

PHILOSOPHICAL DIMENSION OF LIVING LAW INTEGRATION: REALIZING JUSTICE FOR CHILDREN WITH LEGAL CONFLICT

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Abstract

The Judicial Process for handling juvenile crimes has shown how the law works, namely still adhering to the teachings of the syllogism, a legal view that is legal in nature, law is identified as a statutory. Type of the study is a normative-legal research by using philosophical, theoretical, and conceptual approach. It was conducted in the Provinces of Bali and West Papua, Indonesia. This paper provides information on the latest trend in research. The results show that the essence of customary criminal sanctions is strongly influenced by the values that develop in society as a cultural value system and is also influenced by philosophical and sociological aspects. Likewise, for various cultures, tribes and customs that exist, the application of customary criminal sanctions varies greatly with a background of certain variables. In the traditional legal system, local communities in Indonesia are better known as customary law systems, the tendency for customary sanctions to lead to meaning that is restitutive. Meanwhile, the formation of practical law is oriented towards legal principles, because law is not only a building of regulations, but also a building of philosophical values. Therefore, it is appropriate that in the legal regulations there is a part that is able to transmit philosophical values and that part is legal principles.

Keywords: Children; Criminal Law; Legal Policy; Legal Philosophy; Living Law

1. INTRODUCTION

Nowadays, Sentences that are imposed inappropriately because they are influenced by variables such as the tendency of judges to think “rigid” and “legalistically” and to give more priority to aspects of legal certainty can ignore child protection arrangements because in principle criminalizing children is the last resort (*ultimum remedium*) and imposing it for only a short time.¹

There are many legal instruments, both applicable in Indonesia and international law which show that for the treatment of children who have conflicts with the law, imprisonment must be used as a last alternative.² Therefore, there must be alternative punishments that are more constructive and restorative which reflect the values of justice in dealing with children in conflict with the law other than imprisonment. In fact, the judge’s decision may not have a bad influence on the physical, attitude, mental, social and psychological aspects of the child. The judge’s decision does not have to be oriented towards retaliation and punishment but rather on the welfare of the child and the restoration of the child’s original condition by taking into account their future and survival.

The judicial process for handling juvenile crimes has shown how the law works, namely still adhering to the teachings of the syllogism, a legal view that is legal in nature, law is identified as a statutory. The only source of law is the statutory because it is considered complete and

clearly regulates all legal issues, so that judges cannot do anything other than what is clearly and rigidly stated in the statutory.

In Indonesia, there are still several sanctions in the form of fulfilling customary obligations that are still alive and developing in society which if imposed on children will potentially be inconsistent with respect for the dignity of the child and can endanger the physical and mental health of the child, such as Nyanguin Banjar in Balinese society, which means the obligation to feed the members of the Banjar.³

In Minangkabau society, there are customary criminal sanctions known as Berabu Dijentik, Kuma Disasah, meaning that have to hold a banquet by slaughtering chickens to buffaloes. It is different from South Sumatra, where the customary criminal acts that are enforced refer to Simbur Cahaya or Piagam Ratu Sinuhun, which is a book of customary rules for the people of South Sumatra.⁴ The book of Simbur Cahaya is a book of customary laws that once applied to the people of South Sumatra which is considered to be the work of Ratu Sinuhun, the ruler of Palembang from 1639 to 1650. It contains legal material regarding general rules of association in society, association for youth, customary government regulations, farming regulations and punishment rules. Meanwhile, the customary criminal sanctions that apply are giving charity to goats as a symbol to get rid of bad luck and others.

The characteristics of “fulfillment of customary obligations,” the characteristic of additional punishment in general is that it cannot be imposed or applied without imposing or applying the main punishment. Therefore, it is often said that the additional criminal code is accessory or attached to the principal crime. However, it should be noted that since 1959 in the Netherlands the possibility of imposing additional penalties has been opened separately and does not always have to be given in combination with the main sentence.⁵

As mentioned above, the position of the value of justice based on the values that grow and develop in society in a judge’s decision has connectivity both juridically and philosophically. Therefore, this research will focus on conceptualization aspects or ideas of judges through legal discovery by judges in the application of customary criminal sanctions to juvenile criminal cases based on the juvenile justice system in Indonesia.

2. METHODOLOGY

The research is normative legal research, namely to produce an argument, theory or concept as a prescription in solving a problem.⁶ The approach method used in this research is a qualitative-normative approach through philosophical, theoretical, and conceptual approach.⁷ It was conducted in the Provinces of Bali and West Papua, Indonesia. It was conducted by exploring the concepts or ideas of judges through the method of finding the law in judge’s decisions which is the tendency of judges in the practice of juvenile justice.

3. RESULTS AND DISCUSSION

Philosophical Dimension of Living Law Integration: The Essence of Custom Criminal Sanctions to Realize Justice for Children with Legal Conflict

The philosophical aspect is an aspect that has the core of truth and justice, while the sociological aspect considers existing cultural values and lives in society. The philosophical and sociological aspects in its application really require extensive experience and knowledge as well as wisdom that is able to follow the values in society that have been neglected so far. The application of customary criminal sanctions is strongly influenced by the values that develop in society as a cultural value system which is also influenced by philosophical and sociological aspects. In Indonesia, with a variety of cultures, ethnicities and customs, the application of customary criminal sanctions varies greatly due to certain variables, such as:

- a. There are acts committed individually, groups, or by traditional (customary) members.
- b. The act is contrary to the norms of customary law.
- c. The act is seen as causing shock because it disturbs the balance in society.
- d. For the act a reaction arises from the community with sanctions or fulfillment of customary obligations.

Customary crimes occur when the community perceives the act as inappropriate, is seen as disrupting the cosmic balance and causing shock in society. Soepomo gave the view that in the customary law system all actions that conflict with customary law regulations are illegal acts and customary law also recognizes efforts to reform the law if the law is violated. Furthermore, Soepomo said that if there is a violation of the law, the legal officer (traditional head and so on) will take concrete action (*adat reactie*) to correct the violated law.⁸

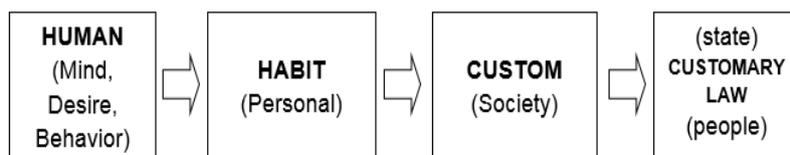
Conduct that conflict with customary law are commonly referred to as “customary offenses”. Ter Haar wrote that what is meant by a violation (offense) is any one-sided disturbance (*eenzijdig*) to the balance and any one-sided collision on the goods of material and immaterial life of an individual person, or of many people who form a single unit (a group), such an action creates a reaction whose nature and size is determined by customary law is called a customary reaction (*adat reactie*) because of the reaction in which the balance can and must be restored (mostly by means of payment for violations in the form of goods or money).⁹

Cosmic nature of the Indonesian traditional mind, the most important thing is the prioritization of creating a balance (*evenwicht harmonie*) between the physical and metaphysics realms, between the entire human group and individuals, between the community and its community members. Otje Salman Soemadiningrat said that any customary violation would result in an imbalance in society. Therefore, every violation must be given customary sanctions which function as a means to restore the destruction of the natural balance (traditional cure).¹⁰

In the traditional legal system, local communities in Indonesia are better known as the customary law system, namely the tendency of customary sanctions to lead to meaning that is restitutive. Hadikusuma describes the customary law system in a series of customary law

evolutions that starts from the human mind or mind as a means of thinking given by God, which is manifested in behavior. If the behavior is imitated by others, then a habit will be born. When these habits are recognized by many people, then these habits become customary, and at the government level they are referred to as customary law (Chart 1).¹¹

Chart 1: The Series of Evolution of Customary Law



Characteristics of Customary Criminal Sanctions for Resolving Juvenile Criminal Cases in Indonesia

Customary sanctions have a function and act as a stabilizer to restore balance between the physical and metaphysical worlds. If there is a violation, then the violator is required to make certain efforts such as clean the village or others that aim to restore balance. Punishment can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law. Sudarto gave the view that the provision of punishment in abstracto by determine stelsel of criminal law sanctions relating to legislators. Meanwhile, the provision of punishment in concreto it relates to the various bodies which all support and implement stelsel of criminal sanctions themselves.

The problem of determining sanctions in customary criminal law is a series of policies that are in one legal system.¹² as a legal system, it cannot be said that each stage of imposing customary criminal sanctions can stand alone but is interrelated with one another and cannot even be separated at all. If related with the entire penal system, where the determination of customary criminal sanctions is essentially a series of authorities from several agencies, it can be analogized that the fall of the stages of punishment from one agency to another must be orderly, and in accordance with predetermined limits.¹³ In the context of the application of customary criminal sanctions, customary boundaries that are born in society are results that can lead to disparity of sentencing.

The disparity of customary criminal sanctions cannot be completely eliminated because it concerns the issue of the extent to which the judge's obligation to consider all relevant elements and variables in juvenile criminal cases concerning their sentencing. This is because the disparity in customary criminal sanctions does not automatically create an unfair gap between child perpetrators. Likewise, equality in sentencing does not automatically result in appropriate customary criminal sanctions which are the basis for justifying in concreto customary criminal sanctions or the stage of judicial policy in the judge's decision.

The use of customary sanctions is considered relevant to the establishment of national criminal law as stipulated in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System and the Criminal Code (New) hereinafter referred to as the New Criminal Code in Indonesia, namely by adherence to the principle of material legality¹⁴. This is known by the inclusion of

additional criminal types in the form of payment of compensation and fulfillment of customary obligations as formulated in the New Criminal Code. Renewal of criminal law in Indonesia is expected to fulfill the sense of justice, because it can reflect the culture and culture of Indonesian society.

In connection with this crime and sentencing, it is necessary to formulate the aims of punishment in advance. The basis for formulating the aim of punishment is based on the idea that punishment is essentially only a means to an end. The identification of the aim of the punishment is based on the balance of 2 (two) main objectives, namely “protection of the community” including victims and “protection of perpetrators.” Viewed from the point of view that focuses more on protecting the interests of the community, it is only natural that in imposing criminal sanctions it still maintains the types of customary criminal sanctions, namely in the form of fines or carrying out customary obligations. However, customary punishment is included in the row of “additional punishments”, and is placed separately as a type of special or exceptional sanction.

The main consideration for shifting the position of customary punishment is based on the premise that judging from the purpose of punishment and the purpose of holding/using criminal law (as a means of “criminal policy” and “social policy”), customary punishment is essentially not the main means to regulate, order and improve society. In this case, customary punishment is only an exception. Such thinking can be identified with the means of amputation or surgery in the field of medicine which in essence are also not the main means/medicine, but only constitute an exception as means/medicine that are additional or alternative in nature.

Every punishment has a certain social meaning because the strength of a sanction depends on the human perception of the sanction. Soerjono Soekanto¹⁵ gave views on negative sanctions such as whether the death penalty should be carried out by electric chair, by a firing squad, or hanged, each has a different effect and impact. Likewise, a prison sentence of 3 (three) years has a different meaning for various groups in society.

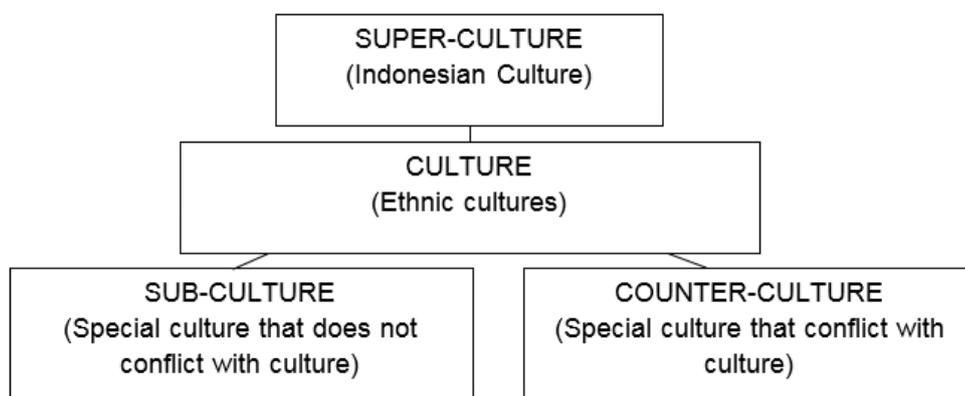
The notion of individualization of a sentence does not only mean that the sentence to be imposed must be adjusted or oriented to individual considerations, but also that the sentence imposed must always be able to be modified or altered or adjusted to the changes and developments of the individual (the convict) concerned. The other side of the idea of criminal individualization is that there is a need for provisions regarding modification or change or adjustment or review of a permanent conviction based on considerations due to changes or developments or improvements in the convict himself.¹⁶

In the context of the relationship between the sanctions and sentencing, changes or adjustments can be made to criminal envoys and/or actions that have obtained permanent legal force, taking into account the development of convicts and the objectives of sentencing. The changes or adjustments are made at the request of the convict, his parents, guardian or legal adviser, or at the request of the public prosecutor or the supervisory judge, and may not be heavier than the original decision and must be with the consent of the convict. Changes or adjustments can be in the form of revocation or termination of remaining sentences or actions or replacement of

the type of crime or other actions. If the application for amendment or adjustment submitted is rejected by the court, a new application can be submitted again after 1 (one) year since the rejection. It's just that if there are special circumstances indicating that the application deserves consideration before the deadline of 1 (one) year, then this matter needs to be considered.

In Indonesia, which is plural, there are various special cultures in addition to the general culture. According to Soekanto, the essence of general and special culture are values as views on good and bad things. If good things are adhered to, then a sub-culture is born, whereas if bad things are not avoided but even embraced, then a counter-culture (such as corruption) arise. Soekanto¹⁷ provides a schematic description on Chart 2.

Chart 2: Internalization of Cultural Values



As far as the apodic way is concerned in determining criminal acts on the basis of assumptions that are considered correct, it can be understood especially in relation to the instrumental function of laws. It needs to be studied further, to what extent this will affect the classification of criminal acts which for the most part function to express values or quality values. The problem will become even more complex if it is linked to the necessity that the criminal law that we will build later is not only defensive in nature, but it must also be anticipatory (legislative forward planning).¹⁸

Criminal imposition of child offenders, in addition to the main punishment, can also be subject to additional punishment, namely for adult offenders in the form of revocation of certain rights, confiscation of certain goods and/or bills, announcement of the judge's decision, payment of compensation, revocation of certain permits, and fulfillment of local customary obligations or obligations under the law that live in society.¹⁹ Meanwhile, additional punishment that can be imposed for child offenders can be in the form of deprivation of profits derived from criminal acts or fulfilment of customary obligations.²⁰

Additional punishment is intended to add to the sentence other than the main sentence imposed and basically is optional. Additional punishment must be stated clearly in the formulation of the criminal act concerned, so that the judge can consider it imposed on the convict, except for revocation of corporate rights and fulfillment of customary obligations.²¹ In sentencing for

children, a double-track system is adopted, namely the types of actions (maatregelen). In this case, the judge can impose action on a child who commits a crime, but is unable to account for his actions because he suffers from a mental disorder or mental illness or mental retardation or other actions that are deemed not to require punishment.

Enforcement of living laws in a society that regulates actions that are prohibited and threatens criminal sanctions is recognized as a crime and is threatened with sanctions criminal law which is an exception to the application of the principle of legality in the criminal law system in Indonesia. The enactment of this living law is a form of formulation into criminal law norms to ensure legal certainty in the future that Indonesia recognizes the principle of formal legality and material legality and to strengthen the development of criminal and criminal law and criminal law enforcement practices.

4. IMPLICATIONS AND RECOMMENDATIONS

In Indonesia, the essence of customary criminal sanctions is strongly influenced by the values that develop in society as a cultural value system and is also influenced by philosophical and sociological aspects. Likewise, for various cultures, tribes and customs that exist, the application of customary criminal sanctions varies greatly with a background of certain variables. In the traditional legal system, local communities in Indonesia are better known as customary law systems, the tendency for customary sanctions to lead to meaning that is restitutive. Meanwhile, the formation of practical law is oriented towards legal principles, because law is not only a building of regulations, but also a building of philosophical values. Therefore, it is appropriate that in the legal regulations there is a part that is able to transmit philosophical values and that part is legal principles.

Acknowledgments

The authors acknowledge all contributors involved in this study. The authors declare no conflict of interest and no research funds or grants received.

Declaration of Interest

Authors declare there are no competing interests in this research and publication.

References

1. Fadli, Muhamad Akhsanul. "Transcendental Approach in Legal Aid Concept in Indonesia: A Philosophy of Law Perspective." *The Indonesian Journal of International Clinical Legal Education* 3, no. 4 (2021): 465-480.
2. González, Thalia. "Keeping kids in schools: Restorative justice, punitive discipline, and the school to prison pipeline." *Journal of Law & Educ.* 41 (2012): 281.
3. Hadi Supeno, 2010, *Kriminalisasi Anak*, PT Gramedia Pustaka Utama, Jakarta.
4. Hilman Hadikusuma, 2003, *Pengantar Ilmu Hukum Adat Indonesia*, Mandar Maju, Bandung.
5. I Made Widnyana, 2013, *Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana*, PT Fikahati Aneska, Jakarta.

6. Irwansyah, 2020, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta.
7. Jan Rimmelink, 2003, *Hukum Pidana Komentar Atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, PT Gramedia Pustaka Utama, Jakarta.
8. Lidya Suryani Widyati, "Pemenuhan Kewajiban Adat sebagai Pidana Tambahan dalam RUU KUHP", *Jurnal Ius Quia Iustum*, 20 (3): 362-385.
9. Lundy, Laura. "Mainstreaming Children's Rights in, to and through Education in a Society Emerging from Conflict." *The International Journal of Children's Rights* 14, no. 4 (2006): 339-362.
10. Lundy, Laura. "Mainstreaming Children's Rights in, to and through Education in a Society Emerging from Conflict." *The International Journal of Children's Rights* 14, no. 4 (2006): 339-362.
11. Marwati Riza, Andi Pangerang Moenta, and Handar Subhandi Bakhtiar. "Sanctions on Children: Comparative Studies of Indonesia and Netherlands." *Journal of Law Pol'y & Globalization* 98 (2020): 225.
12. Nur, Rafika, Slamet Sampurno Soewondo, Syamsuddin Muchtar, and Nur Azisa. "The Essence of Sanctions in Juvenile Justice System." *Journal of Law Pol'y & Globalization* 95 (2020): 48.
13. Otje Salman Soemadiningrat, 2011, *Rekonseptualisasi Hukum Adat Kontemporer*, Alumni, Bandung.
14. Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Press, Jakarta.
15. Soerjono Soekanto, 1988, *Efektivikasi Hukum dan Peranan Sanksi*, Second Edition, Remadja Karya, Bandung.
16. Steinberg, Annie G., Barbara Bennett Woodhouse, and Alyssa Burrell Cowan. "Child-Centered, Vertically Structured, And Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research." *Family Court Review* 40, no. 1 (2002): 116-134.