How to cite item: Abdullah, Rahmat Hi, Abdul Mutalib, and Andri Sutrisno. "Recognition of customary law in the national criminal system: a holistic approach." *Jurnal Cakrawala Hukum* 15 no. 3 (2024): 252-264. https://doi.org/10.26905/idjch.v15i3.14721.

Jurnal Cakrawala Hukum

Volume 15 Issue 3, 2024
P-ISSN: 2356-4962, **E-ISSN**: 2598-6538

Recognition of Customary Law in the National Criminal System: a Holistic Approach

Rahmat Hi. Abdullah[1], Abdul Mutalib[2], and Andri Sutrisno[3].

[1, 2] *Faculty of Sharia, State Islamic Institute of Ternate, Indonesia.*
[3] *IBLAM School of Law, Indonesia.*

Article history:
Received 2024-09-03
Revaised 2024-10-15
Accepted 2024-12-01

Keywords:
Integral Approach; Customary Law; National Criminal System.

DOI:
doi.org/10.26905/idjch.v15i3.14721.

Corresponding Author:
Rahmat Hi. Abdullah.
E-mail: abdullahrahmat@iain-ternate.ac.id..

Abstract: This paper is prepared to focus on the problem of an integral approach to the recognition of customary law in the national punishment system. The analysis results in a policy approach that states that the purpose of punishment is no longer retaliation against the perpetrator but is more oriented towards the goal of preventing people from committing crimes again. In addition, it is also seen that punishment is carried out with the aim of resolving conflicts that arise, restoring social balance, and creating a sense of peace. This conscious and deliberate policy is based on the basic idea of balance, including a mono-dualistic balance between the interests of society and the interests of individuals. The formulated idea of balance is a form of recognition of customary law. The value approach is carried out by formulating the objectives of customary law punishment crystallized in Pancasila, including restoring balance in society, both spiritual balance and balance of social relations. This is very relevant to the balance between religious values, human values, and societal values in the five precepts of Pancasila.

1. Introduction

The National Law Convention organized by the National Law Development Agency (BPHN) on March 15 to 16, 2008, on the *Grand Design* in National Legislation Planning number 5 concluded that:[1] Legal development is inseparable from history; therefore, the start of reform does not mean we start everything from scratch. All the good things that exist in existing positive legal products must become the capital of legal development. In contrast, those that are not good and no longer suitable must be corrected and improved. Legal development is a concept that is continuous and never stops so that issues of justice, law enforcement, and public attitudes towards the law must not ignore the circumstances and dimensions of the time when the law was enacted/applicable; besides being unwise, this, in turn, will also potentially deny the principles and legal certainty itself. Interpreting the law with historical methods in addition to other methods of interpretation, such as grammatical and systematic, is important to understand the real "spirit" of the law."

The legal development capital mentioned in the conclusion, in terms of criminal law reform,[2] should not ignore the social facts about the existence of customary (criminal) law that still ap-

[1] Nyoman Sarikat Putra jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional", *Masalah-Masalah Hukum,* Jilid 45 No. 2 (2016): 123-124, doi: 10.14710/mmh.45.2.2016.123-130

plies in the community now. In Baduy community, for example, Umi Rozah found that:[3] "The life of baduy community which is supported by agriculture and cultivation is dependent on natural preservation. The maintenance and preservation of the environment in the baduy community is unique, where the principle of life from generation to generation is upheld. Various to preserve nature through avoiding goods and modern life styles are carried out from generation to generation so as not to change the natural structure of nature and environment. In preserving nature, the Baduy community provides guidelines for certain actions that their indigenous people should not do, such as burning forests, cutting trees in certain areas. The offenses were made into serious acts of which the punishment was in the form of birth punishment related to society and inner punishment which was spiritual in nature."

There is a principle that is upheld and maintained in the maintenance and preservation of the environment of the Baduy community. This is done because the survival of the Baduy indigenous community is supported by its agriculture and cultivation, which is highly dependent on the preservation of nature. Therefore, in preserving nature, Baduy customary society provides guidelines and sanctions for specific actions that should not be done by its customary society, such as burning forests and cutting down trees in certain areas. Violation of customary law is given a hefty sanction in the form of external law related to the community and inner punishment, which is spiritual.

The people of Tobelo and Galela, who live on the island of Halmahera in North Maluku Province (the author's home region), still apply the tradition of "bobango" to actions that are considered to violate their customary provisions. Bobango in Tobelo means fine, which is a penalty imposed for every act or action, whether in the form of active or passive movements, even in the form of speech, which is considered to violate the customary provisions. This fine has been applied in the past. Its application is accepted and preserved by the community, and positive legal provisions are enacted.

In addition to these social facts, the existence of customary criminal law can also be seen from the juridical facts that serve as its legal basis. Since independence, customary criminal law has gained a position as a legal basis with the issuance of Emergency Law No. 1 of 1951 concerning Temporary Measures to Organize the Unified Structure of Powers and Procedures of Civil Courts (Law No. 1 Drt 1951). In the law, especially in the provisions of Article 5 paragraph (3) sub b, it is possible to carry out punishment based on customary criminal law. In fact,[4] customary sanctions, according to the article, can be used as the primary punishment or main punishment by judges in examining and adjudicating actions that contain living laws considered criminal offenses that have no comparison in the Criminal Code.

The juridical fact of recognizing customary law as a source of law is also emphasized in general rules, including Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (second amendment). The State recognizes and respects the unity of customary law communities along with their traditional rights as long as they are still alive and in accordance with the devel-

---

2 Ahmad Syaufi, Aurora Fatimatuz Zahra, and Mursidah. "The Existence of Customary Law: Badamai Customary Law". *Research Horizon* 1 (3) 2021.:94-99. https://doi.org/10.54518/rh.1.3.2021.94-99.

3 Umi Rozah, "Environmental Maintenance through the Application of Adat (Criminal) Sanctions on baduy Cummunities", *Indian Journal of Forensic Medicine & Toxicology*, Vol. 15 No. 2, (2021): 1206-1213, doi: https://doi.org/10.37506/ijfmt.v15i2.14485

4 F. Osman, "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage." *Potchefstroom Electronic Law Journal*, *22*, (2019). 1-24. https://doi.org/10.17159/1727-3781/2019/v22i0a7592.

opment of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law. Law No. 48 of 2009 on Judicial Power: Article 5 paragraph (1): Judges and Constitutional Court Judges shall explore, follow, and understand the values of law and sense of justice that live in society; Article 50 paragraph (1): Court decisions must not only contain the reasons and basis for the decision but also contain specific articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging.

The Supreme Court (MA), through its decisions, also recognized the existence of customary law. Recognition by the Supreme Court can be seen in several decisions, including:[5] Decision No. 1644 K/Pid/1988 dated May 15, 1991, among other things, determines that a person who has committed an act which, according to the living law (customary law) in the area, is an act that violates customary law, namely "customary offense," the head and customary leaders give a customary reaction (customary sanction) to the perpetrator and the customary sanction has been implemented, then he cannot be brought again (for the second time) as a defendant in a trial of the State Judicial Body (District Court) with the exact charges. In such circumstances, the submission of the case file and the prosecution in the District Court must be declared "inadmissible" (Niet Ontvakelijk Verklaard); Decision No. 189 K/Pid/1996 dated January 30, 1996, held that the act of infidelity of a husband and wife with another party, which has been known as the qualification of the offense of adultery in Article 284 of the Criminal Code, and this case where the perpetrator (dader) has been subjected to customary sanctions or received customary reactions by the customary village leaders, where customary law is still respected and thrives in the Indigenous community concerned, then the prosecution of the perpetrators must be declared "inadmissible."

Efforts to reform criminal law as part of criminal policy to overcome crime are seen in the birth of Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code). As a material criminal law, the National Criminal Code contains provisions that regulate three main things in criminal law: criminal acts or offenses, criminal responsibility, and criminal sanctions. The National Criminal Code cannot be seen as a new set of norms that replace the old norms, namely the colonial legacy Criminal Code.

The current state of the codification of criminal law (KUHP) has experienced a great deal of legal vacuum, where things that, according to the size of the norms or values prevailing in Indonesia, should be threatened with punishment are not regulated in the Criminal Code.[6] According to Sudarto, there are at least three reasons for reforming the KUHP, namely political, sociological, and practical reasons. Politically, Indonesia has been independent for a long time, so it is appropriate to have its own Criminal Code. The sociological aspect of the current KUHP is no longer suitable for the living conditions of the Indonesian people. At the same time, the practical aspect of the current Criminal Code must be replaced immediately because not many people realize that until now, the official text has been written in Dutch.[7]

Mochtar Kusumaatmadja, in relation to the elaboration of Pancasila into the norms of legislation, said that national legal products should not conflict with religion, the law must protect

---

5 Nyoman Sarikat Putra Jaya, *loc. cit.*

6 Aruan Sakidjo dan Bambang Poernomo, "*Seri Hukum Pidana 1: Hukum Pidana Dasar Aturan Umum Hukum Pidana Kodifikasi*". (Jakarta: Ghalia Indonesia, 1990), 20.

7 *Ibid.*

citizens and uphold human dignity, Indonesian law must apply to all Indonesians as national law, power must be subject to the law in the relationship between law and power, and that all citizens must have equal rights and equal status before the law.[8] Meanwhile, according to Bagir Manan, Pancasila, as a philosophical foundation, must be translated into *legal values* and *concepts* that will be the basis for the formation of *legal institutions* and *norms* in the Indonesian legal system.[9]

Barda Nawari Arief states that understanding the nature of criminal law must be done integrally, i.e., not just looking at criminal law as a building of legal norms/substances in the formulation of laws, but must be seen in a broader context, including that criminal law is a sub-system that is not separated from the national legal system; inseparable from its societal background (socio-philosophical, socio-political, socio-cultural, socio-historical).[10] Customary law is part of the national legal system and includes the background for the formulation of the National Criminal Code, especially regarding the punishment system.

Based on the above description, this paper will discuss the issue of the integral approach taken to accommodate or recognize customary law in the Law Act. Number 1 Year 2023 on the Criminal Code, especially the regulation of the punishment system. In order to avoid expanding the discussion, the integral approach intended in this paper is limited to two approaches, namely the policy approach and the value approach. In addition, the punishment system referred to in this paper is limited to the purpose of punishment and guidelines for punishment.

2. Method

Without having to get caught up in the diversity of differentiation techniques and research methodology predicates, this research chooses to use terminology such as descriptive and analytical studies. This research relies on secondary data with document studies as its main instrument. As a legal research, secondary data in this research consists of primary legal materials in the form of laws and several binding legal decisions, the main primary legal materials being the 1945 Constitution of the Republic of Indonesia and Law Number 1 Year 2023. Meanwhile, secondary legal materials consist of several documented studies in the form of books, journals, and other scientific articles. In line with the method used, data analysis is carried out qualitatively, and the results are narrated descriptively.

3. Policy Approach as Part of an Integral Approach to the Recognition of Customary Law in the National Criminal System

Criminal law reform must be carried out with a policy approach because, in essence, it is only part of a policy step, namely part of legal politics/law enforcement, criminal law politics, criminal politics, and social politics. So, the meaning and essence of criminal law reform, when viewed from the point of view of a policy approach:[11] As part of social policy, criminal law reform is essentially

---

[8] Mochtar Kusumaatmadja dan B. Arief Sidharta, "*Pengantar Ilmu Hukum: Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum* ".(Bandung: Alumni, 2000), 138 – 139.

[9] Bagir Manan, "Peranana Hukum dalam Mewujudkan Cita-Cita Keadilan Sosial Menurut UUD 1945", *Makalah Dies Natalis FH Universitas Katolik Parahyangan*, Bandung, (2013): 10.

[10] Barda Nawawi Arief, "*Ilmu Hukum Pidana Integralistik (Pemikiran Integratif Dalam Hukum Pidana)*". (Semarang: Penerbit Pustaka Magister, 2015), 15-16.

[11] Barda Nawawi Arief, "Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru", *op. cit.*, 29-30.

part of efforts to address social problems in order to achieve or support national goals. As part of criminal policy, criminal law reform is essentially part of community protection efforts. As part of law enforcement policy, criminal law reform is essentially part of efforts to update the substance of the law in order to streamline law enforcement.

Criminal Law Reform in Indonesia to replace colonial criminal law has accommodated Adat (Customary) Criminal Law in the NCC. However, the incorporation of Adat Criminal Law has raised some criticism and questions because it could endanger the existence of Adat Criminal Law itself. This paper examines the implications of Adat Criminal Law incorporation in the New Criminal Criminal Code that will be in force in the next 3 years. [12] Thus, from the point of view of this policy approach, it is an integral approach to crime prevention or eradication. As an integral approach, crime prevention using criminal law includes criminal sanctions and sentencing or punishment systems. As a policy issue, criminal law reform through the punishment system can be said to be an effort to realize a better punishment system. Sudarto provides an understanding of the policy or politics of criminal law, which can be seen from criminal politics, which is a rational effort from society to overcome crime, or from legal politics, which is an effort to realize better regulations in accordance with the circumstances and situation at a time.[13]

Marc Ancel states that *penal policy,* as one of the components of "*modern criminal science*," is a science as well as an art that ultimately has a practical goal of improving positive legal regulations and providing guidance not only to lawmakers but also to courts that apply the law and to organizers or executors of court decisions.[14] According to G. P. Hoefnagels, a criminal policy must be rational, which is important because the conception of crime is often determined emotionally.[15]

As the author explained earlier, the existence of legal values and a sense of justice in life are constitutionally recognized. One key concept that evolved into a form of legal recognition or lived in the community is the adoption of the system of sanctions in customary law (customary criminal) in the national legal system.[16] Recognition and protection of sanction customary law become an important thing in the life of Indigenous peoples, for the customary sanctions can be constructed or create a balance and social harmony interests between the human race and the individual, between the alliance (group) and broader society that is the basis from the minds of the traditional Indonesian nation. Recognition of the importance of values in society as customary law (customary criminal) in the renewal of the national criminal law as the national law reform agenda is a necessity and demand for the fulfillment of social justice in accordance with the ideals of the Indonesian nation.

The national punishment system as part of an integral criminal politics or policy, further formulated in the National Criminal Code, carries out the supporting function of the function of criminal law in general as the ultimate goal, namely the realization of social welfare and protection, which is oriented towards the protection of society to achieve social welfare. The intended effort

---

12 Yoserwan. "Implications of Adat Criminal Law Incorporation into the New Indonesian Criminal Code: Strengthening or Weakening?" *Cogent Social Sciences* 10 (1). 2023. DOI: https://doi.org/10.1080/23311886.2023.2289599.

13 Sudarto, "*Hukum dan Hukum Pidana*". (Bandung: Alumni Publisher, 1986), 150 - 151.

14 Barda Nawawi Arief, "Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru", *op. cit*. 23.

15 *Ibid*.

16 Rahmat Hi Abdullah. 2016. "Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Nasional". *Fiat Justisia: Jurnal Ilmu Hukum* 9 (2). DOI: https://doi.org/10.25041/fiatjustisia.v9no2.595.

emphasizes the importance of the policy approach, as explained earlier. The National Criminal Code contains the punishment system in Chapter III on Punishment, Penalty, and Measures.

The purpose of punishment is specified in Article 51, namely: Prevent the commission of criminal offenses by enforcing legal norms for the protection and protection of society; Socializing convicts by providing guidance and mentoring so that they become good and valuable people; Resolving conflicts arising from criminal offenses, restoring balance, and bringing a sense of security and peace in society; and Foster a sense of remorse and relieve the convicted person of guilt. In addition to these provisions, the following article, which is also part of the purpose of punishment (Article 52), determines that punishment is not intended to degrade human dignity. Meanwhile, the guidelines for punishment are formulated in Article 53, which reads: In adjudicating a criminal case, judges are obliged to uphold law and justice; If in upholding the law and justice as referred to in paragraph (1) there is a conflict between legal certainty and justice, the judge must prioritize justice.

Land grabbing is not a new problem in Indonesia. It is an unlawful act that can be classified as a criminal act. This study formulates the problem as the regulation of customary land ownership in North Toraja district and the legal settlement of criminal acts of land grabbing in North Toraja district.[17] Ownership of customary land is marked by physical possession and recognition as stated in Article 24 paragraph (2) of Government Regulation Number 24 of 1997. Regarding customary land or Toraja indigenous people, it is called tongkonan land. The North Toraja government has ratified Regional Regulation Number 1 of 2019 concerning "Recognition and protection of the rights of indigenous peoples," in which the regulation has concretely regulated the system of land tenure and use. There are several stages of legal settlement of customary land grabbing in North Toraja Regency, both within the scope of customary law, namely mediation through the customary institution where the tongkonan land is located, and positive law, namely through the courts.

The following provision in Article 54 paragraph (1) stipulates that in sentencing must be, considered The form of guilt of the perpetrator of the crime, the Motive and purpose for committing the crime, The inner attitude of the perpetrator of the crime, Crimes are either premeditated or unpremeditated; Manner of committing a criminal offense; The attitude and actions of the perpetrator after committing the crime; Life history, social circumstances, and economic circumstances of the perpetrator of the crime; The effect of punishment on the future of offenders; The effect of the crime on the victim or the victim's family; Forgiveness from the victim and/or the victim's family; and/or Values of law and justice that live in society.

The provisions on the objectives and guidelines show that the National Criminal Code, especially in relation to the punishment system, has been adjusted to new developments. The purpose of punishment is no longer a retaliation to the perpetrator but is more oriented towards the goal of preventing people from committing crimes. In addition, punishment is carried out with the aim of resolving conflicts, restoring balance, and bringing a sense of peace to society.

Meanwhile, in the provisions of sentencing guidelines, the concept of integration is seen, which is more aimed at prevention and, at the same time, rehabilitation, which is seen as a target that must be achieved in a punishment. In the following provision, as well as the explanation of

[17] Jenri Ranteallo, and Yana Sukma Permana. "Tinjauan Yuridis Tindak Pidana Penyerobotan Tanah Adat di Kabupaten Toraja Utara". *The Juris* 6 (2), 2022: 437-40. DOI: https://doi.org/10.56301/juris.v6i2.614.

the provisions on sentencing guidelines, it is also stated that the judge can add other considerations with the intention that the punishment imposed is proportional and can be understood by both the convict and the community. In addition, the judge also has the power to grant a pardon based on the principle of rechtelijke pardon to a person who is guilty of committing a minor or non-serious crime.

The existence of the rule of law, including customary criminal law, is meaningless without an institution that enforces Adat law. Like other criminal laws, Adat criminal law also has law enforcement agencies, especially the judiciary, namely Adat Justice. The Dutch colonial government recognized the existence of Adat law and Indigenous justice (court), the so-called Inheemsche Respraak in Dutch. After Indonesia's independence, Law No. 1 Drt. Year (1951), concerning Temporary Measures to Organize the Unity of the Structure of Power and Procedures of the Civil Courts, abolished the existence of Adat Courts. The law stated that it would abolish the village judiciary outside Java and Madura, whose existence was to enforce Adat law. With this emergency law, the Adat Court loses its authority.

The punishment system outlined in the National Criminal Code is based on the basic idea or principles of balance, including a mono-dualistic balance between the interests of society and the interests of individuals. The principle of balance, if examined, has actually existed in the legal system prevailing in Indonesia before the Criminal Code (WvS) or the National Criminal Code was planned/formulated, namely customary law. In customary law, there is a continuous legal agreement by the community from generation to generation about something that is prohibited or allowed. If the prohibition or permissibility is violated, sanctions will be given to realize justice, both justice for the perpetrator, justice for the person who is violated, and justice for the community. This realization of justice is referred to as restoring the balance that has been disturbed.

According to I Nyoman Nurjaya in Fery Kurniawan, this original Indonesian law is a system of norms that embodies the values, principles, structures, institutions, mechanisms, and religions that grow, develop, and are embraced by local communities in its function as an instrument to maintain orderly interactions between community members (social order), orderly relationships with the creator and spirits who are believed to have supernatural powers (spiritual order) and maintain orderly community behavior with their natural environment (ecological order).[18]

In customary law there is also customary criminal law which has characteristics including:[19] It is comprehensive and unifying because it is imbued with an interconnected cosmic nature so that customary criminal law does not distinguish between criminal and civil offenses. The provision is open because it is based on the inability to predict what will happen, so it is not inevitable. Therefore, the provision is always open to all events or actions that may occur. Differentiating problems occur when there is a violation event that is seen not only in the act and its consequences but also in the background and who the perpetrator is. Therefore, with such a mindset, problem-solving in an event becomes different; Justice by request where resolving customary violations is primarily based on a request or complaint, a claim or lawsuit from an aggrieved or unfairly treated party; Reaction or correction measures may not only be imposed on the perpetrator but may also be im-

[18] Fery Kurniawan, "Hukum Pidana Adat Sebagai Pembaharuan Hukum Pidana Nasional", *EDUKA: Jurnal Pendidikan, Hukum dan Bisnis* 1, No 2, (2016): 27. doi: https://doi.org/10.32493/eduka.v1i2.3739

[19] *Ibid*., hlm. 25

posed on his relatives or family and may even be imposed on the community concerned to restore the disturbed balance.

The Ammatoa Kajang Customary Law Community in Bulukumba, South Sulawesi, has criminal law instruments, including criminal articles and customary justice systems. The implementation of customary punishment is dominant within the Kajang customary territory, compared to state crimes and religious law. The coexistence of multiple legal systems leads to intersections and adjustments between them.[20] From the characteristics of customary criminal law, it can be seen that the objectives and guidelines of the punishment or punishment system formulated in the National Criminal Code are a form of recognition of customary law and/or customary criminal law. The policy approach is a rational effort to formulate a better punishment system in the National Criminal Code, which is carried out deliberately and consciously by accommodating or recognizing the principles that apply in customary law.

The recognition of the principles of customary law can be mentioned, among others: The formulation of the purpose of punishment stems from the idea that, in essence, punishment is only a tool to achieve goals. Therefore, the identification of the purpose of punishment is based on the concept of the balance of two main objectives, namely, the protection of society and the protection of criminal offenders. The terms of punishment are also based on the principle of a mono-dualistic balance between the interests of society and individuals. Therefore, punishment in the National Criminal Code is also based on fundamental principles in criminal law, namely the principle of legality, which is the basis of society, and the principle of guilt, which is the basis of humanity.

Another aspect of community protection is protecting victims and restoring the balance of values that are violated in the community. Therefore, the National Criminal Code also formulates types of sanctions that do not have to be pursued through formal juridical processes (additional punishment). Starting from the idea that punishment must also be oriented towards the person or perpetrator of the crime, the punishment system in the National Criminal Code also recognizes individualization of punishment.

From the aspect of policy approach, these things are considered rational because customary law is a law that was born in the Indonesian nation and contains principles of punishment that are suitable for adoption in national criminal law; the aim is to resolve conflicts and restore balance in society. Romli Atmasasmita said that the fundamental reform of sentencing policy is relevant to the economic, social, and cultural situation and conditions of the nation.[21]

4. The Policy Approach and The Values Approach in the Sentencing System.

It is not criminal law reform if the value orientation of the aspired criminal law is the same as the value orientation of the previous criminal law. In other words, criminal law reform is essentially an effort to reorient and reevaluate or review and reassess the sociopolitical, socio-philosophical, and sociocultural values that underlie and give content to the normative and substantive content of the aspired criminal law.[22]

---

[20] Ning Adiasih, and Mulya Sarmono. "Overview Pluralism Law: Application Ammatoa Customary Crime Kajang, Bulukumba, South Sulawesi After the New Criminal Code Law". *Revista De Gestão Social E Ambiental* 18 (6). São Paulo (SP):e05864. 2024. DOI: https://doi.org/10.24857/rgsa.v18n6-059.

[21] Romli Atmasasmita, "*Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan "Geen Straf Zonder Schuld"*." (Jakarta: Gramedia Pustaka Utama, 2017), 11-12.

[22] Barda Nawawi Arief, "Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru," *op. cit*. 30.

In other terms, criminal law reform is an attempt to achieve and/or protect specific values with criminal law. According to Bassiouni, the values that criminal law aims to achieve and/or protect are generally manifested in social interests that contain specific values that need to be protected.[23] These interests are maintaining community order, protecting citizens from unjustified crimes, harm, or dangers committed by others, resocializing offenders, and Maintaining or defending the integrity of certain basic views on social justice, human dignity, and individual justice.

On that basis, Bassiouni continued that in conducting criminal law policy, an approach that is not only policy-oriented but also value-oriented is needed. Indonesia, which is based on Pancasila and its national development policy line, aims to form a complete Indonesian human being. If criminal law through the punishment system is used as a means for this purpose, it should be done with the approach of values contained in Pancasila.[24]

Bearing in mind the existence of the State of Indonesia, which was born and formed from various regions, races, religions, and cultures, the law is also greatly influenced by norms that have been adhered to by each community. This fact aligns with the Indonesian nation's motto, Bhineka Tunggal Ika (although diverse but still united). The values and norms in this society can be categorized into various terms, such as customs, Adat, and adat law. This diversity should also be reflected in the renewal of national law, including criminal law. The policy in developing national law should also pay attention to legal diversity (legal pluralism). Ignoring aspects of legal pluralism will impact the development of the law itself.

Umi Rozah, in her dissertation summary, states that Pancasila, as a general formulation of the values and ideas of the original law of the Indonesian people, is a crystallization of the values of the cultural customs of the Indonesian people. Customary customs are institutionalized into customary law, which is the original legal taste of the Indonesian people. At the highest level, customary law will be a formulation of shared values of all Indonesian people in the field of law that reflects the character of the Indonesian nation.[25]

Based on Pancasila, which is the source of all sources of state law, it must be used as a reference and must be elaborated.[26] The importance of elaboration is to describe the values contained in the five precepts in the norms of legislation, including norms of punishment. As a legal ideal or general formulation of legal values and ideas, all regulations, including those on punishment, must reflect the ethical demands of society in the form of principles of punishment that reflect the values of Pancasila as the crystallization of legal values and justice in Indonesian society. In that context, the punishment system contained in the National Criminal Code, from the perspective of Pancasila, is a punishment system that contains a measure of Pancasila values as the basis or basis for the operation of the national punishment system.

Considering that the existence of the Indonesian state is inseparable from Adat law communities, Adat law is also an integral part of the life of the nation and state. Acceptance and recognition of the State to Adat law existed initially in the 1945 Constitution, though it did not use the term Adat law. Even though it does not use the term Adat law, some scholars think that this article con-

---

23 *Ibid*., 36.

24 Barda Nawawi Arief. "*Kebijakan Legislatif Dalam Penganggulangan Kejahatan Dengan Pidana Penjara*". (Yogyakarta: Genta Publishing. Cetakan Keempat, 2010), 42.

25 Umi Rozah, "*Membangun Asas-Asas Pemidanaan Dalam Kerangka Pancasila*, Ringkasa Disertasi, (Program Doktor Ilmu Hukum Universitas Diponegoro, 2015), 51.

26 Ni,matul Huda, "*Politik Hukum dan Pembangunan Sistem Hukum Nasional*". (Jakarta: Sinar Grafika, 2023), 68.

tains the notion of Adat law because elucidating the 1945 Constitution says that in addition to the written Constitution, it also recognizes the existence of unwritten Law.

Umi Rozah, based on her dissertation research, found that there is a common ground between the principles of punishment as part of the applicable punishment system in resolving customary offenses in Lampung and Bali. This is concluded as a consequence of the existence of indigenous Law (adat), which was born and developed in a society with a religious-communal character that is inherent in other customary criminal laws in Indonesia. The content of the criminal rules is strongly influenced and colored by religious, ethical, and moral values that characterize the Indonesian nation, which are crystallized as Pancasila values.[27]

This study shows that the recognition of customary criminal law in Article 2 of the new Criminal Code presents challenges and opportunities for Indonesia's criminal justice system.[28] This integration supports restorative justice and reflects the country's cultural diversity, but it also requires careful handling of legal certainty and the principle of legality. Precise conflict resolution mechanisms and additional regulations are crucial to maintaining a balance between customary legal traditions and the requirements of modern criminal law.

It can be mentioned that the value approach of recognizing customary law in the national punishment system can be seen from the formulation of the objectives and guidelines for punishment determined by the National Criminal Code. The purpose of customary law punishment crystallized in Pancasila is to restore balance in society, both spiritual balance and balance of social relations. The goal of restoring this balance is realized in the goal of recovery and repair of losses to victims or families of victims and the community due to the perpetrator's actions formulated in Article 51 letter c.

If connected with the values contained in Pancasila, the purpose of punishment as stipulated in Article 51 of the National Criminal Code is very relevant to the balance between religious values, humanitarian values, and societal values in the five precepts of Pancasila. Religious value is realized with the purpose of penance, which, in the life of Pancasila society, is integrated with cultural values so that God also prohibits acts prohibited by custom in religious books. So that the punishment as imposed and carried out by the perpetrator becomes a means of penance to God as well as redemption of guilt for the victim, the family of the victim, and/or the community.

Concretely, implementing the recognition of the Adat law must be contained in an organic law to implement the 1945 Constitution. In further developments, Law No. 5 of 1974 regarding the Regional Government of the State gives authority or autonomy to regional governments to implement development under the social life and culture of each as long as it does not conflict with national law. Law No. 48 of 2009 concerning Judicial Power obliges judges to explore, follow, and understand legal values and a sense of justice that lives in society. Thus, the national legal instruments have provided a solid legal basis for the regions to make rules and adopt policies related to Adat law.

Meanwhile, the humanitarian and societal values contained in the second to fifth precepts have relevance to the purpose of punishment in the form of admission of guilt and forgiveness or

---

[27] Umi Rozah, "Membangun Asas-Asas Pemidanaan Dalam Kerangka Pancasila," *Loc. Cit.*

[28] Yanuardi Yogaswara, Tata Surwita, and Dewi Asri Yustia. "Implikasi Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Terhadap Asas Legalitas Dalam Sistem Hukum Pidana Indonesia". *El-Mujtama: Jurnal Pengabdian Masyarakat* 4 (3) 2024: 1736–1744. DOI: https://doi.org/10.47467/elmujtama.v4i3.2191.

reconciliation between the perpetrator and the victim/ family of the victim and the community as well as compensation for losses suffered by the victim/ family of the victim and the community as a result of the perpetrator's actions. In addition, it is also a form of conflict resolution and re-adhesive relations between the perpetrator and the victim/ victim's family and the community, which is a reflection of humanitarian and societal values.

The guideline of punishment in the National Criminal Code, if connected with the aspect of customary law crystallized in Pancasila, also has relevance, which the foundation of the principle of balance of religious, humanitarian, and societal values shows. This is realized by the formulation of guidelines for judges in imposing punishment must consider things including:[29] Prioritize justice for perpetrators, victims, and society; Consider humanity in imposing punishment such as granting forgiveness in trivial or minor cases; Do not impose different or discriminatory punishments because of bribes, introductions, and others; Not just imposing punishment but must exercise restraint and economy in the use of punishment; Providing leeway or flexibility for the perpetrator in carrying out his punishment with conditions and considerations determined by the judge.

In addition to the policy approach, the punishment system in the National Criminal Code is also carried out with a value approach. The value approach is manifested by the recognition of customary law, which can be seen in the formulation of objectives and guidelines for punishment. The purpose of customary law punishment crystallized in Pancasila is to restore balance in society, both spiritual balance and balance of social relations. If connected with the values contained in Pancasila, the purpose of punishment as stipulated in Article 51 of the National Criminal Code is very relevant to the balance between religious values, humanitarian values, and societal values in the five precepts of Pancasila. Meanwhile, the guideline of punishment in the National Criminal Code, if connected with the aspect of customary law crystallized in Pancasila, also has relevance, which the foundation of the principle of balance of religious, humanitarian, and societal values shows.

5. Conclusion

The provisions of the sentencing guidelines show the concept of integration as a form of policy approach that is more aimed at prevention and, at the same time, rehabilitation, which is seen as a target that must be achieved in a punishment. This conscious and deliberate policy is based on basic ideas or principles of balance, including a mono-dualistic balance between the interests of society and the interests of individuals. The principle of balance, if examined, has actually been found in the legal system applicable in Indonesia before the Criminal Code (WvS) or the National Criminal Code was planned/formulated, namely customary law. In customary law, there is a continuous legal agreement by the community from generation to generation about something that is prohibited or allowed. If the prohibition or permissibility is violated, sanctions will be given to realize justice, both justice for the perpetrator, justice for the person who is violated, and justice for the community. This realization of justice is referred to as restoring the balance that has been disturbed.

[29] *Ibid.*, 61

Meanwhile, the guidelines for punishment in the National Criminal Code, if connected with the aspect of customary law, are crystallized in Pancasila. Philosophical ground means that the regulation, here the codification, shall align with the philosophy of the nation and people to which their regulation will be in force. In Indonesia, the codification should be based on the values of Pancasila as a state philosophy.

6. References

Abdullah, Rahmat Hi. 2016. "Urgensi Hukum Adat Dalam Pembaharuan Hukum Pidana Nasional". *Fiat Justisia: Jurnal Ilmu Hukum* 9 (2).
DOI: https://doi.org/10.25041/fiatjustisia.v9no2.595.

Adiasih, Ning, and Mulya Sarmono. "Overview Pluralism Law: Application Ammatoa Customary Crime Kajang, Bulukumba, South Sulawesi After the New Criminal Code Law". *Revista De Gestão Social E Ambiental* 18 (6). São Paulo (SP):e05864. 2024.
DOI: https://doi.org/10.24857/rgsa.v18n6-059.

Arief, Barda Nawawi, "*Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*." Jakarta: Kencana, 2010.

Arief, Barda Nawawi, "*Ilmu Hukum Pidana Integralistik (Pemikiran Integratif Dalam Hukum Pidana)*." Semarang: Penerbit Pustaka Magister, 2015.

Arief, Barda Nawawi, "*Kebijakan Legislatif Dalam Penganggulangan Kejahatan Dengan Pidana Penjara*." Cetakan Keempat. Yogyakarta: Genta Publishing, 2010.

Atmasasmita, *Romli. "Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan "Geen Straf Zonder Schuld."* Jakarta: Gramedia Pustaka Utama, 2017.

Huda, Ni,matul. "*Politik Hukum dan Pembangunan Sistem Hukum Nasional*. "Jakarta: Sinar Grafika, 2023.

Irmawanti, Noveria Devy & Barda Nawawi Arief. "Urgensi Tujuan dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana", *Jurnal Pembangunan Hukum Indonesia*, Nomor 2, (2021): 219,
DOI: https://doi.org/10.14710/jphi.v3i2.217-227.

Jaya, Nyoman Sarikat Putra. "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional", *Masalah-Masalah Hukum* 45, No. 2 (2016): 123-124,
DOI: https://doi.org/10.14710/mmh.45.2.2016.123-130.

Kurniawan, Fery. "Hukum Pidana Adat Sebagai Pembaharuan Hukum Pidana Nasional", *EDUKA: Jurnal Pendidikan, Hukum dan Bisnis* 1, Nomor 2 (2016): 27.
https://doi.org/10.32493/eduka.v1i2.3739

Kusumaatmadja, Mochtar dan B. Arief Sidharta. "*Pengantar Ilmu Hukum: Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum*." Bandung: Alumni, 2000.

Manan, Bagir. "Peranana Hukum dalam Mewujudkan Cita-Cita Keadilan Sosial Menurut UUD 1945", *Makalah Dies Natalis FH Universitas Katolik Parahyangan*, Bandung, 21 September 2013.

Osman, F. "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage." *Potchefstroom Electronic Law Journal*, *22*, (2019). 1-24. https://doi.org/10.17159/1727-3781/2019/v22i0a7592.

Ranteallo, Jenri and Yana Sukma Permana. "Tinjauan Yuridis Tindak Pidana Penyerobotan Tanah Adat di Kabupaten Toraja Utara". *The Juris* 6 (2), 2022: 437-40.
DOI: https://doi.org/10.56301/juris.v6i2.614.

Rozah, Umi. "Environmental Maintenance through the Application of Adat (Criminal) Sanctions on baduy Cummunities", *Indian Journal of Forensic Medicine & Toxicology* 15 No. 2 (2021): 1206-1213, https://doi.org/10.37506/ijfmt.v15i2.14485

Rozah, Umi. "Membangun Asas-Asas Pemidanaan Dalam Kerangka Pancasila". *Ringkasan Disertasi Program Doktor Ilmu Hukum Universitas Diponegoro*, 2015.

Sakidjo, Aruan & Bambang Poernomo, "*Seri Hukum Pidana 1: Hukum Pidana Dasar Aturan Umum Hukum Pidana Kodifikasi*." Jakarta: Ghalia Indonesia, 1990.

Syaufi, Ahmad, Aurora Fatimatuz Zahra, and Mursidah. "The Existence of Customary Law: Badamai Customary Law". *Research Horizon* 1 (3) 2021.:94-99. https://doi.org/10.54518/rh.1.3.2021.94-99.

Sudarto. "*Hukum dan Hukum Pidana*." Bandung: Penerbit Alumni, 1986.

Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, Lembaran Negara Republik Indonesia Tahun 2023 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 6842.

Yogaswara, Yanuardi. Tata Surwita, and Dewi Asri Yustia. "Implikasi Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Terhadap Asas Legalitas Dalam Sistem Hukum Pidana Indonesia". *El-Mujtama: Jurnal Pengabdian Masyarakat* 4 (3) 2024: 1736–1744. DOI: https://doi.org/10.47467/elmujtama.v4i3.2191.

Yoserwan. "Implications of Adat Criminal Law Incorporation into the New Indonesian Criminal Code: Strengthening or Weakening?" *Cogent Social Sciences* 10 (1). 2023. DOI: https://doi.org/10.1080/23311886.2023.2289599.