The Legal Position of Customary Criminal Sanctions for the Baduy Community in Indonesian Legal Politics

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Submission date: 12-Jan-2022 01:53PM (UTC+0700)
Submission ID: 1740484745
File name: The_Legal_Position_of_Customary_Criminal_2.pdf (2.32M)
Word count: 8050
Character count: 43482

ICOBEST 2020

THE 3rd INTERNATIONAL CONFERENCE ON BUSINESS, ECONOMICS, SOCIAL SCIENCES & HUMANITIES

UNIVERSITAS KOMPUTER INDONESIA
UNIKOM

"New Era, the Trend towards Global Challenge after Covid-19 Pandemic"

PROCEEDING

UNIKOM International Conference on Business, Economic, Social Sciences and Humanities (ICOBEST) 2020

ISBN 978-623-95562-0-4

ISBN 978-623-95562-0-4

International Conference on Business Economics, Social Sciences & Humanities

The Legal Position of Customary Criminal Sanctions for the Baduy Community in Indonesian Legal Politics

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Abstract. Laws that live in society or known as living law are a characteristic of a cultural nation that must be protected by the state, one of which is the application of customary criminal sanctions to the Baduy community which emphasizes settlement through kinship compared to corporal punishment. The emergence of the problem of overcapacity in correctional institutions isone of the indicators that shows that, applying and imposing criminal sanctions is not always effective. This study aims to determine further the position of customary criminal sanctions in the Baduy community which is considered more effective and more optimal without causing much effect in its application. The approach method used in this research is a sociological juridical approach and the research specification uses a descriptive analytical method. Based on the results of the research, it shows that national legal politics is a basic policy in the administration of the State in the field of law and through national legal politics, reform of Indonesian criminal law can be realized by making changes and utilizing the sources of the values prevailing in Indonesian society.

1. Introduction

Law and society cannot be separated from each other, because where there is a society there is law. Talking about the law, talking about mistakes, legal accountability and sanctions that must be enforced for the sake of upholding the law itself. The existence of legal sanctions is very necessary, in Indonesia as a rule of law as mandated in Article 1 paragraph (3) of the 1945 Constitution recognizes the existence of criminal law sanctions, civil legal sanctions and administrative legal sanctions. In criminal law, for example, imprisonment is still a prima donna sanction so that in practice it has many negative impacts compared to positive impacts, although in Article 10 of the Criminal Code it is stated that the punishment consists of the main punishment, death penalty, imprisonment, imprisonment and fines and additional penalties, revocation of rights. -certain rights, confiscation of certain items and announcement of the judge's decision. Therefore it is necessary to carry out a renewal of criminal sanctions by exploring the values that live in society such as the Baduy customary criminal sanctions which are used as a reference through Indonesian legal politics. WhereIn the event of a criminal act in Baduy, Puun as the controller of customary law and who oversees the prevailing order of life in the community, will provide punishment through customary law in force in the indigenous Baduy community where the perpetrator is subject to a waiting sentence of 40 days in a customary detention center and is given advice by Puun[1].

The discussion regarding customary criminal sanctions is not a new topic, previous research has conducted many studies related to customary criminal sanctions, including the following:

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1. Eka Susylawati, University of 17 August 1945 Surabaya in 2009 with the journal title: The Existence of Customary Law in the Legal System in Indonesia;
2. Ukilah Supriatin and Iwan Setiawan, Galuh University, in 2016 with the title: Perceptions of Customary Criminal Law.
3. Aria Zurnetti, Andalas University, in 2015 with the title: Implementation of Customary Criminal Sanctions in Child Criminal Cases.
4. Yudha Dhrama Bandawi, Tarumanegara University, in 2009 with the title: The Process of Theft Crime Settlement in Cikertawana Village According to Baduy Customary Law, Kanekes-Lebak Village, Banten.
5. Jawahir Thontowi, Indonesian Islamic University, in 2013 with the title: Protection and Recognition of Indigenous Peoples and Their Challenges in Indonesian Law.

   The first research discusses the existence of customary law in national law. The second research discusses the development of indigenous peoples and customary law as cultural heritage and as laws that live and develop in Indonesian society. The third research discusses the basis for judges' considerations in implementing customary criminal sanctions in juvenile cases. The fourth research discusses the different concepts between the Western legal system and the customary law system. The fifth research discusses efforts to defend customary law communities and their traditional values. While the research conducted by the author is about the legal position of customary criminal sanctions, especially in Baduy indigenous people in national legal politics.

Based on this, the author's research is different from previous studies, where the research conducted by the author is research that responds to the customary laws that apply in indigenous peoples, in this case the Baduy indigenous people, with problems that occur as a result of the current punishment. Where the authors describe the things that are the basis for the importance of preservation and protection of customary law then the authors relate them to legal theories as well as the constraints and problems of punishment that occur then make a view of the provision of customary criminal sanctions should be made in writing so that legal certainty is achieved and minimizes the occurrence of repeated sanctions given,

This research was conducted with the aim of knowing the position of the criminal law sanctions of the Baduy indigenous people in Indonesian legal politics. In this study the method usedSociological juridical approach and research specifications using descriptive analytical methods. Analytical description is a study that describes, thoroughly finds legal facts and systematically examines secondary data. So that we get a complete concept in bridging the protection and preservation of customary criminal sanctions in national law and implementing them as an effort to achieve legal goals, namely legal certainty, justice and usefulness.

2. Research methods

The approach method used in this study is a sociological juridical approach, namely identifying and conceptualizing law as a real and functional social institution in a real life system.[2]The sociological juridical approach is intended as an explanation and study of the relationship between legal aspects in reality. The research specification uses analytical descriptive method, which is a method that functions to describe or give an overview of the object under study through data or samples that have been collected as they are without analyzing and making general conclusions.[3]

3. Results

Whereas the position of customary law receives juridical protection, but the application of customary criminal sanctions that have so far been in effect has not been written, causing doubts regarding legal

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certainty regarding its application and implementation. When viewed from the politics of Indonesian law, where before the Colonial Nation occupied Indonesia, the Indonesian people had used customary criminal sanctions in resolving legal problems, therefore customary law should be used as a reference in the political law of the application of criminal sanctions in national law as the law that is sought. -cario (ius constituendum) through education from the government to local tribal or customary chiefs so that the sentence imposed can be documented in writing.

4. Research and Discussion

Humans have different backgrounds, therefore in society there are also different kinds of thoughts, wills and behaviors. This is in line with the term conveyed by a famous philosopher, namely Cicero, who said that Ubi Societas Ibi Ius, which means that where there is a society there is law. In addition to acting for and on behalf of himself, humans are also part of society, which is not free from the existence of a legal issue or dispute or conflict resulting from a conflict of two interests. So that in order to maintain order in society, a pattern of prohibitions and / or permits is needed which is known as law, including customs or cultural values that live in indigenous peoples. The law here regulates things that are not good,[4]

Every society has a national legal system, as a reflection of the nation's culture, because law is the nation's mind and grows from legal awareness.[5] Laws are written regulations as well as unwritten regulations.[6] Unwritten regulations are provisions that come from laws that live and develop in society. Meanwhile, customary criminal law is an act that violates the sense of justice and appropriateness that lives in society, causing disorder in society.[7]. Judging from its history, prior to the arrival of the Dutch in 1596, the Indonesian people had used unwritten law or customary law, where the rules of customary law that apply in Indonesia vary widely according to the local customary law community environment. For example, existence Baduy people until now still have their own charm and become the attention of people outside Baduy, both Indonesians themselves and from abroad who are interested and want to visit as tourists. The Baduy community is a traditional society that is unpretentious but has very high local wisdom which has good (positive) values. Baduy people actually have local knowledge and wisdom about plant-based medicine. [8]. The Baduy community is located at the foot of the Kendeng mountains in Kanekes Village, Leuwidamar District, Lebak Rangkasbitung Regency, Banten.[9].

Currently implementing sthe application of criminal sanctions against criminals and the existing criminal system is experiencing major problems that require immediate reconstruction and / or reformulation of the current legal system, where the purpose of punishment itself is social reintegration and can be accepted back by the community and can carry out its role as a member of society . Thus the phenomenon of overcapacity in correctional institutions (Lapas) shows that the implementation of imprisonment is ineffective which implies that inmates in prisons are not well developed. Apart from this, the factors that become obstacles in carrying out coaching for prisoners include the quantity and quality of prison officers, inadequate facilities and infrastructure, coaching programs that are not going well and so on. Therefore, the role of customary institutions in reforming national criminal law as an effort to create a just Ius Constituendum is very important. This is also supported by the existence of legal pluralism that exists in Indonesia, such as the application of customary sanctions to the indigenous Baduy community inside and the indigenous Baduy community who are differentiated so as to create legal effectiveness, the application of qanuns in Aceh, customary law in Bali, customary Dayak law and so on.[10].

On this basis, to understand the legal position of customary criminal sanctions for the Baduy community in Indonesian legal politics, it is necessary to first understand the role of Baduy traditional institutions, Acculturation of Baduy customary law, customary criminal law, customary crimes of the Baduy community, the role of Baduy customary criminal law in reforming criminal law. , the role of the government, the concept of protection of society and the politics of Indonesian law, as well as reform of criminal law which will be described below:

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4.1 The Role of Baduy Customary Institutions

4.1.1 Baduy Customary Institution

Pikukuh Baduy regulates the existing institutions in the Baduy community. The Baduy traditional institution is led by three Pu'un people or tribal chiefs. The three top leaders came from sacred villages in Inner Baduy, namely Cibeo, Cikeusik and Cikertawana. Puun is not allowed to leave the village, on the other hand, tourists who come to Baduy cannot meet Pu'un, meaning that only certain people can meet Pu'un. Apart from Pu'un there is what is called Girang Serat, namely Pu'un's representatives who are in charge of taking care of the agricultural sector, there are also Jaro Tangtu, Jaro Tangtu there are 3 namely Jaro Cibeo, Jaro Cikeusik, Jaro Cikertawana who are in charge of taking care of traditional ceremonies or the implementation of governance in indigenous peoples, There are also Pu'un advisors who are called baresan seven or baresan salapan in Cibeo and Cikeusik villages, which are in Cikertawana village, namely baresan seven or known as the stodgy line who serve as Pu'un's advisors. Tangkesan is an advisor to Jaro, who is tasked with determining the date of traditional ceremonies, there is also called the Jaro Twelve Tanggungan who is in charge of religious matters, karuhun and the responsibility to hold a causeaduy, namely handing over agricultural products to Ibu Gede or the Province by walking, there is also Jaro seven who are responsible and tasked with imposing sanctions on people who commit violations, where the person who commits the violation must be exiled, Jaro Dangka is in charge of managing the village (inner Baduy and outer Baduy). which is located in Cikertawana Village, namely baresan seven or known as the old-fashioned row who served as Pu'un's advisor. Tangkesan is an advisor to Jaro, who is tasked with determining the date of traditional ceremonies, there is also called the Jaro Twelve Tanggungan who is in charge of religious matters, karuhun and the responsibility to hold a causeaduy, namely handing over agricultural products to Ibu Gede or the Province by walking, there is also Jaro seven who are responsible and tasked with imposing sanctions on people who commit violations, where the person who commits the violation must be exiled, Jaro Dangka is in charge of taking care of the village (inner Baduy and outer Baduy). which is located in Cikertawana Village, namely baresan seven or known as the old-fashioned row who served as Pu'un's advisor. Tangkesan is an advisor to Jaro, who is tasked with determining the date of traditional ceremonies, there is also called the Jaro Twelve Tanggungan who is in charge of religious matters, karuhun and the responsibility to hold a causeaduy, namely handing over agricultural products to Ibu Gede or the Province by walking, there is also Jaro seven who are responsible and tasked with imposing sanctions on people who commit violations, where the person who commits the violation must be exiled, Jaro Dangka is in charge of taking care of the village (inner Baduy and outer Baduy).[11].

4.1.2 Acculturation of Baduy Customary Law

The Baduy indigenous people recognize the existence of prohibitions, including prohibitions from receiving formal education, prohibitions in technological activities, prohibitions on the construction of proper community facilities according to the times, prohibitions on using chemicals and so on. In this regard, that the habits they hold and obey are laws that live in the Baduy community.

W. Friedman said that natural law in its various forms as an expression to achieve a higher ideal than positive law. Meanwhile Hans Kelsen stated that there is a dualism between positive law and natural law. It is emphasized that above the imperfect positive law there is a natural law that corresponds to the natural law. In addition, Aquinas said that positive law is against natural law, not law. Based on the experts' understanding, it can be understood that in the formation of a law (positive law) one must pay attention to the values that exist and develop naturally so that the law does not conflict with one another and can be maximally applied.[12]. In this case, the Baduy community has a very big share in maintaining the culture that has existed for a long time.[13].

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4.2 Traditional Criminal Law

Customary criminal law is a living law and will continue to exist as long as there are cultural people.[14]. According to Soenaryati Hartono of the opinion that customary law is actually none other than the original law of our nation, so naturally the national law which was jointly formed must be rooted in customary law. Soenaryati likens customary law to land and national law as the building on it.[15]. In line with this, Ter Haar said that the conception of customary law, if there is an act of violation of the provisions of customary norms, then customary sanctions which are essentially customary reactions, the content is not in the form of torture or suffering (leed) but the most important thing is to restore kosmisch, which disturbed as a result of a violation.[16].

The purpose of customary criminal law is essentially more aimed at maintaining the relationship between citizens, both between the perpetrator and the victim and with the community, so that there is a restoration of balance and peace. This goal is related to case settlement through restorative justice. As stated by John Braitwaite[17]: "... to be restorative justice, it has to be about restoring victims, restoring offenders and restoring communities as a result of the participation of a plurality of stakeholders"

Customary criminal law comes from the Dutch term, adat delecten recht. Customary criminal law, namely the law of life, is followed and adhered to by indigenous peoples on an ongoing basis from one generation to the next, where violations of these rules of order are considered to cause shocks in society because they are considered to disturb the cosmic balance of society.[18].

4.2.2 Baduy Indigenous Crimes

In the Baduy community there are known serious and minor offenses, in contrast to the national criminal law there are criminal qualifications and violations. As for the criminal acts regulated in the Baduy criminal law, namely (1) The criminal act of defamation or slander which is resolved amicably for defamation of ordinary Baduy residents, but if defamation is directed at customary officials, it is resolved according to custom. (2) The crime of adultery committed by an unmarried spouse will be married off, except for the offender who is married will be detained in a detention center for 40 days and expelled from Inner Baduy, if it is committed by a blood relationship then the sentence will be tied the sea. (3) The criminal act of rape is given a sanction of marriage if the victim wants it and if it is not desired then is expelled from Inner Baduy. (4) The criminal act of theft is given the sanction of compensating the victim and mutual forgiveness, if the perpetrator has died then the compensation is handed over to his family. (5) The criminal act of fraud is sanctioned by paying compensation, if the perpetrator is unable to transfer the responsibility to his family, (6) The criminal act of persecution is resolved by mutual forgiveness, unless serious abuse is resolved according to custom, (7) The crime of murder is sanctioned. repentance for 40 times, carry out the delivery of pati and be expelled from the inner Baduy. (8) The crime of witchcraft is sanctioned by being tied up and thrown into the sea.[19].

Based on this, it can be seen that customary criminal sanctions prioritize the principle of kinship in the settlement of criminal acts, the application of fines or compensation and exile in customary detention centers for 40 days with advice or advice and the heaviest tied and then thrown into the sea. When compared with the types of punishment in the Criminal Code Article 10, which consists of basic crimes, including death penalty, imprisonment, imprisonment, fines and imprisonment. In addition, there are additional penalties, among others, in the form of confiscation of certain goods, revocation of certain rights and announcement of a judge's decision. Meanwhile, in Article 71 of Law no. 11 of 2012 concerning the Juvenile Justice System, the principal and additional crimes apply. The main crimes consist of: (1) warning crimes, (2) crimes with the following conditions: a) development outside the institution, b) community service, c) supervision, (3) job training, (4) guidance within the institution, (5) prison. As well as additional penalties consist of (1) confiscation of profits obtained from criminal acts and (2) fulfillment of customary

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obligations. Meanwhile in the RKUHP 2019 the types of criminal sanctions are regulated in Article 64 to Article 67, namely penalties consisting of (1) main crimes, including: (a) imprisonment, (b) closure, (c) supervision, (d) criminal fines, (e) social work punishment. (2) additional penalties consist of: (a) revocation of certain rights, (b) confiscation of certain goods and / or claims, (c) announcement of a judge's decision, (d) payment of compensation, (e) revocation of certain licenses, (f) fulfillment of local customary obligations.

Customary settlement when paired with the national legal system is the same as settlement through restorative justice, namely through mediation which is an effort to resolve disputes of the parties by mutual agreement through a neutral mediator with an atmosphere of openness, honesty and exchange of opinions to reach consensus. In addition, compensation is carried out by involving the participation of victims and the community, in which the party has a role and responsibility in restorative justice.[20].

4.2.3 The Role of Baduy Customary Criminal Law in Criminal Law Reform

Customary law (customary law) aims to create social balance and harmony, interests between human groups and individuals, between associations (groups) and the wider community which is the basis of the traditional thinking of the Indonesian people.[21]. This is because the ideal national law is a responsive national law.[22]. The existence of indigenous peoples is recognized, respected and protected by the State of Indonesia through statutory regulations. The basis for the enforcement of the role of customary law, namely Article 18 B paragraph (2) of the 1945 Constitution which reads that the State recognizes and respects indigenous peoples 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 which are regulated in law. -invited.[23]In addition, the basis for the application of customary law, namely Article 28 I paragraph (3) of the 1945 Constitution which explains the cultural identity and traditional society as part of human rights, Article 32 paragraph (1) and (2) of the 1945 Constitution which explains the traditional natural resource patterns become local wisdom for the community in managing the environment. MPR Decree No. XVII / MPR / 1998 concerning Human Rights, which states that traditional community culture is protected in line with the times, MPR Decree No. IV / MPR / 1999 regarding GBHN 1999-2004 which states that land use is fair, transparent and productive by prioritizing the rights of local people including the rights of customary communities and customary communities, MPR Decree No. IX / MPR / 2001 concerning Agrarian Reform and Natural Resource Management which states that it recognizes,natural resources / agrarian, Drt Law No. 1 of 1951 concerning Temporary Measures to Organize the Composition, Power and Procedure of Civil Courts, Article 2 paragraph (4) of Law No. 5 of 1960 concerning Basic Agrarian Principles which states that the right to control the state above its implementation can be empowered to the Head of the Self-reliant Region and the customary law community, Law No. 5 of 1990 concerning the Conservation of Living Natural Resources and their Ecosystems, explains the traditional regulatory policies related to genetic resources, Law No. 10 of 1992 concerning Population and Prosperous Families which states that from the point of view of statutory regulations there is a strong position for indigenous / tribal people or groups with a unique life to defend their lives, Law No. 26 of 2007 concerning Spatial Planning which states that the implementation of spatial planning still respects indigenous peoples, Law No. 45 of 2009 concerning Fisheries which states that fisheries management for the benefit of fishing and fish cultivation must consider customary law, Article 50 paragraph (1) of Law No. 8 of 2009 concerning Judicial Power, Law no. 39 of 1999 concerning Human Rights which explains the importance of the fulfillment of indigenous peoples that must be considered and protected by law, society and government, Law no. 41 of 1999 concerning Forestry, which explains that control of forests by the state still takes into account the rights of indigenous peoples as long as it does not conflict with national interests, Law No. 18 of 2004 concerning Plantation states that entrepreneurs who apply for rights to territories must conduct

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deliberations with customary law communities who hold customary rights where indigenous peoples' rights get compensation if their area is converted into plantations, Law Number 6 of 2014 concerning Villages which recognizes rights the rights of indigenous peoples, Law no. 23 of 2014 concerning Regional Government which explains that the rules regarding indigenous peoples are submitted to the Government at various levels for various matters, MA Jurisprudence Number 1644K / Pid / 1988 dated May 15, 1991 where perpetrators who have been subject to customary reactions or customary penalties cannot be re-filed as a defendant in court,[24].

4.2.4 Role of Government

The state as the holder of the highest authority in the administration of the life order of its people must make the best of efforts to fulfill the constitutional rights of its citizens, including the constitutional rights of indigenous peoples. The fulfillment of the constitutional rights of citizens is a reflection of the ideals of a rule of law, including the process of making laws.[25]. The basis of the Republic of Indonesia for the application of criminal sanctions against perpetrators of criminal acts, namely criminal law which is written law, besides that there is also unwritten law that lives in the community such as punishment for paying compensation and being exiled for 40 days which applies in the Baduy community. To provide more legal certainty for the community, it is necessary for the government to accommodate customary law that lives in the community to be included in national law, this is in line with Barda Nawawi's thought which states that there is a need for harmonization, synchronization, consistency between reform of national law and the socio-cultural values in the Public.[26] The unclear recognition of customary courts in statutory regulations results in their existence and implementation creating doubts over their validity.[27]. The state has the duty of the constitution to recognize and respect the unity of indigenous peoples and their traditional rights through the delegation of authority from the central government in the form of attribution, delegation and mandate to regional governments.[28]Related to this, Jimly Asshiddiqie emphasized that the existence of customary law communities can be considered very important. Therefore, in increasing their empowerment, it is important to conduct a national inventory. Although the Regional Government has regulated that the determination of customary law communities is carried out by the Regional Government.[29]. Therefore, it is important for the Government to intervene in adopting positive values that live in indigenous peoples, such as in the application of customary criminal sanctions to the national criminal law in the form of criminal law reform because the current application of criminal sanctions has negative impacts such as the overcapacity of prisoners. in prisons, community labeling of ex-convicts, ex-convicts has difficulty participating in national development by being responsible for society and family, less optimal guidance in prisons and so on. In addition to the importance of the application of restorative justice in solving criminal acts in society, It is also important to apply customary criminal sanctions to the national criminal system and its imposition does not have to be through a court decision, but rather by the local customary leader. Therefore, the Police as the front line dealing directly with the community, either through reports and / or complaints, must ascertain whether the perpetrator has received customary sanctions or not, if the settlement efforts have not been made through restorative justice first. However, the application of customary sanctions must be in writing so that it can be used as a reference and / or legal certainty for the community. Therefore, the government's participation is needed in synergizing the application of criminal sanctions through education from the government to customary leaders related to the imposition of customary crimes that can be documented in writing, to support the Supreme Court ruling No. 1644K / Pid / 1988 dated 15 May 1991 which states that perpetrators who have been subjected to customary reactions or customary penalties cannot be brought back as defendants in court. Thus the legal position of the customary criminal sanctions of the Baduy community has a role in determining the direction of legal policy as the idealized law (ius constituendum), namely the law that is aspired to in the social life of the state. Based on this the importance of written and / or document administration and legality from the local

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Regional Government and / or the Central Government (Kemenkumham) in administering customary criminal sanctions imposed by the customary head.

4.2.5 Community Protection

Philosophically, correctionalization is a criminal system that has moved far away from the philosophy of retributive (retaliation), detterence (deterrence) and resocialization. In other words, punishment is not intended to make suffering as a form of retaliation, is not intended to deter suffering, nor is it intended to assume the convict is someone who lacks socialization. Correctional facilities are in line with the social reintegration philosophy which assumes that crime is a conflict between the convicted person and the community. So that punishment is aimed at restoring conflict or reuniting the convicted person with his community (reintegration).[30]. From the aspect of criminal policy, the stipulation of criminal law sanctions should be carried out through a rational approach. Through a rational approach, the ultimate goal of the determination of criminal sanctions is inseparable from the determination of the objectives to be achieved by the overall criminal policy, namely the protection of society to achieve prosperity. Based on this, the importance of understanding the purpose of punishment both in terms of community protection and from the aspect of guidance for perpetrators of criminal acts. This shows that state law is not the only form of law that applies in society. If law is defined as a cultural instrument that functions to maintain social order, or as social control, then in addition to state law there are also other legal systems such as customary law,[31]. The theory of the purpose of punishment adjusts to the dynamics of the development of crime which continues to develop in society with consideration of targets to be achieved such as absolute theory, treatment theory, social protection theory and others. [32]. The absolute (retributive) theory focuses on actions so that it sees that punishment is a retribution for the crime it has committed.[33]. Penalty is given to someone who has committed a crime without considering the consequences and impacts on society for the imposition of the crime.[34]. Through the theory of retaliation, the imposition of punishment against the perpetrator of a crime is retribution for his actions that cause suffering to the community and / or other people.[35]. In the relative theory (deterrence), the purpose of punishment is an effort to realize community protection, including efforts to prevent crime, return the perpetrator so that he can be accepted back into society and can participate in development.[36] Leonard argues that punishment is an effort to implement laws and norms that have been violated with the aim of reducing and preventing the occurrence of new crimes in society. [37]Crime is not just for retaliating or rewarding people who have committed a criminal act, but has certain useful purposes. Retaliation itself has no value, but only as a means of protecting the interests of society. The basis for criminal justification lies in the goal of reducing the frequency of crimes. The punishment is imposed not because people commit crimes, but so that people do not commit crimes. So that this theory is often called the theory of goals (utilitarian theory)[38]. The combined theory (integrative) bases the crime on the principle of retaliation and the principle of orderly defense of public order, in other words the two reasons become the basis for the imposition of a criminal. Basically the combined theory is a combination of absolute theory and relative theory. The combination of the two theories teaches that the imposition of punishment is to maintain legal order in society and improve the personality of the criminal.[39]. There are 2 (two) groups in this theory, namely:[40]

1) Retaliation as the aim and objective of punishment with due observance of public order;
2) Protection of order in society which is the goal but the application of the crime does not exceed the sanctions set.

In treatment theory, the application of punishment is aimed at the perpetrator with the hope of restoring social abilities so that they can be returned and accepted by society. Albert Camus argues that because the perpetrator is a part of society and an individual who has the right to be protected, the application of punishment must be a treatment effort.[41]Treatment as a goal of punishment was put forward by a

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positive stream. This flow is based on the understanding of determination which states that people do not have free will in doing an action because it is influenced by their personal character, environmental and social factors.[42]. Therefore, the application of punishment for criminals is more appropriate through treaatment efforts considering that crime is a manifestation of a person's abnormal condition. In the theory of social protection (social defense), punishment is an attempt to create social order through rules that are in accordance with the principles of social life through efforts to unite the perpetrators into a social order.[42]. So harsh and imposing sanctions that are owned by criminal law, the state is not allowed to use criminal law without clear rationality. Van Bemmelem stated that the use of criminal law must be strictly limited and must always be considered as a last resort (ultimum remedium) to resolve problems that occur in their territory.[43]In the reform of criminal law as stated in the RKUHP, customary criminal law is used as one of the sources to determine whether an act can be punished or not, both as a positive and negative source. Customary sanctions in the form of fulfillment of customary obligations, in addition to being an additional punishment can also be a priority crime, solely for violations of customary law.[44]The concept of restorative justice is an effort to protect the interests of both the perpetrator and the victim, through deliberation and mediation to settle and restore balance by including the victim and the perpetrator as well as their families and communities. so that the authority to resolve it does not come from the judiciary but comes from the community who are considered more just and bring harmony.[45]. Sahetapy emphasized that punishment should be aimed at "liberation". Liberation here must be seen not in a physical sense. Because physically the person concerned does not experience it at all, except that his movement is limited because he is in a correctional facility. However, within the limited space he could move, he was freed mentally and spiritually. As such he is experiencing a mental and spiritual rebirth. This means that he not only gives up his old ways and lifestyle, but he also gives up old ways of thinking and habits[46]. Based on this, the application of customary sanctions does not only apply to customary violations but is also expected to be applied to other crimes regulated in the Criminal Code by considering the positive impact they cause compared to imprisonment. Do not let customary criminal law no longer apply as happened in Nigeria where the court only handed down the penalties specified in written law[47].

4.3 Indonesian Law Politics

In the formation of a country it cannot be separated from politics. It can be said that the heart of law in a country is its own legal politics. We can see this in the constitutional foundation of a country, for example the 1945 Constitution which is the basis for fundamental norms and Pancasila asgrundnorms of the Indonesian state. Moh. Mahfud MD gave the definition of political law is a legal policy that will be or has been implemented nationally by the government, including the understanding of how politics affects the law by looking at the configuration of the forces behind the making and enforcement of the law. This understanding cannot be separated from the assumption that views "law as a political product".[48] Sother than that, Teuku Moh. Radhie stated that legal politics is a statement of the will of the state authorities regarding the laws that apply in their territory and regarding the direction in which the law is to be developed.[49]. Thus, it can be seen that the political and legal objectives (rechtpolitiek) of a country must be adjusted to the national objectives of the country concerned. In the Indonesian context, national legal politics must be shown to build a national legal system that enables the realization of a goal of national and state life based on and animated by the basic norms (grundnorm) namely the 1945 Constitution, the ideal foundation of Pancasila and the operational political foundation for the objectives of society, nation and state. have a state as expressly stated in the 4th paragraph of the preamble to the 1945 Constitution. Based on the direction and policy of legal development, it can be seen that the national law politics (including the politics of criminal law) must be formulated in an orderly national legal framework to support development in all fields and be directed towards the realization of protection of human rights (HAM) and the welfare of the community based on basic principles. Indonesian people as referred to by Pancasila. In the perspective

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of national law politics, the implementation of legal politics (rechtpolitiek) can be found in Article 1 paragraph 3 (UUD 1945 (post-amendment), which states that "the Indonesian state is a law state." With this affirmation, in every social, national and state life then every Indonesian citizen is obliged to uphold the law (rule of law).[50].

4.4 Criminal Law Reform

Customary law as a manifestation of unwritten law is a law that has been alive and well recognized in society for a long time. The position of customary law in Indonesia's pluralistic legal system has a very significant role, especially customary criminal law, which is recognized philosophically, juridically and sociologically. The practice of recognizing customary criminal law can be used as a means for the government to protect and guarantee the human rights of indigenous peoples as well as to create reforms to national law.[51]. According to Soedarto, there are 4 (four) things in criminal law reform, namely:[52]

1) Criminalization and decriminalization
   Criminalization is a process in which everything is not a criminal act into a criminal act. On the other hand, decriminalization, which is initially a criminal act, turns into a non-criminal act.
2) Granting of a criminal
   According to Soedarto, this gift has 2 (du) meanings, namely: (a) in a general sense, it concerns legislators in determining criminal sanctions, (b) in a concrete sense, is related to various agencies or agencies, all of which support and implement the set criminal law sanctions.
3) Implementation of criminal law
   It is necessary to have regulations that enable this criminal law to be implemented.
4) The Urgency of the National Criminal Code
   In the slogan of criminal law, namely in dubio pro reo, it means that if there is doubt about a defendant as to whether or not he can be punished, it must be decided in a favorable way for the defendant.

Criminal law reform essentially implies an effort to recent and reform criminal law in accordance with the sociopolitical, sociophilosophical and sociocultural values of Indonesian society which underlie social policies, criminal policies and law enforcement policies in Indonesia. In short, it can be said that the reform of criminal law in essence must be taken with a policy-oriented approach and at the same time a value-oriented approach.[53]. For example, this can be seen in the application of compensation payment sanctions by the perpetrator to the victim for the crime of theft, marriage for unmarried adultery offenders, exile for 40 days accompanied by giving advice, settlement of mutual forgiveness in criminal acts of defamation which is a form of sanctions that still pay attention to human rights, the law that is felt to be effective in restoring the balance of the community environment that has been disturbed by the existence of criminal acts.

5. Conclusion

The role of the government, in this case the Ministry of Law and Human Rights (Kemenkumham) and also the local government, is to be able to provide education and / or counseling on the importance of codifying in writing against the imposition of customary criminal sanctions by the head of custom and / or local customary courts. In addition, the types of sanctions in indigenous peoples that have positive values must be stated and applied in the national criminal law regulations as a form of reform of national criminal law that has legal certainty and justice. In realizing the goal of punishment it is important to uphold human dignity, it must be able to make the perpetrator fully aware of his actions so that he has a positive attitude and punishment must be felt fair both by the perpetrator and by the victim or the community. Pancasila and the 1945 Constitution as the basis of the state that recognizes and respects state law, religious law and

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customary law, therefore it is appropriate for customary sanctions to be used as a reference in the application of national criminal law. Besides that, customary criminal law is a reflection of moral values.

Recognition

A big thank you, the author would like to convey to the Chancellor of the Indonesian Computer University, as well as to the Head or Person in Charge of the Journal who has helped publish the author's article in the ICOBEST Journal.

Reference

[1] YD BANDAWI, "The Process of Theft Crime Settlement in Cikertawana Village According to Baduy Customary Law, Kanekes-Lebak Village, Banten / By Yudha Dharma Bandawi," Tarumanagara University, 2009.

[2] S. Soekanto, *Introduction to Legal Research*. Jakarta: University of Indonesia, 1986.

[3] E. Susylawati, "The Existence of Customary Law in the Legal System in Indonesia," *Al-Ihkam J. Huk. And Pranata Sos.*, vol. 4, no. 1, pp. 124–140, 2013, [Online]. Available: http://www.ejournal.stainpamekasan.ac.id/alihkam/article/download/267/258.

[4] IGA Wiranata, &, and M. SH, *Indonesian Customary Law Developments From Time to Time Indonesian Customary Law Develops From Time to Time*. Bandung: Citra Aditya Bakti, 2005.

[5] D. Sugiyono, *Quantitative research methods and R&D*. Bandung: Alfabeta, 2010.

[6] M. Jufri, "Unwritten Legal Power as a Source of Wad Law"™I In Indonesia, "Lisan Al-Hal J. Pengemb. Thinker. Dan Kebud., Vol. 7, no. 2, pp. 401–409, 2013, [Online]. Available: https://journal.ibrahimy.ac.id/index.php/lisanalhal/article/view/70.

[7] H. Helnawaty, "Customary Criminal Law in the Reform of the National Criminal Law," *Binamulia Huk.*, vol. 7, no. 2, pp. 149–160, 2017.

[8] CE Permana, "Local Wisdom About Disaster Mitigation in Baduy Communities," *Hubs-Asia*, vol. 10, no. 1, pp. 67–76, 2012.

[9] A. Gopur, "The View of Islamic Law on Marriage of the Outer Baduy ethnic Sundanese Wiwitan with Islamic Procedures (Case Study in Des. Kanekes, Lewidamar-Lebak)," Uin Smh Banten, 2020.

[10] Y. Kurniawan, "Implementation of Customary Sanctions Against Violations That Occur in the Territorial of the Baduy Indigenous Peoples," Sebelas Maret University, 2016.

[11] R. Yulia, "Baduy Customary Criminal Law." https://www.youtube.com/Watch?V=Y79c4pul3ig (accessed Sep. 24, 2020).

[12] SI Anggraini, Y. Ulfa, &, and D. Rivaldy, "Acculturation of Baduy Customary Law with Indonesian Positive Law," *Rechtsregel J. Legal Sciences.*, vol. 3, no. 1, pp. 13–39, 2020, [Online]. Available: http://openjournal.unpam.ac.id/index.php/rjih/article/view/6618/4364.

[13] AF Adha, "Social Construction in the Sundanese Traditional Inheritance Law System: Inheritance Study in Seven Traditional Villages in West Java," UIN Sunan Gunung Djati Bandung, 2017.

[14] F. Kurniawan, "Customary Criminal Law as a Source of National Criminal Law Renewal," *EDUCATION J. Educator.*, vol. 2, no. 2, pp. 10–31, 2016.

[15] JE Isharyanto, "The Existence and Regulation of Customary Law Community Unity as Subjects of State Order," *J. Ilm. Huk. And Din. Masy.*, vol. 16, no. 1, 2018, [Online]. Available: http://jurnal.untagsmg.ac.id/index.php/hdm/article/download/846/748.

[16] U. Supriatin, &, and I. Setiawan, "Perceptions of Customary Criminal Law," *J. Ilm. Galuh Justisi*, vol. 4, no. 2, pp. 198–211, 2017, doi: http://dx.doi.org/10.25157/jigj.v4i2.323.

[17] J. Braithwaite, "Restorative justice: Assessing optimistic and pessimistic accounts," *Crime and justice*, vol. 25, pp. 1–127, 1999.

ISBN: 978-623-95562-0-4

[18] A. Harahap, "Criminal Law Reform Based on Customary Law," *EduTech J. Science Educators. and Science Sos.*, vol. 4, no. 2, pp. 1–9, 2018, doi: DOI: https://doi.org/10.30596/edutech.v4i2.2268.
[19] F. Fathurokhman, "Baduy Customary Criminal Law and Its Relevance in Criminal Law Reform," Diponegoro University, 2010.
[20] D. Tamarasari, "Customary Law Approaches in Resolving Community Conflicts in Autonomous Regions," *Indonesia. J. Criminol.*, vol. 2, no. 1, p. 4219, 2002.
[21] RH Abdullah, "The Urgency of Customary Law in the Reform of National Criminal Law," *FIAT JUSTISIA J. Law.*, vol. 9, no. 2, 2015, doi: https://doi.org/10.25041/fiatjustisia.v9no2.595.
[22] D. Apriani, "The Urgency of Customary Law in Reforming Criminal Law in Indonesia," *J. Legal Studies.*, vol. 5, no. 1, pp. 65–74, 2014, doi: http://dx.doi.org/10.30652/jih.v5i1.2779.
[23] A. Abubakar, "The Urgency to Settle Criminal Cases with Customary Law," *MADANIA J. Kaji. Islam.*, vol. 18, no. 1, pp. 57–66, 2014.
[24] GAES Sudirga, &, and IG Artha, "Application of Customary Crimes Against Perpetrators Who Commit Customary Offenses."
[25] A. Rosyada, E. Warassih, &, and R. Herawati, "Constitutional Protection of Customary Law Community Unity in Realizing Social Justice," *Kanun J. Law Science.*, vol. 20, no. 1, pp. 1–22, 2018, doi: hs: //doi.org/10.24815/kanun.v20i1.10021.
[26] MS Alfarisi, "The Politics of Customary Criminal Law in Indonesian Criminal Law Reform," *J. Juridical UNAJA*, vol. 1, no. 1, pp. 15–33, 2018, doi: 10.5281 / jyu.v1i1.100.
[27] IK Sudantra, "The Urgency and Strategy of Empowering Customary Courts in the National Legal System," *J. Indones. Customary Law*, vol. 2, no. 3, pp. 122–146, 2018, doi: https://doi.org/10.46816/jial.v2i3.10.
[28] A. Subroto, "The Role of the State in Maintaining the Existence of Customary Law Communities," *Yuriska J. Ilm. Huk.*, vol. 11, no. 1, pp. 59–73, 2019, doi: https://doi.org/10.24903/yrs.v11i1.457.
[29] J. Thontowi, "Protection and Recognition of Indigenous Peoples and Challenges in Indonesian Law," *J. Huk. Ius Quia Iustum*, vol. 20, no. 1, pp. 21–36, 2013, doi: https://doi.org/10.20885/iustum.vol20.iss1.art2.
[30] I. Sulhin, "Philosophy (system) of correctional," *J. Indonesian Criminology.*, vol. 7, no. 1, pp. 134–150, 2012.
[31] IN Nurjaya, "Understanding the position and capacity of customary law in the politics of national law development," *Perspective*, vol. 16, no. 4, pp. 236–243, 2011, doi: DOI: http://dx.doi.org/10.30742/perspektif.v16i4.86.
[32] D. Priyanto, *Prison Criminal Implementation System in Indonesia*. Bandung: Refika Aditama, 2009.
[33] L. Marpaung, *Principles of Criminal Law Theory-Practice*. Jakarta: Sinar Grafika, 2009.
[34] D. Priyanto, *Prison Criminal Implementation System in Indonesia*. Bandung: Refika Aditama, 2009.
[35] T. Prasetyo, &, and AH Barakatullah, *Criminal Law Politics*. Yogyakarta: Student Library, 2005.
[36] L. Marpaung, *Principles of Criminal Law Theory-Practice*. Jakarta: Sinar Garfika, 2009.
[37] T. Prasetyo, &, and AH Barkatullah, *Politics of law*. Yogyakarta: Student Library, 2005.
[38] D. Priyanto, *Prison Criminal Implementation System in Indonesia*. Bandung: Refika Aditama, 2009.
[39] L. Marpaung, *Principles, Theory, and Practice of Criminal Law*. Jakarta: Sinar Garfika, 2009.
[40] A. Chazawi, *Criminal Law Lessons I*. Jakarta: Raja Grafindo, 2010.
[41] T. Prasetyo, &, and AH Barakatullah, *Politics of law*. Yogyakarta: Student Library, 2005.
[42] Muladi, &, and BN Arief, *Interest of Criminal Law Policies*. Bandung: Citra Aditya Bakti, 2002.
[43] EA Zulfa, AR Akbari, &, and ZI Samad, *Development of the criminal system and the correctional system*. Bandung, 2017.
[44] NSP Jaya, "Customary Criminal Law (Sanctions) in the Reform of the National Criminal Law," *Masal. Huk.*, vol. 45, no. 2, pp. 123–130, 2016, doi: 10.14710 / mmh.45.2.2016.123-130.

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