



Breakthrough Strategy in Implementation of Adat Law over Resolution to Cohabitation as Crime in Indonesia according to Restorative Justice Theory

Hoiruddin Hasibuan

Faculty of Law, Universitas Wisnuwardhana, Indonesia

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Abstract

Research on adat law aimed to resolve criminal cohabitation is deemed legal breakthrough outside national legal system in Indonesia. Adat law is intangible, where it is owned by every tribe in Indonesia. This research is aimed to describe how adat law can serve as an instrument to handle the case of cohabitation (Javanese term: kumpul kebo). The concept of diversion and restorative justice is an alternative resolution, intended for informal resolution where all related parties are involved in the offense. In terms of case of cohabitation, the case is settled under kinship spirit and humanity. This legal settlement is intended to protect related parties from harming potential and is performed by involving victims, members of public, and perpetrators, all aimed for improvement and reconciliation among parties involved in the criminal offense.

Keywords: *Adat Law; Restorative Justice; Cohabitation; Indonesia*

Introduction

Adat law holds values and is strongly rooted into Indonesian culture. This law has been growing and developing even before this country gained its independence. Essentially, *adat* law is embedded to the spirit and social behaviour of the members of public in Indonesia, either the spirit to regulate the procedure for settling criminal case or norms in legal relationship (Maladi, 2011, p. 426). In fact, behaviour and legal relationship is different from the procedure required to settle disputes according to state law.

In line with the principle of European law, *adat* law divides law into both public and private law, where the former involves public interest, while the latter regulates relationship among members of public. However, *adat* law does not pick things based on interest and who stands for the interest concerned. Furthermore, *adat* law leaves no much concern over public interest and special interest.

Adat law recognises *adat* sanctions applying to all people committing a crime or violating rules and norms, contravening public interest. Principally, criminal offenses are deemed inappropriate and contravening public interest. The following are factors triggering offenses (Syukur, 2012, p. 15-16):

1. According to the basis how offenses take place.

Crime is a social and humanity-related issue with complex contributing factors, where they are beyond the reach of criminal law. Incapability of criminal law to analyse the causes of crime indicates that it needs a hand from another discipline. Therefore, in terms of the discussion of crime prevention, criminal law is integrated with social approach.

2. Limited function of criminal law

The limitedness of criminal law is obvious from the principles in how the criminal law functions. Implementation of criminal law is short term, where it only resolves accompanying symptoms, not the main causes. In other words, criminal law does not work as preventive action before an offense takes place. When this is the case, criminal law is incapable of reaching the main cause of the crime in the society.

As an alternative breakthrough, people of *adat* law normally settle disputes in kinship way, and this mediation outside a court is considered dispute settlement in a more peaceful way, where the involvement of the third parties like *adat* head, religious head, and other significant figures are needed (Ubbe, 2013). Therefore, *adat* law is an aspect existing among societies and culture of Indonesia and they have represented the essence of life, way of life, and perspective of the societies of Indonesia trapped in western way of thinking that leads to legal system with such an idea (Jayus, 2012, p. 205).

Adat law in Indonesia as a room to accommodate what comes from all *adat* judicial bodies also has a concept described as the root of restorative justice. The characteristics of *adat* law in every region generally support the implementation of restorative justice. It is obvious from general *adat* characteristics in Indonesia, a perspective towards violation of *adat* rules/ *adat* offenses, a model, and the way of case settlement offered.

One of cases that has been in debate concerning the implementation of criminal law in Indonesia is cohabitation. Based on *Kamus Besar Bahasa Indonesia* (KBBI), cohabitation is defined as living with a partner under one roof without marriage. A Black's Law Dictionary defines cohabitation as living together as husband and wife (Garner, 2004, p. 783-784.). Furthermore, cohabitation or known as *la cohabitation* in French, is politically defined in *Le Nouveau Petit Robert* dictionary¹, where infinitively, *cohabiter* comes from two words *co* (together) and *habiter* (live). In other words, *cohabiter* is defined as living or staying together.

The practice of cohabitation is indicated by living together as if husband and wife without any marital ties, and this trend seems to grow among societies. In certain cultures, this is seen as violation of law, but national law in Indonesia does not impose strong sanction, or it is commonly called as notorious cohabitation. In Indonesia, living together without any marital status, in Javanese term, is known as '*kumpul kebo*'. In a simple way, as described earlier, this term is defined as living under one roof with a partner without any marital status, and this term is compared to the life of buffalos (*kebo*) living under one stall.

To some people, cohabitation is understood as a negative behaviour since the life of the unmarried partners under one roof is closely linked to free sex outside marriage, while such a biological need must only be given under marital status. So, what becomes the concern in cohabitation is mainly the free sex outside marriage.

In Indonesia, cohabitation is regulated in the draft of Criminal Code that stipulates this crime in Article 488:

¹ *Le Nouveau Petit Robert* or commonly abbreviated as *Le Petit Robert* is French Dictionary frequently updated with new lexical resources

Every person who lives together with his/her partner as if they were husband and wife without any legal marriage, is punishable by up to one year's imprisonment or is subject to paying fine for as much as category II.

Explanation of Article 488: this provision, by members of public, is known as "*kumpul kebo*".

Prior to the stipulation in the draft of Criminal Code of 2012, this provision was previously regulated in Article 485 of the draft of Criminal Code of 1999/2000 stating:

Every person who lives together with his/her partner as if they were husband and wife without any legal marriage is punishable by up to one year's imprisonment or is subject to fine for as much as category II (at least IDR. 30 millions)

The concept of the draft of Criminal Code of 2012 is principally aimed to reduce the potential of cohabitation based on the concept of the draft of Criminal Code 1999/2000. In the draft, it is stated in Article 422 as follows:

- 1) Every person who lives together with his/her partner as if they were husband and wife without any legal marriage is punishable by up to one year's imprisonment or is subject to fine for as much as category II (at least IDR. 30 millions)
- 2) There is no charge against Criminal offense regulated in Paragraph (1) unless complaint is submitted by a member of family of the offender up to the third category, *adat* head, village head, or local village head.

Indonesia has diverse moral culture concerning the practice of cohabitation, making it harder to set benchmark and scope. Bali, Minahasa, and Mentawai are three regions in Indonesia allowing the practice of cohabitation, while the rest majorly go against the practice (Eddyono, 2016).

The government is in progress formulating the punishment for cohabitation. The concept of the draft of Criminal Code of 2015 attempts to extract the essence of the regulation over the same case in several countries. In Canada and Malaysia, for example, the governments of the two countries have revoked complaint offense concerning cohabitation and have replaced this offense with formal delict. Those countries define the concept of "cohabitation" as a limited offense when it takes a child, a woman believing that she is legally married to the man she lives with, or active military member as a victim (Eddyono, 2016).

In Indonesia, the significant implication is not concerning the unmarried couple but concerning those whose marriage is not registered in both *adat* legal system and the provision of state administration, recalling that there are many not legally married and this situation accidentally leads them to such a criminal offense of cohabitation.

Cohabitation is an inappropriate deed not regulated in Criminal Code and this could spark adultery. The imposition of sanction on the criminals is intended to deter someone from repeating the offense. Therefore, social approach needs to be taken into account in addition to the existing criminal sanction. Penal procedure taken to prevent the offense also involves the functioning role of law enforcers in criminal judicial system comprising police, attorneys, courts, and departments of corrections. Settling a case through penal policy is more focused on repressive action after an offense takes place, while non-penal policy is more intended for preventive purpose before an offense takes place (Adi, 2014, p. 93).

Non-penal procedure is given by raising religious values, and other forms of workshop for competent figures in society or other positively encouraging activities. In other words, case handling not only refers to penal policy, but also refers to non-penal.

G. Peiter Hoefnagels argues that prevention of criminal offenses can be performed with the following (Arief, 2010, p. 2):

1. criminal law application
2. prevention without punishment
3. influencing views of society on crime and punishment on mass media.

Approach to this prevention should be integrally performed recalling that criminal offenses are issues involving both humans and their social life. An approach only taken based on the application of criminal law is not deemed sufficiently appropriate, since criminal law comes with drawbacks. In reference to this issue, this research is aimed to initiate legal breakthrough, where this initiation is intended to put *adat* law into implementation for settling the case of cohabitation based on the theory of restorative justice.

Research Method

This study is categorised into normative legal research with philosophical, statute, and case approaches.

Results and Discussion

Understanding Restorative Justice

Restorative justice is a form of conflict resolution not only judging and punishing offenders with retaliation, but it is intended more for the recovery of the condition of the victim, offender, and the family of the victim and offender or other members of public concerned (Zeh & Gohar, 2003, p. 21). This justice, on one hand, explains that the offense committed is not acceptable by law. On the other hand, it is aimed to protect and respect basic individual rights (Crawford, 2010, p. 19).

The resolution taking place outside criminal justice system where the victim, offender, the family of both, and other people concerned are involved to come to an agreement and resolution (Rosenberg & Galt, 2013, p. 2321). Restorative justice is a new paradigm in seeing crime.

The implementation of the concept of restorative justice has given opportunities to people to actively take part in restoring criminal cases (Gabbay, 2005, p. 355). This concept has one framework of thinking in attempting to search for the best alternative of settling criminal cases committed by *adat* people without any intention to impose any criminal punishment in order to raise justice for humanity, but mediation is given as part of individual rights.

In terms of restorative justice, the role and involvement of the members of public are essential to help fix inappropriateness in the society concerned. Resolution by means of restorative justice is intended to deliver recovery especially for the related parties disadvantaged by the crime and to give rewards and respect to the victim. Such a respect requires the criminal to be recovered from the crime committed, where the recovery could involve compensation, voluntary work, and particular activities required according to shared agreement approved by all parties concerned (Gabbay, 2005, p. 355).

This concept is aimed to seek for justice and resolution through the model of traditional justice, leading to punishment intended to encourage community justice with which recovery is attempted, as suggested by Griffiths and Hamilton (1996), Stuart (1995), and Barajas (1995) that restorative justice is a form of justice attempted by members of public for community (Syukur, 2012, p. 24). This concept implementation gives a greater chance to victims regarding the loss they have to bear, either material or moral loss due to the crime committed. This concept also gives equally greater chance to the offender since they have their room to express triggering causes why one commits a crime causing loss to the victims.

Implementing *Adat* Law as Restorative Justice for Offenders of Cohabitation

Adat criminal law is a living law, frequently followed and obeyed by *adat* people through generations (Pujiyono, 2011, p. 150). Violation of rules is seen to be able to raise conflict in a society and to interrupt cosmic balance in the society. Therefore, it is seen appropriate when an offender is treated with *adat* rule, *adat* correction, or *adat* sanction imposed by members of community through a person having prominent position in a village.

Definition of *adat* criminal law has the three following principles (Widnyana, 1993, p. 3):

1. A set of regulation governs public order made, followed, and obeyed by *adat* people concerned.
2. Violation of rules of public order can raise conflict since it can interrupt cosmic balance. Such violation of rules is deemed *adat* offense.
3. An offender violating the rules is subject to sanction imposed by people concerned.

Adat is an unwritten norm, but it is binding for its people, causing severe effects to those failing to abide by it since a severe sanction can indirectly be imposed. For example, divorce will not only impact the couple in dispute, but the family members will also be subject to sanction, even the members of the community. *Adat* is a rule, custom that grows and forms from a society or a region that has values raised high and obeyed by its people. Rules stemming from accepted custom of a community have turned to *adat* law. *Adat* is fossilised in the life of the society either in the form of tradition, traditional ceremony, or other forms that are able to control the behaviour of community members that reflect both happiness and pride, and the role of *adat* figures as part of *adat* community becomes fairly important (Bushar, 2006).

Cohabitation is no longer uncommon in Indonesia. Regulation concerning sanction imposition on the offenders is not governed in Criminal Code as the basis based on which the people of Indonesia should behave at social and national level. This, in turn, leads to a social issue.

Cohabitation is inappropriate and it is left unregulated in Criminal Code, and this issue could accidentally legalise adultery. This perspective is supported by the existence of the legality suggesting that a deed cannot be said illicit as long as no provision bans it. In other words, the people concerned have their right to do things as they like or to leave them (*nullum delictum nulla poena sine praevia lege poenali*) (Hairi, 2019, p. 3).

Criminal Code governs adultery, but the scope of the regulation is only limited to married couple committing adultery with others not as their husband or wife. Therefore, this offense is restricted to married couples (Hairi, 2019, p. 3).

In extensive interpretation, cohabitation can be categorised as adultery, since it is seen inappropriate or against the applying norm. This issue is also governed in Islamic law that categorises adultery into two types: (1) adultery committed by a married man/woman with another person outside

their marital ties; and (2) adultery committed by unmarried man/woman with another (Djamali, 2002, p. 199). The second type suggests that cohabitation is a form of adultery, and this situation requires a law to govern the issue.

This concept of *adat* law is significantly different from the definition of criminal offense within the scope of criminal law. Based on the definition, the characteristics of violation of *adat* law can be given as follows (Zulfa & Adji, 2011, p. 69-70):

a. Comprehensive and integrated

Comprehensiveness and integrity exist due to cosmic condition, where one is connected to another, or one is inextricable from another. There is no boundary between a criminal offense and civil violation, and between violation of religion and moral violation, neither is there any boundary for the judicial system. All occur in the scope of cases that hold similar perspective of religion, morality, criminal offenses or civil violation

b. Open

The provision of *adat* violation is intended to maintain justice according the awareness of people based on time, place, and condition. Tradition of applying *adat* law is aimed to resolve *adat* cases, but the resolution is open. With the development of the community, provisions concerning resolution to *adat* law keep growing through absolute deliberation.

c. Different issues

Resolution to *adat* conflict cannot only be viewed from the offense and the impact caused, but there should be more to consider the motive and the offender. Due to this perspective, the resolution and legal measures taken can be different from one case to another.

d. Judicial System and Demand

Investigation taking place in the violation of *adat* law is based on the presence/absence of complaint submitted by the party harmed or treated unjustly.

e. Reaction and Corrections

In terms of *adat* reaction, legal apparatus can take measures to settle disputes and criminal offenses not only for the offenders, but the family members of offenders and other people concerned can also be responsible for the impact caused. Moreover, the resolution in *adat* perspective also requires the recovery of cosmic balance by performing *adat* ceremonies and other activities.

It is common for social conflict to take place within *adat* community due to violation of *adat* rules by a person or a group of community members. However, the conflict will recover when reaction in the form of sanction is given and taken by the violator. Bushar Muhammad defines an *adat* offense as a deed unilaterally committed by a person or a group that also involves threat or conflict that interrupts the harmony of the community either in material or immaterial way (Widnyana, 1993, p. 5).

According to *adat* law, all offenses against *adat* rules are considered illegal and *adat* law recognises endeavours aimed to fix law (*rechtsherstel*) when the law is violated (Setiady, 2008, p. 346). All forms violation of *adat* law are commonly called as ‘*adat* offenses’ (*adat delicts*). In terms of this issue, Ter Haar argues that an offense (*delict*) is defined as any interruption of one-sided regulation (*eenzijdig*) against disharmony and clash with the one-sided regulation embedded on the materials owned by an individual or a group of people. This offense triggers a reaction that has to recover through compensation of materials or amount of money that has to be paid for the violation caused (Widnyana, 1993, p. 5).

Based on what Ter Haar has suggested, the disharmony in the society not only affects tangible objects, but it also influences intangible ones. This is because *adat* law communities cling on to communal realm and strong supernatural religion. Such a condition sees the life as a homogenous unity

where humans are central. Humans are part of Mother Nature (macro cosmos), inseparable from the Almighty God as their creator and they are integrated with their environment. All this connection is influential among the elements and deserves to be maintained. When the harmony is interrupted, recovery should come as a rescue.

From the above perspective, it can be said that adat offenses (delict) comprise all conducts or occurrences contravening compliance, communion, security, justice, and awareness of the people concerned, either due to the conduct performed by an individual, by a group, or conduct performed by the persons in charge of the adat system, the conduct that is seen as the trigger of interruption affecting the cosmic harmony and of reaction coming from the people in the form of adat sanctions.

For example, to face offenses, dispute resolution of Bajo community is reached through kinship system where the value of humanity is upheld, recalling that humans are equal before God. This way is aimed to not cause any loss for certain parties (Kaluku, 2014, p. 104).

To determine adat delict requires the principle of legality as mentioned by the system of Criminal Code that requires the presence of a law that governs the offense as a prohibited conduct and the law as a rule followed by the members of community. An Adat offense (delict) appears when there is a prohibition over a conduct deemed inappropriate and immoral by the members of community since this violation can lead to the interruption of cosmic balance and trigger clash in the society.

Emile Durkhem suggests that social reaction given as a punishment or sanction is required, since it is intended to maintain indigenous values from any interruption to encourage the harmony of the community. Traditional way of thinking is considered cosmic, where creating a good harmony between the real world and supernatural (Widnyana, 1993, p. 8). Therefore, adat sanction is aimed to facilitate the recovery of the harmony between the two worlds.

This practice that triggers adat reaction is believed to be able to recover the interrupted harmony through many ways like paying it with some materials, amount of money, religious ritual, slaughter of big or small animals, and so forth (Muhamad, 2013, p. 61-62). Normally, in the circle of adat people, finding out when an adat offense takes place and what elements are involved is not easy since it depends on representations collectives or the realm of mind within the members of community. This is seen as the integration of values existing in society, which is participative and analytical (*partisiperend en analiserend*).

Soepomo argues there is no system called *prae-existente* rebels in adat law, meaning that adat law does not recognise any violations or offenses previously agreed, while those violations and offenses are the basis according to which punishment or retaliation aimed to bring back harmony is imposed (Muhamad, 2013, p. 62). No articles like in Criminal Code are referred to by adat law, but the articles are replaced by the whole tradition of the community and its devotion. All the layers of the community serve as an opened book that governs what is prohibited and what is legalised. Ter Haar adds that the reasons behind interruption of harmony and the recovery of the harmony are mostly determined by an element that is personal commonly known as 'feeling of embarrassment or 'feeling offended' that can extend to feeling bad, anger, revenge from the party harmed to the another person harming, and all these elements may come from negligence or intention from other parties.

Conflict, gap, and hatred between two people can weaken the society of law or community. Therefore, good relationship has to be recovered, so does revenge for the public interests. Those feeling offended must be paid with compensation. From this, it can be seen that personal and shared motive of the members of community or alliance are integrated into one.

With the absence of *prae-existente regels* as mentioned earlier and the integration of motives, the community serves as a touchstone concerning what is and is not allowed. Each measure or situation that is irrelevant to or that interrupts the security of the people, of certain groups, of families, or of members of public can be seen as an offense which is previously not seen as adat delict in the society. When this is the case, adat reaction needs to be delivered to recover the harmony of the community.

The concept of adat law as a room from adat-based judicial institutions can also be described as the root of restorative justice. The characteristics of adat law in each region are principally supportive to the implementation of restorative justice. This can be seen from general characteristics of adat law against adat offenses/delicts and the models and ways of resolution offered.

Soepomo (2007) describes general characteristics as follows:

- 1) Religious characteristics position adat law as a unity of the soul of the people in an alliance (communal life).
- 2) Communal characteristics from adat law positioning individuals as people connected to their community. An individual has freedom but still restricted to norms applied.
- 3) The aim of communal life is to maintain the harmony among individuals, groups, and their environment (*levemilieu*). This aim is followed by every individual to reach the goal of alliance.
- 4) Intention to maintain the balance embarks on the perspective concerning order in the cosmic system, where the public order is the representative of harmony. Movement and efforts aimed to meet the need of individuals are derived from the cosmic realm.
- 5) Violation of adat law is interpreted as violation of the cosmic line. For all people serving adat law, they necessarily follow the cosmic line. When they fail to comply with this requirement, the individual concerned or other people of the community may suffer since they are out of the line. This condition is deemed violation of adat law.

Discourse on adat judicial system as essential part of the development of philosophy of punishment in restorative justice comes from the idea that restorative justice principally stems from the values living in adat community. Perspective of restorative justice concerning the meaning of offenses is principally similar to the perspective of criminal punishment, where it is seen as an attack against an individual and community and against relationship of members of the community. However, in terms of restorative justice, the main victim of an offense is not a state, like in criminal system. Therefore, a crime triggers the responsibility to fix the broken relationship due to the impact of the offense.

Justice is defined as seeking for resolution to a problem that takes place over a criminal case where the involvement of a victim, a community, and an offender is considered important in the effort of improvement, reconciliation, and guarantee of the continuity of the recovery attempted. In terms of the definition of restorative justice, perspectives towards a crime and criminal are different. This idea is based on the perspective concerning the source of values contained in restorative justice that is principally derived from the values living in adat law.

Restorative justice is deemed a process to resolve issues comprising all related parties without involving policemen as law enforcers.

Principally, resolution of criminal cases that involves an approach of restorative justice is an option that cannot replace conventional judicial system. The presence of conventional judicial system is still required especially when restorative justice works in the way not as expected.

However, handling criminal cases with restorative justice can serve as a frame for the conventional judicial system because basically the process of criminal case handling through restorative justice in adat law is a process aimed to seek for the best form of resolution over disputes occurring in society, either it is performed independently or performed by people or by involving the criminal judicial system (Zulfa & Adji, 2011, p. 76).

Violation of adat law is interpreted as violation of cosmic line of order. Every individual serving adat law necessarily follows the cosmic line. Failing to follow this line will cause an individual or a group to suffer due to the violation of the adat law. Similarly, in terms of resolution in the perspective of adat law, there are no provisions whose application is accompanied by the requirements guaranteeing compliance with the law in the form of force since adat sanction is not equal to criminal sanction (Hadikusuma, 2003).

Principally, people have an important role in guaranteeing the implementation of the process required in criminal case handling through restorative justice, where the main element of the restorative justice involves willingness and participation of a victim, perpetrator, and members of community to recover from the criminal offense. This also contributes to the characteristic of adat law.

Restorative justice is mainly intended to encourage recovery of social relationship in the society, but it is not possible to perform restorative justice when it threatens the security of the members of public, fails to guarantee the protection for the people, interrupts the harmony living in the society due to the crime being settled (Zulfa & Adji, 2011, p. 79). Therefore, people's safety should be mainly taken into account for the best interest of the people themselves. The process should not threaten the safety and should not trigger fear, let alone to threaten the harmony of social connection in the society.

Conclusion

Violation of adat law has its own way of resolution, where the violation is related to the condition of cosmic balance growing in the society, involving any conducts interrupting the peace or conducts against compliance in the society. Justice is defined as a process to resolve a problem over criminal cases that involve victims, people in the society, and perpetrators, and justice is aimed for improvement, reconciliation, and guarantee of the continuity as part of the improvement. The main principle of restorative justice is to resolve problems involving related parties without involving police as law enforcers. Resolution to criminal cases with restorative justice is an option offered but it does not mean that this approach is to replace or reduce the work of conventional judicial system. The presence of criminal judicial system is still deemed necessary especially when restorative justice is not working as expected.

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