

# Implementing Justice for Children in Conflict with the Law: Philosophical Aspects of Living Law

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**Keywords:** Children, Criminal Law, Philosophical, Living Laws.

**Abstract:** The process of juvenile criminal justice has demonstrated how the law operates, still adhering to syllogism principles, a legalistic perspective of the law, and equating law with legislation. This type of research is normative legal research using a philosophical, theoretical, and conceptual approach. The research was conducted in the provinces of Bali. This paper provides insights into the latest trends in research. The research findings indicate that the essence of customary criminal sanctions is significantly influenced by the values prevailing in society as a cultural value system and is also influenced by philosophical and sociological aspects. Similarly, for various cultures, tribes, and customary practices, the application of customary criminal sanctions varies greatly based on specific variables. In Indonesia's traditional legal system of local communities, better known as customary law, the tendency of customary sanctions leans towards a restorative meaning. Meanwhile, the formation of practical law is oriented towards legal principles, as law is not merely a structure of regulations but also embodies philosophical values. Hence, it is only fitting that legal regulations encompass a section capable of transmitting philosophical values, and that section is the legal principles.

## 1 INTRODUCTION

Punishment that is applied inappropriately because it is influenced by factors such as the attitude of judges who tend to be too rigid and focus on legalistic aspects, and prioritize legal certainty, can result in neglect of child protection. This occurs because the basic concept in punishing children should be the last resort, and the punishment applied should be temporary, in this context, child protection can also be neglected because punishment of children should be considered as a last resort (*ultimum remedium*) and must consider the interests and rights of children (Supeno, 2010).

Child protection is an important principle in law, which recognizes that children have special rights and protections that must be considered in any legal action or decision that may affect them. This includes juvenile sentencing, where prevention, rehabilitation and educational approaches are considered to take precedence over harsh and long-term punishment.

If sentences imposed on children do not take into account these principles and are based more on legal certainty, this can have a negative impact on the child's development and rehabilitation. Therefore, it is important for the justice system to remain sensitive

to children's rights and ensure that sentences are in line with the goals of rehabilitation and protection. Various legal instruments, both in the Indonesian context and international law, which emphasize that punishment of children involved in criminal acts should only be used as a last resort. In addressing this situation, there needs to be more constructive and restorative alternatives to punishment, which reflect the principles of justice, to deal with children involved in violations of the law, apart from imprisonment (Lidya Rahmadani Hasibuan, M.Hamdan, 2015). Furthermore, it is important that the judge's decision does not have a negative impact on the physical, mental, attitudinal and social aspects of the child. The purpose of the judge's decision should not be solely retaliation or punishment, but rather focus more on the welfare of the child and the restoration of his or her condition. In this case, it is necessary to consider the child's future and ensure that the decision supports the child's recovery so that they can return to their original or better condition.

Thus, the application of punishment to children in conflict with the law must be in line with the values of justice, concern for the welfare of children, and the goal of rehabilitation. This is in line with the concept of child protection that is recognized both at the

national and international levels.

The judicial process in handling juvenile criminal offenses has illustrated how the legal system operates, by still prioritizing the principle of syllogism, a legal approach that tends to be legalistic, where the law is considered synonymous with the law. In this view, the law is considered the only relevant source of law, considered to have covered all aspects of the law in detail and clearly. Therefore, judges are considered to have limitations to act beyond what has been strictly and rigidly regulated in the law.

In practice, this approach may result in a lack of scope for judges to interpret the law or make decisions that are more contextualized and based on broader principles of justice. This can lead to a neglect of individual and situational factors that may influence juvenile criminal cases. Legal approaches that rely solely on the text of the law often overlook the importance of social, psychological and rehabilitative contexts in the treatment of children involved in criminal offenses. Therefore, there is a push to consider a more holistic, restorative and adaptive approach to dealing with juvenile offending, which recognizes the complexity and individual needs in each case. More inclusive and child-responsive legal thinking can help avoid potential negative impacts on children's rights and welfare in the justice system. Sanctions or customary obligations that still exist in Indonesian society against children. Some of these sanctions or obligations may not always be in line with the principle of respect for the rights, dignity and rights of the child and may have a negative impact on the child's physical and mental health. Customary sanctions or obligations such as Nyanguin Banjar that reflect the culture and traditions of the Balinese are an integral part of Indonesia's cultural heritage. However, when applied to children, it is necessary to strike a balance between respect for tradition and protection of children's rights. The protection of children's rights in Indonesia is governed by various laws and regulations, such as Law No. 35/2014 on Child Protection. This law recognizes children's right to live, grow and develop at their best and to be protected from any adverse influence or exploitation that may harm them. In situations like this, the government and community need to work together to ensure that the implementation of customary obligations does not neglect the rights and interests of children. Respect for tradition and culture can be maintained while ensuring that children do not face inappropriate physical and mental health risks. It may be important for authorities, community organizations and relevant agencies to engage all

parties in dialogue and education, so that awareness about child protection can be raised while safeguarding the cultural heritage that is important to the community (Widnyana, 2013).

In various regions in Indonesia, there are variations in the form and implementation of customary criminal sanctions that are still practiced in accordance with local traditions and culture. In Minangkabau society, there is a customary criminal sanction known as "Berabu Dijantik" or "Kuma Disasah," where perpetrators of certain acts are required to organize a banquet by slaughtering chickens to buffaloes. This sanction has social and economic aspects, where the perpetrator must make a donation that has meaning in the customary context. In South Sumatra, there are customary criminal offenses that refer to the "Simbur Cahaya" or "Ratu Sinuhun's Charter". This book of customary law contains regulations governing various aspects of community life, including rules of social intercourse, agriculture, and customary governance. The customary criminal sanctions that apply here involve actions such as making donations or giving goats as a form of reparation and avoiding bad luck (Suryani Widyati, 2014).

This variation reflects the diversity of cultures, traditions, and legal perspectives in Indonesia. However, it is important to ensure that the application of customary criminal sanctions does not conflict with the rights and welfare of individuals, especially children. Understanding and respecting cultural heritage while safeguarding human rights is an important challenge in maintaining a good balance between tradition and protection. The characteristics of "fulfillment of customary obligations" and the characteristics of additional punishment in general have several important features (Suryani Widyati, 2014):

1. **Dependency on Principal Punishment:** Additional punishment generally cannot be imposed or applied without the principal punishment being imposed first. This means that the additional punishment becomes linked to the main punishment given for the violation of the law.
2. **Accessory or Attached Nature:** Additional punishment is considered to have an accessory or attached nature to the main punishment. This means that additional punishment usually does not have its own independence and only appears as an addition to the main punishment that has been imposed.

However, it is important to note that in some jurisdictions, such as the Netherlands since 1959, there has been a change in the approach to additional punishment. The possibility of imposing additional

punishment has been opened up separately from the principal punishment. This means that additional punishments do not always have to be imposed at the same time as the main punishment and can be considered separately, depending on policy and applicable law. It is important to understand the differences in legal approaches to additional punishment in different jurisdictions, as this may impact how additional sanctions are applied in a particular context.

Research that will focus on the conceptualization or ideas of judges in applying customary criminal sanctions in juvenile criminal cases based on the juvenile justice system in Indonesia has an important meaning. This idea links the values of justice instilled in society with judicial practices and the application of sanctions in cases of juvenile crime. This concept reflects the close relationship between law, society and justice. Here are some aspects to consider in this research:

1. **Local Justice Values:** This research could explore how local justice values, including in the context of customary law or tradition, influence judges' views and approaches to the application of customary criminal sanctions in juvenile criminal cases. How are these values reflected in judges' considerations in deciding on appropriate sanctions?
2. **Conformity with Child Protection Principles:** In applying customary criminal sanctions in juvenile criminal cases, it is important to ensure that child protection principles are respected and carefully considered. How do judges maintain a balance between tradition and the protection of children's rights in their legal decisions?
3. **Interaction between National and Customary Legal Systems:** How do judges accommodate and integrate local justice values with national and international legal principles relating to child protection? How do they interpret the relationship between customary criminal sanctions and the broader juvenile justice system?
4. **Philosophical and Ethical Aspects:** The research could also investigate the philosophical and ethical considerations that guide judges in deciding on the application of customary criminal sanctions. What moral considerations play a role in their decisions?

Such research will provide deeper insights into how the Indonesian juvenile justice system interacts with cultural values and local justice in the application of customary criminal sanctions in juvenile criminal cases.

## 2 LITERATURE REVIEW

Previous research that has been conducted on the issue of living law was written by (Hadi, 2018) with the title "Positive Law and Living Law (Existence and Application in Society)". This research focuses more on the study of the dialogical debate between the school of legal sociology and the school of legal positivism.

Furthermore, (Hamzani et al., 2019) in his article entitled "Considering Living Law as a Source in National Legal Development focuses on discussing the importance of including living law in national legal development."

Another research was conducted by (Khoirunnisa & Jubaidi, 2023b) with the title "Significance of the Living Law Concept in the New Criminal Code: A Progressive Law Perspective". This research focuses more on the importance of living law arrangements in the New Criminal Code from a progressive legal perspective.

While this research emphasizes more on the essential aspects of customary criminal sanctions which are significantly influenced by the values prevailing in society as a cultural value system and also influenced by philosophical and sociological aspects, although it refers to almost the same regulations and discussions regarding living law, but with a different perspective, the author in this paper emphasizes more on living law related to customary law, so it is still actual to be discussed. With a different approach, the author can provide new views, deeper analysis, and diverse perspectives related to living law in customary law. In the context of the actuality of the discussion, this research can provide relevant and valuable information for readers who are interested in the issue of living law.

## 3 METHODS

This research focuses on a normative legal approach with the aim of producing arguments, theories, or concepts as solutions to overcome a problem, the approach used is a qualitative- normative approach involving philosophical, theoretical, and conceptual approaches (Khoirunnisa & Jubaidi, 2023a). This research was conducted in Bali Province and was carried out by identifying concepts or ideas used by judges through legal discovery methods in judges' decisions. This approach illustrates the tendency of judges in juvenile justice practice.

## 4 RESULTS AND DISCUSSION

### 4.1 Living Law Theory with Customary Law

Soepomo argues that customary law is the living law, because it reflects the real-life experiences of the community. In accordance with its natural character, customary law continues to develop along with the development of the community itself (Soepomo, 1987). The term "customary law" first appeared during the VOC colonial era under Dutch rule under the influence of Van Vollenhoven. It is important to note that customary law is not the same thing as customary law, which is the English translation of adat law. Customary law refers to the norms of custom that prevail in society and is not in the nature of legal regulations made by government authorities.

Professor Van Vollenhoven, who first introduced the term customary law, gave a definition of customary law as a set of rules of conduct applicable to natives and foreigners in the East, which on the one hand has legal sanctions and on the other hand is not regulated in the form of a written code because it is customary (Haq, 2020). Although Van Vollenhoven's view was suitable for describing Adat Recht at the time, according to Abdulrahman, the definition is not fully in accordance with the current Customary Law (Meidy, 2022).

According to J.H.P. Bellefroid, customary law is a set of rules that are not formally written or promulgated but are respected and obeyed by the community with the belief that these rules have legal force (Wulansari, n.d.).

A similar thought was expressed by Prof. Mr. B. Terhaar Bzn, who defined customary law as the totality of rules reflected in the decisions of customary chiefs and applied spontaneously in society. Terhaar's opinion on the definition of customary law is often linked to his theory called "Decision Theory." This means that to determine whether a custom is considered customary law, it is necessary to consider the attitude of the ruler of the legal community towards violations of customary regulations. If the ruler imposes punishment on the violator, then the custom is considered to have become customary law (Bzn, n.d.).

According to the view of (Soekanto, 1988) the essence of customary law is actually customary law that has an impact on the legal aspect and is a series of repeated actions in a similar form, with the aim of leading to a just society. Based on the results of the Seminar on Customary Law and the development of National Law, customary law is defined as

Indonesian native law that is not written in the form of laws of the Republic of Indonesia, which includes elements of religion in various contexts. According to the view of (Muhammad, 2002) customary law is a legal framework that regulates human behavior in Indonesia in relationships between individuals, both through general norms involving customs and ethics adopted and upheld by members of the indigenous community, as well as through rules governing sanctions for violations set by customary leaders.

According to Dr. Sukanto, S.H., customary law is a collection of various customs that are generally not regulated in written form, not codified, and are binding with sanctions that have legal effects. In Djojodigono's view, the dimensions of customary law have two aspects, namely the formal and material dimensions. The formal dimension refers to unwritten law, while the material dimension relates to the system of norms that reflect the concept of community justice (Lukito, 2008). In the Indonesian context, customary law reflects the living law of the Indonesian people.

Customary law can also be used as a source of law by judges if required by law (Sulastriyono, 2012).

Customary Law is the uncodified law within the Indonesian nation and foreign Eastern communities such as Chinese and Arabs. In analyzing the position of customary law in the legal system, the principles of the natural flow of legal science Sociological Jurisprudence by (Eugen, 1963), needs to be considered, where the basic concept is living law.

The term "the living law" was first introduced by (Eugen, 1963) as a contrast to "state law." "State law" refers to law made by the state or positive law. For Eugen Ehrlich, the evolution of law centers on society itself, not on the formation of law by the state, the decisions of judges, or the development of legal science. Eugen Ehrlich argued that society is the main source of law, and law cannot be separated from its social context. Eugen Ehrlich wanted to emphasize that "the living law" is the law that controls people's lives, even if it has not been described in the form of formal legal statements. From this view, it can be understood that the living law is a set of rules that was born along with the emergence of society. Law grows from within society, and its purpose is to serve the interests of society. Therefore, Eugen Ehrlich argues that state law is not something separate from social factors. State law must consider "the living law" that has existed and developed in the life of society (Eugen, 1963), states:

*"Rules of law are not lifeless constructions which exist independently of the social reality. On the contrary, they are parts of the "living", i.e.*

*functioning and effective order of social communications, which protects certain interests privileged by society and discriminates those interests that are denounced and disapproved by society. Society itself engenders a general order of societal relations, which is later put into legal forms by social groups and individuals who act thereby in the capacity of lawmakers (in the broader meaning, as specified above)"*

In addition to the views expressed by Eugen Ehrlich above, the concept of "The living law" can also be exemplified from a historical point of view with its main figures (Von Savigny, 1880), proposed his theory in response to efforts to transplant Roman law and German codification into French law. In this context, F.K. von Savigny presented the concept of "Volksgeist" (national spirit, national character, soul of the people) which suggests that law derives from the distinctive beliefs of the nation itself. Furthermore, F.K. von Savigny emphasized that law is part of the culture that flows in society. This implies that law is found in society and not created by the authorities. Law reflects the distinctive and indigenous spirit of different nations. Law is not a product of nature or God, but law can be found through the vibrations of community life. Therefore, law is an important component of social and national life (Reimann, n.d.).

Law exists, develops, declines, and strengthens along with the development of society. This phenomenon shows that law cannot be separated from the context of society. As expressed by Karunamay Basu, "the law grows along with the nation, increases along with it, dies when the nation dissolves, and becomes its characteristic". F.K. von Savigny's view underlines that the optimal law is a law that is found from within its society, not a law that is formed and separated from the social reality in which the law applies. Such law is referred to as "The living law," which is a law that lives, grows, and exists together in the dynamics of social life. The government should not only import laws that are not derived from the values and culture of its people, but the government must actively explore the living law (Kutner L., n.d.).

According to Professor Sulis Irianto, the term "living law" is not just an ordinary phrase, but is a key concept studied historically in various fields of legal science, including legal anthropology. The essence of "living law" is the law that is truly recognized and applied in society. In the study of legal pluralism, it is accepted that state law is not the only law that controls the behavior of citizens. In everyday reality, there is customary law, religious law, custom, or a mixture of these, which are equally effective in regulating

relations between individuals. Although state law has a strong supremacy, its role in everyday life is very limited. State law is generally only found in administrative matters, civil transactions or criminal offenses. In contrast, other laws outside of state law are closer to the daily reality of society (Irianto, 2022).

It is understood that "living law" is not the same as normatively formulated legal texts, whether in state law, custom, religion, or unwritten legal norms. Legal texts always reflect ideal norms, aiming to protect society from crime, greed, and regulate the distribution of justice. However, a gap always exists between the ideal formulation and the legal practices that occur in society. Not all individuals abide by the law, some break it. In this context, the question is what exactly is "the living law"? It refers to the law that has been tested in cases of dispute, i.e. when violations of the law are resolved in courts, customary communities, or religious circles. This is when idealized articles or norms are tested through discussions between judges and parties. From this comes the judge's judgment and decision. In fact, "living law" is the result of the decision of a judge or authority in the community, which emerges after the examination of the legal text. This is the law that will be followed and applied in the life of the community.

#### **4.2 Philosophical Aspects of Actual Law Incorporation: The Importance of Customary Criminal Sanctions in Ensuring Justice for Children Facing the Justice System**

The philosophical aspect involves the essence of truth and justice, while the sociological dimension accommodates cultural values that live and grow in society. Both philosophical and sociological aspects in its application require extensive knowledge, experience, and wisdom to adapt to the values that are nurtured in society but often overlooked. The application of customary criminal sanctions is strongly influenced by the cultural value system that develops in society and is influenced by philosophical and sociological aspects.

In Indonesia, which is known for its cultural diversity, ethnicity, and customs, the application of customary criminal sanctions has significant variations. This variability is caused by several factors, among others:

- a. Actions may be carried out by individuals, groups, or members of indigenous communities.
- b. The act committed violates the norms of customary law.

- c. Such actions are deemed to damage the balance in society and cause turmoil.
- d. The community's response to the act results in sanctions or fulfillment of customary obligations.

In this context, both individual and collective aspects as well as conformity with customary norms play an important role in determining the type and level of customary criminal sanctions applied. Understanding these dynamics will help formulate legal policies that are more in line with the social and cultural conditions of the community.

Customary crimes occur when the community considers that an action is inappropriate, is considered to disturb the balance of the universe, and causes unrest in the community. According to Soepomo's view, in the customary law system, all actions that are not in accordance with the rules of customary law are considered acts against the law, and in customary law there is also the concept of legal rejuvenation if the rules are violated. Furthermore, Soepomo explained that if there is a violation of the law, then the legal authorities (such as the customary head and the like) will take concrete action (referred to as "adat reactie") to restore the violated legal rules (Soepomo, 1987).

Acts that violate customary law norms are often referred to as "customary offenses". Ter Haar explains that offense (delik) refers to a unilateral disturbance of the balance, or a unilateral impact on the goods of life, both material and immaterial, belonging to an individual or group. Such an act triggers a reaction whose nature and magnitude are determined by customary law, and this reaction is known as the "adat reaction" or "adat reactie". Through adat reaction, the disturbed balance can and must be restored, often by paying compensation in any kind or money as a consequence of the violation (Bzn, n.d.).

In the traditional Indonesian view, the most important aspect is the creation of balance (evenwicht harmonie) between the physical and metaphysical realms, between whole human groups and individuals, and between society and its members. Otje Salman Soemadiningrat explains that any violation of customary norms will cause imbalance in society. Therefore, it is important for any violation of custom to be subject to customary sanctions that serve as a means to restore the disturbed natural balance (traditional cure). These customary sanctions aim to restore harmony that has been disrupted due to customary violations and maintain balance in the lives of traditional Indonesian society (Salman Soemadiningrat, 2011).

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In the traditional legal structures found in local communities in Indonesia, there is a customary legal system that often leads to restitutive sanctions. Hadikusuma describes the customary law system as part of a series of customary laws that start from human reason or thought, which is a tool of thought given by God and reflected in daily actions. If these actions are followed by others, a habit will be formed. If the habit is accepted by many people, it will develop into a custom, and in the context of government, this custom will be recognized as customary law.

In the customary law system, the sanctions applied tend to have a restitutive character, meaning that the sanctions aim to restore balance and harmony in society that has been disrupted due to violations. These sanctions do not only focus on punishment, but also on restoring social relations and restoring the

balance of nature and the order of society that was damaged by the act of violating customary norms. This reflects the concept of conflict resolution and reconciliation in Indonesia's customary law tradition (Hadikusuma, 2003).

### **4.3 Characteristics of Customary Criminal Sanctions in Handling Juvenile Criminal Cases in Indonesia**

Customary sanctions have a role and function as elements that maintain stability and restore balance between the physical and metaphysical worlds. In situations of violation, individuals who violate customary norms will be directed to make recovery efforts such as cleaning the village or other actions aimed at restoring the disturbed balance. The punishment process can be interpreted as the determination stage as well as the implementation stage of sanctions in the realm of criminal law. Sudarto's view shows the difference between criminalization in two dimensions:

Criminal administration in abstracto involves the determination of the criminal law sanction system associated with the lawmaking process. On the other hand, the administration of punishment in concreto relates to the various institutions that jointly support and implement the criminal sanction system.

The issue of determining sanctions in customary criminal law is part of a series of policies that exist in the legal system (Tongat et al., 2020). As a system, each stage in the imposition of customary criminal sanctions cannot be considered as a stand-alone entity, but rather interconnected and mutually influencing each other. In fact, these stages cannot be separated absolutely.

When viewed within the framework of the overall criminalization system, the determination of customary criminal sanctions involves the authority of several agencies working together. This can be likened to the flow of the criminalization process that flows from one agency to another in a predetermined order. In this case, it is important that the stages of punishment are carried out sequentially and in accordance with predetermined limits (Lamintang, 2011). In this case, it is important that the stages of punishment are carried out sequentially and in accordance with predetermined limits.

However, in the context of the application of customary criminal sanctions, there are customary boundaries that arise in society that can result in inequalities in the criminalization process. These boundaries may result in disparities in the imposition

of customary criminal sanctions, where similar acts may be dealt with differently based on different cultural contexts and customs in society.

This underlines the importance of an in-depth understanding of customary boundaries in the application of customary criminal sanctions so that inequality or disparity in the handling of criminal cases can be minimized.

Disparities in the imposition of customary criminal sanctions are difficult to eliminate, as they involve the extent of judges' responsibility to consider all relevant factors and variables in juvenile criminal cases when making sentencing decisions. The presence of these disparities is related to the complexity of the issues, including in juvenile cases, where the judge's judgment needs to consider many diverse aspects. However, it is important to note that disparities in customary criminal sanctions do not necessarily result in injustice for child offenders.

When talking about equality in sentencing, it is important to remember that equality itself does not necessarily guarantee that the customary criminal sanction imposed will automatically be the most appropriate. The sentencing process, especially in the case of customary criminal sanctions, involves complex considerations that must consider the context, culture, and values involved in the case. Therefore, equality in the imposition of customary criminal sanctions does not always result in proper justification in the selection of customary criminal sanctions applied specifically (in concreto), especially when judges make judicial policies in judicial decisions.

It is important to maintain a balance between the principle of equality in sentencing and a deep understanding of the cultural context and values involved in the process of imposing customary criminal sanctions, particularly in cases of children.

The use of customary sanctions is considered appropriate and in accordance with the formation of national criminal law, in accordance with the provisions in Law No. 11/2012 on the Juvenile Criminal Justice System and the revision of the Criminal Code (KUHP), better known as the New Criminal Code in Indonesia. The principle adopted is the principle of material legality (Remmeling, n.d.) This connection can be seen from the explanation in the laws and regulations, the addition of types of punishment in the form of payment of compensation and fulfillment of customary obligations as formulated in the New Criminal Code. The reformation of criminal law in Indonesia is expected to fulfill the sense of justice, because it can reflect the culture and culture of Indonesian society.

The principle of material legality emphasizes that a person cannot be punished except on the basis of clear and unequivocal laws. This is reflected in the application of customary sanctions where the use of customary criminal sanctions must be in accordance with existing legal norms and enforced based on clear provisions in the legislation.

This arrangement is in accordance with Law No. 11/2012 on the Juvenile Justice System and the revision of the Criminal Code, which recognizes the existence of customary law norms as a component that can play a role in the juvenile criminal justice system. Although customary sanctions do not always have to be in the same form as modern criminal penalties, the use of customary sanctions is regulated in such a way that it still adheres to the principles of material legality that ensure clarity and legal certainty in the process of enforcing juvenile criminal law.

In the context of crime and punishment, it is very important to formulate the purpose of the punishment process. The basis for the formulation of this objective stems from the belief that punishment is basically only a tool to achieve certain goals. The process of identifying the purpose of punishment is based on a balance between two main objectives, namely the "protection of society" which involves the protection of victims and the "protection of offenders." When looking at aspects that are more concerned with the interests of the community, it is natural that in the imposition of criminal sanctions, types of customary criminal sanctions such as fines or fulfillment of customary obligations are maintained.

However, it is important to note that customary punishment is included in the category of "additional punishment" and placed separately as a special or extraordinary type of sanction. This reflects that customary criminal sanctions have different characteristics from conventional criminal sanctions. Although it remains relevant to achieve the objectives of community and individual protection, the use of customary criminal sanctions is applied carefully and contextually. By including customary punishment in an additional category and paying special attention to its characteristics, the legal system recognizes the diversity of sanctions and ensures that their use is in accordance with the principles of appropriate punishment.

The key consideration in changing the position of customary punishment is based on the understanding that, when looking at the purpose of punishment and the purpose of the use of criminal law in general (as a tool of criminal and social policy), customary punishment is basically not the main tool to regulate, control, and improve society. In this view, customary

punishment is more of an exception.

In this context, customary punishment is considered like surgery in medical practice, which is not the main method or main medicine, but rather an exception or additional tool used according to circumstances. In this case, customary punishment is understood as a tool or sanction used in certain situations, perhaps as an alternative to respond to violations of customary norms that have a negative impact on social harmony. Although not the main tool, the use of customary punishment still has relevance as a special option in order to maintain cultural and social values in society.

Every punishment has certain social implications because the effectiveness of a sanction depends on how society perceives the sanction. Soerjono Soekanto provides a view that negative sanctions, such as in the case of the death penalty, for example, with the use of an electric chair, firing squad, or hanging, have different effects and impacts. Similarly, a 3-year prison sentence has different interpretations and significance for different groups in society (Soekanto, 1988).

This highlights the importance of understanding that punishment is not just a formal act, but also carries social and psychological consequences. Society's reaction to a punishment may vary based on its culture, moral outlook, and social views. Therefore, in designing and imposing punishment, it is important to consider how society will respond and understand the punishment.

The concept of individualization of punishment not only refers to the adjustment or consideration of individuals when imposing punishment, but also involves the ability to modify, change, or adjust the punishment in line with the development and changes experienced by the convicted individual. Another aspect of the idea of individualization of punishment is the need for provisions that regulate the possibility of modifying, changing, reviewing, or adjusting the punishment that has been imposed, especially if there are changes, developments, or improvements in the convicted person (Soekanto, 2001).

In other words, penal individualization embodies the concept that sentences should be responsive to changes within the convicted person. This includes the recognition that individuals are subject to transformation, growth, and change in their lives, which impacts the effectiveness and relevance of the punishment that has been imposed. Therefore, the idea of penal individualization illustrates the importance of flexibility in the penal system to accommodate individual development and ensure that the punishment applied remains fair and



appropriate to the actual situation of the convicted person.

In the relationship between sanctions and punishment, changes or adjustments can be made to decisions of conviction and/or measures that have obtained permanent legal force. This is done by considering the development of the prisoner and the purpose of the punishment. The amendment or adjustment process can be carried out based on a request from the prisoner himself, his parents, guardian, or legal counsel. In addition, this request can also come from the public prosecutor or supervisory judge. These changes or adjustments must not be more severe than the original decision and must be approved by the prisoner.

This may include revocation or termination of the remaining punishment or measure, or substitution of another type of punishment or measure. If a request for modification or adjustment is rejected by the court, the prisoner can submit a new request after one year from the rejection. However, if there are special circumstances that indicate that the application should be considered before the one-year time limit, then this can be considered.

In essence, this concept recognizes the importance of flexibility in sentencing to consider individual development and change, as well as ensuring that the punishment given remains in line with the aims of rehabilitation and recovery of the prisoner.

In Indonesia, which has cultural diversity, there are various special cultures in addition to general culture. According to (Soekanto, 2001) the essence of general culture and special culture are values that refer to views on the concept of good and bad. If norms that are considered good are followed and applied, then a sub-culture will be formed. Conversely, if bad values are not avoided and even embraced, then perhaps an alternative culture will emerge such as the culture of corruption.

In terms of determining criminal offenses based on assumptions that are considered true, the apodictic approach becomes relevant, especially when looking at its function as an instrumental tool of law. This requires further study to understand the extent of its influence on the classification of criminal offenses, which generally plays a role in expressing certain values or qualities.

It should be noted that the complexity increases when linking this with the requirement that the criminal law system developed is not only defensive, but also must be proactive (legislative forward planning). (Widnyana, 2013)' With this anticipatory approach, criminal law is directed to foresee potential future offenses and formulate preventive measures

early. This requires criminal law to adapt to social developments, technology, and situations that have not yet occurred, with the aim of preventing criminal offenses before they occur.

As such, there is a complex challenge in combining the apodictic approach, the values expressed by the classification of criminal offenses, and the anticipatory requirements in building an effective and appropriate criminal law system.

Sanctions given to juvenile offenders, in addition to the main punishment, can also involve additional punishment. For adult offenders, additional punishment can be in the form of revocation of certain rights, deprivation of certain goods or bills, announcement of a judge's decision, payment of compensation, revocation of certain licenses, as well as fulfillment of local customary obligations or obligations based on norms prevailing in the community (Suryani Widyati, 2014). On the other hand, additional punishments that may be imposed on juvenile offenders may include the forfeiture of benefits obtained from the criminal offense or the performance of customary obligations (Suryani Widyati, 2014). The application of this additional punishment aims to provide further consequences to the perpetrators of criminal offenses, as well as provide a broader impact on them.

These additional punishments can have various impacts, such as correcting the harm caused by the crime, emphasizing the offender's responsibility to society, and encouraging better behavior in the future. By combining main and additional punishment, the justice system can provide more holistic and impactful sanctions in dealing with criminal offenses, especially in juvenile cases.

Additional punishment refers to the imposition of punishment that complements the main punishment and is basically optional. Additional punishment needs to be clearly outlined in the formulation of the relevant criminal offense. This allows the judge to consider whether additional punishment should be imposed on the convicted person, with the exception of cases of revocation of corporate rights and fulfillment of customary obligations (Nur et al., 2020). In the context of imposing additional punishment on juveniles, a dual-track system is applied, which refers to the type of action (*maatregelen*). In this situation, the judge has the authority to decide what measures to impose on the child who committed the criminal offense. This applies especially if the child cannot be held accountable for his or her actions due to mental illness, mental illness, mental retardation, or other reasons that lead to a decision not to impose

punishment. This dual-track system allows for the handling of juvenile cases to focus more on correction and rehabilitation, rather than punishment.

The use of living law in society that regulates actions that are prohibited and threatened with criminal sanctions are recognized as criminal acts and threatened with criminal law sanctions is an exception to the application of the principle of legality in the criminal law system in Indonesia. The concept of living law involves the formation of relevant criminal law norms to deal with situations and challenges that develop in society, which have not been explicitly regulated in legislation.

The application of living law is a way to formulate criminal law norms to provide legal certainty in the future. This action recognizes the principle of legality both formally and materially and serves as a tool to strengthen and develop the field of criminal law and punishment, as well as to strengthen the practice of criminal law enforcement.

This indicates that in certain situations, the principle of legality underlying criminal law can be adjusted to social, cultural, and normative developments in society. In this way, the criminal law system can remain relevant and effective in dealing with the dynamics that occur in society.

## 5 CONCLUSION

In Indonesia, the core of customary criminal sanctions is heavily influenced by the norms and values that develop in the culture of the community and is also influenced by philosophical and social factors. This also applies to the diverse cultures, tribes, and traditions that exist, resulting in variations in the application of customary criminal sanctions that are based on a variety of specific variables. Within the framework of the traditional legal system of local communities in Indonesia, known as the adat legal system, the tendency of adat sanctions tends to produce restitutive effects. Meanwhile, in the practical formation of law, legal aspects are reflected in legal principles, because law is not just a regulation, but also reflects philosophical values. Therefore, it is important to have a part in legal regulations that can accommodate philosophical values, which are embodied in the form of legal principles.

In the criminal law framework, it is important to consider aspects of justice, child protection and community culture. The application of customary criminal sanctions, while not primary, remains relevant for restoration and balance. Additional

punishments, especially for children, reflect a holistic and individualized approach to punishment. The use of living law recognizes the adaptation of criminal law to the development of society. Overall, the integration of the values of justice, child protection, and social norms is important to create a just society through criminal law enforcement that focuses on restoration and adaptation.

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