procedures. The place of dispute resolution is the community center.

Restoration is very effective because indigenous peoples follow their way of resolving social conflicts: by controlling people's lives and sanctioning abuses. Dispute resolution through deliberation is a living law and is known to almost all legal circles (*rechtskring*) (Barama, 2016). In resolving disputes through deliberation, the chairman of the people (usually the chairman) is always involved, both in preventing lawlessness (*preventieve Rechtszorg*) and in restoring justice (*rechtshertel*). Seeing this phenomenon, researchers put forward the following two problem formulations based on the discussion above: 1) What is the role of the customary criminal justice system in the National Criminal Justice System? 2) What are the legal consequences for the enforcement of Adat Dayak Bangkalaan criminal justice when linked to the National Criminal Justice System through the enforcement of the Due Process Model?

The purpose of this study is to determine the position of the customary justice system in the National Justice System and describe what legal impacts occur on the enforcement of Customary criminal justice Dayak Bangkalaan when related to the national justice system through the enforcement of the Due Process Model. This research is expected to improve and develop scientific treasures in Customary Law research and is expected to be used for further research studies or used as material for policy makers in making regulations.

### **Research Methods**

This research uses sociological legal research methods. Legal data collection techniques are carried out through literature review, including primary legal data, secondary legal data, and tertiary legal data related to this study. This research focuses on the legitimacy of customary rules in the Indonesian legal system, by taking a study sample from the Bangkalan Dayak tribe in South Kalimantan Province as an example of customary villages in Indonesia. This research focuses on two formulations of problems, namely the role of the customary criminal justice system in the national criminal justice system and the impact of Dayak Bangkalan customary criminal law enforcement when related to the national criminal justice system. The results showed that the state recognizes the existence of customary law communities in accordance with Article 18B of the 1945 Constitution of the Republic of Indonesia. Although there is no legal framework that can regulate this at the national level, the policy mandate of local

legislatures still recognizes the existence of customary courts. This is evidenced by the existence of regional regulations that recognize and protect indigenous peoples. In addition, the results of the study stated that the legal implications arising from customary court rulings can be used as legal data in national criminal justice.

## **Results and Discussion**

### **The Role of Customary Criminal Justice in National Criminal Justice**

Customary law has a traditional form and goes back to the will of the ancestors. Common law rules can change in response to the changing effects of life events and circumstances. Changes are often unknown and sometimes the public is not informed of the changes (Pellokila, 2021). Because, this happens in everyday life in the national situation. Because of its unwritten roots, customary law can demonstrate adaptability and resilience. Customary law both in its simple and well-established form is a means of resolving various disputes/ conflicts and problems arising from violations of order between community members and those related to nature and the environment. For some groups, customary courts are seen as an alternative to state judiciaries, which are weak or inadequate in providing justice to villagers.

In the current perspective of Indonesian law, the term customary law is known as the law of community life, living law, legal values and a sense of justice of life in society, unwritten law, customary law, and primitive Indonesian law (Soediro, 2019). Moreover, there is a close, intact and even inseparable relationship between the term customary law and its indigenous peoples, which is usually expressed in the form of small laws (Dewi et al., 2020). The recognition of customary jurisdiction by the state cannot be separated from the human rights of indigenous peoples guaranteed in the 1945 Constitution of the Republic of Indonesia and the United Nations Declaration on the Rights of Indigenous Peoples. Human rights are fundamental human rights in the true sense and must be respected, protected and enforced (Amin, 2019). There is absolutely no power capable of reducing, eliminating, or ignoring it. Human rights are rights that we enjoy because we are human beings.

The concept of justice was not only known to the Indonesian people after the entry of colonial law (Syamsuddin, 2019). Long before other countries provided legal systems for all people in the archipelago, there was a process of solving problems based on various mechanisms and aimed at restoring social balance by providing justice to the parties involved (Amin et al., 2018). This process is carried out and managed by customary or regional institutions with various designs. In Indonesian customary law community entities, there are various terms that refer to the mechanism for resolving cases (disputes/violations) which are often called customary courts. Terms that are often used are "adat council session", "adat council", "adat meeting" or expressions typical of each region (Dasor, 2020).

In addition, those who decide to file a customary lawsuit to resolve a problem are local customary law officials. The process of solving people's life problems by people who are directly trusted by the community is open and transparent. On the other hand,

because decisions and sanctions are taken based on deliberation for consensus, the term 'justice' has a meaning that is more similar to existing judicial law. Traditional justice is becoming increasingly important to prevent street justice (Antari & Adnyana, 2023).

It is necessary to think about the form of customary law so that the existing settlements at the customary level are no longer controversial and raised to the level of positive law. We look at it from a philosophical, sociological and legal point of view. The existence of Customary Courts must be recognized, these aspects and dimensions refer to the provisions of Article 18B paragraph (2). Article 281 Paragraph (3) and Article 24 Paragraph (3) of the Constitution of the Republic of Indonesia Year 1945. The basic conclusion of these provisions is that they are essentially regulated, recognized, and respected for the existence of the unity of indigenous peoples and their traditional rights.

Then, there is respect for cultural identity, national cultural diversity and traditional community rights as part of human rights so that they are in harmony with the development of times and civilization. At the level of local legislation, the existence of Customary Courts is still recognized. This is evidenced by the many Regency or City Regional Regulations that regulate the Recognition and Protection of Customary Law Peoples, one of these Regional Regulations is Regional Regulations. Kotabaru Regency Number 19 of 2017 hereinafter referred to as PERDA Kab. Kotabaru Number 19 of 2017 (Sudantra, 2018). As for Article 13 Letter d of the Rights of Customary Law Peoples, it is explained that Customary Law Peoples have the right to carry out distinctive customs, spirituality, traditions, and customary justice systems that develop from time to time in accordance with the development of Customary Law Peoples. The recognition and protection of Customary Law Peoples is also affirmed in the Regional Regulation of Kotabaru Regency Number 19 of 2017 Article 23 Paragraph (2) point b which explains the authority of Customary Institutions in carrying out Customary Law and Justice and Article 24 Paragraph (2) which explains that in terms of solving problems that arise within Customary Law Peoples, customary law is prioritized.

This is in line with higher regulations, namely Law Number 6 of 2014 concerning Villages Article 103 letter d which explains that the settlement of customary disputes based on customary law in force in customary villages in areas that are in line with human rights principles by prioritizing deliberative settlement. Judging from the explanation above, customary law in fact still exists today even though its recognition is only recognized within the scope of each province in Indonesia. The existence of provisions regarding customary law communities at the national level is very important to provide legal certainty and protect all indigenous peoples in Indonesia, ensuring the status of customary.

Criminal law is recognized by national criminal courts. Furthermore, the values embodied in common law litigation should be applied to the country's criminal justice system, particularly misdemeanor litigation. Because we know that litigation settlement only solves legal problems, not necessarily social problems in a fraternal environment. The application of traditional justice values in court processes and decisions is intended to realize a higher sense of justice, because it is essentially an advisory system to seek

compromise and win-win solutions. No harm will befall both parties, the bond of brotherhood will remain intact, and there will be no enmity between generations.

### **Legal consequences on the enforcement of Bangkalaan Dayak customary criminal justice when linked to the national criminal justice system**

In each customary law area, there are various customary justice systems in their respective territories. As applicable to the Bangkalaan Dayak Customary Law area located in Bangkalaan Dayak Village, Kelumpang Hulu District, Kotabaru Regency, South Kalimantan Province. Bangkalaan Dayak is part of the Meratus Dayak tribe spread across several regencies, namely Banjar Regency, Tapin Regency, South Hulu Sungai Regency, Hulu Sungai Tengah Regency, Balangan Regency, Tanah Laut Regency, Tanah Bumbu Regency, Kotabaru Regency. In Bangkalaan Dayak Village, especially the Bangkalaan Dayak Custom, it has its own judicial mechanism structure for the surrounding Customary Community if they want to solve cases or problems in a customary manner, to carry out the Customary Case Court, usually called the Customary Assembly and the place to hold customary courts is located at the Bangkalaan Dayak Traditional Hall (Ahmad, 2021).

Before starting the rally, there are several initial steps that must be taken, such as reporting or notifying the incident to the traditional head, traditional tetuha, village head, and police, security forces appointed by the upstream. Indigenous local government. The two traditional leaders meet to discuss the time and number of people who will attend the customary assembly, and finally the traditional leader gathers the families of the victims or perpetrators to prepare for the customary assembly. In the judicial process of customary assemblies, traditional leaders are accompanied by two or three traditional leaders, traditional leaders act as leaders of the congregation, and traditional leaders act as companions who express their opinions in the session (Resmini & Sakban, 2018). The chairman of the session can determine the amount of sanctions that will be imposed on violators. customary law. After the parties raised issues in the case of the Bangkalan.

Dayak Customary Court, the Tetuha indigenous people expressed their views on the violations committed by the perpetrators, recalling the problems that occurred before, and also the amount of fines imposed for the same violations. he. For example, one day a customary hearing was held for theft, during the customary session the traditional elders remembered the events of the previous trial and the amount of sanctions imposed on the same case. This happened because the customary law of Dayak Bangkalan village has not been written. Therefore, Tetuha and traditional leaders must always be aware of sanctions given to violators of customary law.

Ordinary court hearings can be held up to three times. If no settlement is found in the ordinary court proceedings, then the next step is the domestic court process. The sanction is a fine called tahlil, which is paid with a large plain white plate called a plate. The usual sanction given by the Bangkalan Dayak is one tahlil equal to two pingan (white plates). So, if a customary sanction is imposed on someone and ordered to pay a fine of 10 pingan, then the amount that must be charged to the aggrieved party is 20 pingan. The

## Analysis of The Role Based on The Customary Criminal Justice System of Dayak Bangkalan in The National Criminal Justice System

Bangkalan Dayak customary law community does not recognize criminal or civil cases, only violations of customary law. All violations that occur in the Dayak Bangkalan customary environment must first be resolved through ordinary courts. Conflict resolution using customary law is generally considered to ensure justice for indigenous peoples compared to domestic law which is less fair.

Because, common law is an agreement based on the advice and consent of the community and takes into account the interests of the community, individuals, and parties involved. For example, when there was a theft incident in the Bangkalan Dayak tribe in South Kalimantan, the head of the Bangkalan Dayak tribe formed a team based on the victim's report, investigated the victim's confession, and set out to investigate the theft. We are investigating the culprit. If found guilty, the perpetrator must pay compensation and fines determined by Tetuha Adat. This solution may seem very simple, but for indigenous peoples, this mechanism is seen more as justice than national law. The general court does not recognize other courts. This is explained in Article 18 of Law Number 48 of 2009 concerning Judicial Power which limits the exercise of judicial power by the Supreme Court and the judicial power below it in the general judicial environment. There are courts, military courts, state administrative courts, and constitutional courts.

Although Customary Courts are not recognized within the scope of Judicial Power, it does not mean that Customary Court rulings only apply to the local customary law environment. The position of the decision results from the process of resolving customary problems is also recognized as one of the sources of law (jurisprudence) for judges. This refers to Article 5 Paragraph (1) and Article 50 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, in essence both articles explain that judges are obliged to study laws that live in society and unwritten laws in order to be taken into consideration when deciding a case. Professor of the Faculty of Law, Diponegoro University, Semarang, Nyoman Uni Putra Jaya, said the source of criminal law in Indonesia is not only written criminal but also unwritten crime. Formally, when the Netherlands enacted it, customary criminal law was not enforced. But materially it remains valid and applied in judicial practice. After independence, customary crime was given a place through Emergency Law No. 1 Drt 1951. Article 5 paragraph (3) point b of this Law explains customary crimes that have no equal in the Criminal Code, customary crimes that have no equal in the Criminal Code, and customary sanctions. Customary sanctions can be made the main crime or the main crime by the judge in examining and trying acts that according to living law are considered unparalleled crimes in the Criminal Code.

One of the rulings that respects customary crimes, according to Prof. Nyoman United, is the Supreme Court decision No. 984 K / Pid / 1996 dated January 30, 1996. In this ruling, the panel of judges stated that if the perpetrator of adultery has been sanctioned by customary sanctions or received customary reactions by customary village leaders, where customary law is still respected and thrives, then the prosecution must be declared inadmissible. In addition to being regulated in Law Number 48 of 2009 concerning Judicial Power, each region that has customary law jurisdiction certainly has a Regional

Regulation that regulates the Protection and Recognition of Customary Law Peoples. The recognition of the existence of Customary Law Peoples in local Regional Regulations will certainly provide legal standing for indigenous peoples to litigate in national courts. So in this case it can be concluded that although in the hierarchy of judicial power customary court decisions are not expressly recognized, in practice the existence of these decisions is still recognized if they have a legal position regarding the recognition of the existence of Customary Law Peoples contained in local regulations. Therefore, every decision issued by a customary judge is binding on the Customary Law Peoples concerned. Although according to legal logic, the decision of the National Court has more legal force than the decision of the Customary court because it is based on the Positive Law.

### Conclusion

Based on consultations, problem resolution in public courts is conducted by individuals directly trusted by the community, with courts being open and transparent. A fairer clause is deemed more efficient as it holds greater influence on ordinary courts in decision-making and sanctioning. Although customary courts aren't recognized within their jurisdiction, customary court decisions are acknowledged by judges as a source of law. Nevertheless, these decisions hold weaker legal force compared to decisions of regular courts as they're based on positive law. However, explicit recognition in regional regulations would grant greater legal power to customary courts and ensure the legal rights of indigenous communities are recognized nationally. Thus, despite not being explicitly recognized within the jurisdictional hierarchy, their existence can be considered practically accepted in legal practice and regional regulations.

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Analysis of The Role Based on The Customary Criminal Justice System of Dayak  
Bangkalaan in The National Criminal Justice System

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