

# “Bertih Pisang” in Riau Malay Tradition as an Alternative for Resolving Criminal Acts

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**Abstract**—This research is focused on the model of the settlement of criminal acts according to the customary law of the Riau Malay Community which is known as the "Bertih Pisang". The purpose of this study is to contribute to law enforcement officers (police, prosecutors and judges) in resolving criminal acts that occur in the community, which cannot be resolved through formal justice other than that the results of this study are also expected to provide solutions so that law enforcement officers in making decisions does not only focus on the perpetrators of criminal acts but must also pay attention to the interests of the victim. This type of research is normative-empirical legal research. The results of this study conclude that, (1) Settlement of criminal acts through formal justice and using positive law has weaknesses because the orientation in punishment is more focused on the perpetrators so that the suffering or loss of victims is ignored. (2) the application of Malay customary law through "bertih Pisang" in resolving criminal acts always considers the interests of victims and the interests of the community, so that the sanctions imposed are not only useful for the perpetrators but also useful for the recovery of the suffering or loss of victims and the wider community.

**Keywords:** *crime, customary law, Malay*

## I. INTRODUCTION

Non-Criminal Settlement through formal institutions, assumes that justice in criminal law has been enforced if the perpetrators of the crime have been sanctioned in accordance with positive legal rules, in other words the loss or suffering of the victim is considered to have been paid or recovered by the perpetrators by undergoing and accepting the criminal process. However, if given careful attention, the substance and procedure for the resolution of criminal acts through criminal law that have so far been carried out have almost no benefits whatsoever for the recovery of victims' suffering.

Settlement of cases through formal justice and using positive law has a weakness because the orientation in punishment is more focused on the perpetrators (Offender oriented) so that the suffering or loss of the victim is ignored, besides the procedure of resolving criminal acts through criminal law which has so far not been possible for victims to participate and actively determine how the conflict will be resolved. Even the attitudes and actions of law enforcement officers often actually cause other suffering for victims.

In the retributive paradigm, crime is defined as an act that violates the rule of law established by the state to maintain order, peace and security of public life. The consequences of using the retributive paradigm are First, the formulation and imposition of criminal sanctions, in return for evil deeds. Both law enforcement officers are the only parties who have the right and authority to resolve criminal cases that occur. Third, criminal sanctions emphasize the suffering that must be borne by the offender in retaliation for his evil actions towards the victim, so that the victim's suffering is compensated by the threat of criminal sanctions that can be imposed on the offender.

Various alternatives are carried out to overcome the weaknesses of formal justice, one of which is to use informal justice whose decisions contain elements of justice, usefulness and legal certainty [1]. In contrast to the retributive paradigm, the restorative paradigm reflected in the application of customary law in resolving criminal acts that occur in the midst of society actually sees 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 victims, so that the sanctions imposed are not only useful for the perpetrators and the wider community but also are useful for the recovery of victims' suffering or loss

Riau is one of the regions in Indonesia which until now still applies customary law in daily life, even in resolving conflicts that occur in society. Efforts to resolve the conflict that occurred in the Malay community are known as "Bertih Pisang", and researchers felt interested in examining how the form of the resolution of criminal acts through the procession of Bertih Pisang. The researcher hopes that the results of this research will be input for law enforcement officials in completing the case, so that the sanctions imposed are not only useful for the perpetrators, but more importantly useful and beneficial for the recovery of suffering or loss of victims.

## II. RESEARCH METHODS

This type of research is normative-empirical legal research. Data obtained by conducting library research to get the conception of the theory or doctrine and materials of legislation and scientific work related to the problem under study. And

field research is carried out to get an explanation of the implementation of conflict resolution that occurs in the community through customary law known as "Bertih Pisang".

Sources of data in conducting library research:

- Primary Legal Material: 1945 Constitution of the Unitary Republic of Indonesia, "KUHP".
- Secondary Legal Materials: Journals and scientific works from legal experts relating to research issues.
- Tertiary Legal Material: legal dictionary.
- The field research collection technique was carried out by conducting interviews with the "Chairman Lembaga Adat Melayu Riau (LAM)".

The analysis used in this research is content analysis which is an analysis carried out by making an objective, systematic assessment and conducting a special identification of the contents of documents or legal material and the results of interviews obtained from informants, while the analytical thinking technique uses deductive thinking techniques, inductive and comparative.

### III. RESULTS AND DISCUSSION

As a rule of law, the Indonesian Constitution guarantees that access to justice is a human right that must be respected and guaranteed to be fulfilled, every citizen has the right to receive remedies for violations of the rights he suffers and the state must provide protection and fulfilment of these rights. But in reality there are still limited capabilities of state institutions in providing quick access to justice for the community. The geographical condition of Indonesia, which is an archipelagic country, causes that there are some areas that are far from access to formal justice, the cost of attaining formal justice is expensive, the limited reach of police services often becomes a barrier for poor and marginal communities to resolve conflicts encountered through formal institutions [2].

In addition to the problem of limited ability of formal institutions to provide access to justice for the community, positive law in Indonesia also has limitations to be a source of resolving conflicts that occur in the community, there are several conflicts that often occur in traditional society, but are not regulated in positive law. Thus, thinking is needed to look

for other alternatives in efforts to resolve conflicts in the community. One such idea is the strengthening of informal justice, for example by applying customary law.

The existence of this customary law is also recognized by the State. Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, namely the State, recognizes and respects the customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, regulated in Constitution. Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that cultural identity and traditional community rights are respected in accordance with the times and civilizations. Article 32 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that the State promotes Indonesian national culture in the midst of world civilization by ensuring the freedom of the people in maintaining and developing their cultural values. (The 1945 Constitution of the Unitary State of the Republic of Indonesia).

The three legal grounds emphasize that the constitution stipulates customary law as a community right and is guaranteed by the constitution. The constitution provides room for customary law in contributing to bring order to the customary community. The legal basis puts the position of customary law into a very central position when solving problems in society. Recognition and respect for indigenous peoples shows the awareness that there are still Indonesian people who lead a unique life, conditions with positive values, norms, and customs, but with very poor conditions [3].

Riau is one of the regions in Indonesia which until now still applies customary law in daily life, even in resolving conflicts that occur in society. Customary law was chosen as the legal basis in resolving criminal acts and because customary law is not contrary to the will of the community. In accordance with what was said by Eugen Erlich, that good law is a living law and in accordance with public awareness [4].

Efforts to resolve criminal acts according to Riau Malay customary law are known as "Bertih Pisang". Conflicts and forms of decisions / resolutions that are often carried out through the Malay customary law mechanism can be seen in the following table: (Interview results with "Ketua Lembaga Adat Melayu Riau (LAM)).

TABLE I. TINDAK CRIMINAL ACTS AND SETTLEMENT EFFORTS ACCORDING TO THE "BERTIH PISANG" MECHANISM

No	Type of Crime	Form of sanctions
1	Persecution	Victim's medical expenses
2	Fighting / Beating	Criminals / families are required to pay medical expenses to victims
3	Destruction of Goods	Criminals / families are required to pay compensation for goods that have been damaged
4	Domestic violence	Adapted to the form of violence and the consequences and causes of domestic violence
5	Traffic accident	Pay medical expenses / funeral costs (provided that both parties involved in the accident are natives) If the parties involved in the accident are not indigenous, then the remedy is left to the police.
6	Crime of theft	Adjusted for the nominal / value of the stolen item, background / cause of theft, the form of punishment can be: • Hair shaved / shaved • Carrying stolen goods and paraded around the market • Customary fines in the form of one goat • Returns the value of the stolen item • Be under the supervision of a traditional figure for a certain period of time.

Table 1. Cont.

No	Type of Crime	Form of sanctions
7	Has cattle that damage other people's gardens and yards	Pay the fine according to the loss suffered by the victim
8	Adultery is divided into three categories: 1. Adultery committed by a person who is not married ("single") 2. Adultery committed by people who are married  3. Acting together in a lonely place	Inviting to eat people in the village to apologize and get married.  Evicted from the village This is done because the perpetrator is considered not only to harm his good name, but also involves the name of the alliance or his hometown. With the imposition of sanctions expelled from the village so that the relative of the perpetrator or his hometown is free from disgrace, and his hope after being monitored the perpetrator can repent, able to change himself be a good person.  Inviting to eat people in the village to apologize

Based on the table above it can be seen that the application of Malay 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 and to the surrounding environment.

Consequently, the process of resolving each case through 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 also useful for the recovery of the suffering or loss of victims and the wider community. Through the "Banana Flame Procession" the sanctions imposed on perpetrators sentenced more fines, Becker and Posner argued that fines have several advantages compared to imprisonment [5]. The use of criminal fines can

avoid social costs to maintain prisons, avoid unnecessary detention and avoid wasting useless human capital in prisons [6].

In contrast to the completion of criminal acts through formal justice and using positive law, it has weaknesses because the orientation in punishment is more focused on the perpetrators (Offender oriented) so that the suffering or loss of the victim is ignored, besides the procedure of resolving criminal acts through criminal law that has so far not been possible victims to participate actively determine how the conflict will be resolved. Even the attitudes and actions of law enforcement officers often actually cause other suffering for victims. Through table 2 below, it will be seen what if the crime in table 1 is resolved through formal justice using positive law.

TABLE II. CRIMINAL ACT AND SETTLEMENT EFFORTS THROUGH FORMAL JUSTICE MECHANISMS

No	Type of Crime	Type of sanction according to positive law
1	Persecution	maximum imprisonment of 2 years and 8 months and a fine ("Pasal 351 KUHP")
2	Fighting / Beating	Imprisonmen
3	Destruction of Good	maximum imprisonment of 2 years and 8 months and a fine ("Pasal 406 KUHP")
4	Domestic violence	Imprisonment ("Undang-undang No. 23/2004 tentang Penghapusan kekerasan dalam Rumah Tangga")
5	Traffic accident	Imprisonment and fine ("Undang-undang Nomor 22 Tahun 2009 Tentang Lalu Lintas Dan angkutan Jalan yang diatur dalam Pasal 310 dan Pasal 311)
6	Crime of theft	Imprisonment ("Pasal 362-365 KUHP)
7	Has cattle that damage other people's gardens and yards	Not punished
8	Adultery is divided into three categories: 1. Adultery committed by a person who is not married ("single")  2. Adultery committed by people who are married  3. Acting together in a lonely place	Not punished  Can be punished if a Legal Partner (wife / husband complains to law enforcement) because this is a complaint offense (Pasal 284 KUHP)  Not punished

From table 2 above, it can be seen that a crime is defined as an act that violates the legal rules established by the state to maintain order, peace and security of social life. So that criminal sanctions further highlight the suffering that must be

borne by the offender in retaliation for his evil deeds towards the victim, so that the victim's suffering is compensated by the

threat of criminal sanctions that can be imposed on the offender.

#### IV. CONCLUSION

Settlement of criminal acts through banana flies or through customary law is felt to be fair by the community, because in addition to the quick process it also does not cause resentment among the parties to the conflict, because in resolving criminal acts always put forward a sense of kinship and the principle of peace. Thus, the government apparatus in the regions should immediately prepare to re-use alternative models in mediating the penalties in line with the values that live in the local community.

#### REFERENCES

- [1] B. Suhariyanto, "Problema Penyerapan Adat Oleh Pengadilan dan Pengaruhnya bagi Pembaruan hukum Pidana Nasional," *Mimbar Hukum*, vol. 30, no. 3, 2018.
- [2] M. Junef, "Penerapan Sanksi Adat Kepada perusahaan dan Pihak lain dalam peradilan Adat," *E-journal Widya Yustisia*, vol. I, no. 2, 2015.
- [3] W. Wandu, "Eksistensi Pengakuan Hukum Adat dalam Politik Pembangunan Hukum Pemerintahan Daerah di Indonesia," *Jurnal Mahkamah*, vol. 5, no. 1, 2013.
- [4] A. Safrijal, "Penerapan Sanksi Adat dalam penyelesaian Perkara Pidana," *Kanun Jurnal Ilmu Hukum*, no. 59, 2013.
- [5] J. Waldfogel, "Are Fines and Prison Terms Used Efficiently? Evidence on Federal Fraud Offenders," *Journal of Law and Economics*, vol. 35, 1995.
- [6] S.D. Levitt, "Incentive Compatibility Constraints as an Explanation for the Use of Prison Sentences Instead of Fines," *International Review of Law and Economics*, vol. 17, 1997.