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The Convergence of Customary Sanctions and State Criminal Sanctions: An Analysis of Legal Certainty and Human Rights Protection

ABSTRACT

Indonesia adheres to legal pluralism that places customary law side by side with national criminal law. The recognition of the law that lives in society in Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) opens up a space for convergence between customary sanctions and state criminal sanctions, but at the same time raises the issue of legal certainty and potential human rights (HAM) violations. This study aims to analyze the form of convergence of the two types of sanctions, their implications for legal certainty, and the mechanism for human rights protection in their application. The research uses a normative juridical method with legislative, conceptual, and case approaches. The results of the analysis show that convergence is realized through the recognition of the principle of material legality, additional penalties in the form of fulfillment of customary obligations, as well as restrictions through Regional Regulations and human rights principles. Legal certainty can only be maintained if customary law is documented and formalized in local regulations, while human rights protection requires strict limits in the form of prohibition of sanctions that degrade dignity, the principle of ne bis in idem, and judicial supervision.

Keywords: customary sanctions, criminal sanctions, legal certainty, human rights, legal pluralism

INTRODUCTION

Indonesian society lives in a pluralistic legal system. State law, customary law, and religious law work simultaneously in regulating the behavior of citizens. This condition in the study of legal sociology is called legal pluralism, which is a situation when more than one normative order applies to the same social space. In the criminal context, customary law has its own mechanism for resolving violations that are oriented towards restoring the cosmic and social balance of the community, for example through customary fines, cleansing rituals, or symbolic expulsion.

The Constitution recognizes and respects the unity of customary law communities and their traditional rights as long as they are alive and in

accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia (NKRI). However, for decades the national criminal law derived from the Wetboek van Strafrecht adheres to the principle of formal legality so that the space for customary sanctions is very limited. According to Sudarto, as Hasan explained, the consequence of this principle is that unwritten laws do not have the power to be applied as a basis for punishment. The only important recognition is contained in Article 5 paragraph (3) sub b of Emergency Law Number 1 of 1951 which allows judges to decide on acts that have no equivalent in the Criminal Code based on customary law.

The changes occurred through the National Criminal Code (Law Number 1 of 2023) which came into effect on January 2, 2026. Article 2 of the National Criminal Code recognizes the enactment of laws that live in society as the basis for criminalization, provided that it is in accordance with the values of Pancasila, the 1945 Constitution, human rights, and general law principles recognized by the people of nations. The National Criminal Code also includes the fulfillment of local customary obligations as one of the additional criminal penalties. Thus, there is a convergence, namely the meeting and adjustment between customary sanctions and state criminal sanctions within one national legal framework.

This convergence raises two main problems. First, the issue of legal certainty: customary law is generally unwritten, differs between communities, and is dynamic, so it has the potential to conflict with the requirements *of lex certa* and *lex scripta* in criminal law. Second, the issue of human rights: some customary sanctions, such as exclusion, expulsion, or actions that degrade dignity, may conflict with constitutionally guaranteed rights and even are classified as *non-derogable rights*. This study is important to formulate limits and mechanisms so that recognition of customary law does not compromise legal certainty and the protection of individual rights.

RESEARCH METHOD

This research is a normative legal research with a statute *approach*, a conceptual *approach*, and a case *approach*. Primary legal materials include the 1945 Constitution, the Human Rights Law, the National Criminal Code, and the Constitutional Court ruling. Secondary legal materials are in the form of books

and scientific journals. The analysis was carried out qualitatively prescriptively with the theoretical framework of the three basic values of Radbruch law (certainty, justice, utility).

RESULT AND DISCUSSION

Forms of Convergence of Customary Sanctions and State Criminal Sanctions

The convergence of customary sanctions and state criminal sanctions is rooted in the constitutional foundation of the recognition of indigenous peoples in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. These two articles contain restrictive conditions: customary law is recognized as long as it is alive, in accordance with the development of the community, and in line with the principles of the Republic of Indonesia. Recognition at the international level is also affirmed in *the United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) which gives indigenous peoples the right to defend their legal system and institutions, while respecting international human rights standards. The Constitutional Court in Decision No. 35/PUU-X/2012 affirmed that customary law communities are legal subjects whose rights are protected by the constitution, thereby strengthening the position of customary law in the national legal system.

In the National Criminal Code, convergence appears in at least three forms. First, the expansion of the principle of legality. Article 1 paragraph (1) still affirms the principle of formal legality, but Article 2 provides an exception by recognizing the law that lives in the community as the basis for declaring an act as a criminal offense even though it is not regulated in the law. This provision shifts formal legality to material legality. Second, the integration of customary sanctions in the national criminal system through additional penalties in the form of fulfillment of local customary obligations, which by lawmakers are seen as a form of criminal that can be imposed by a joint judge or accompany the principal crime. Third, the delegation of technical arrangements to Regional Regulations. The laws that live in the community in question are further regulated by district/city regional regulations, so that customary law acquires a written form and can be verified.

From limited recognition to structured recognition

Prior to the National Criminal Code, the recognition of customary law in criminal law was narrow and depended on the discretion of the judge. Article 5 paragraph (3) sub b of Emergency Law Number 1 of 1951 only allows customary law to be used for acts that have no equivalent in the Criminal Code, with criminal threats that are limited to following the closest equivalent in the Criminal Code. The recognition is residual: customary law only fills a void and does not become a stand-alone source of criminal law. The National Criminal Code changes this position to structured recognition, namely recognition with explicit terms, limits, and implementation arrangements.

Theoretically, this form of convergence can be read as an effort to bridge the two paradigms. State criminal law is retributive and oriented towards procedural certainty, while customary criminal law is restorative and emphasizes the restoration of social relations and magical-religious balance. Customary criminal law is generally unwritten and local, so it only applies to certain indigenous peoples and varies between regions. Customary criminal law does not recognize a strict separation between the criminal and civil realms as in the tradition of Western law; a violation is considered to disturb the balance of society so that customary reactions are aimed at restoring it. Therefore, convergence essentially opens up space for restorative justice in the formal criminal justice system. Restorative justice itself emphasizes the restoration of the situation to its original position by involving the perpetrator, victim, family, and related parties, not retaliation.

Nevertheless, convergence does not mean fusion. Customary sanctions still have their own social legitimacy in the community, while state criminal sanctions derive from state sovereignty. The relationship between the two is more accurately understood as a mutually complementary and limiting relationship: the state recognizes the effectiveness of customary settlements, but sets constitutional and human rights limits on its content and implementation.

Conditions and limits for the application of laws that live in society

Convergence in the National Criminal Code does not open up unlimited space. Article 2 establishes four boundaries that apply simultaneously:

1. Territorial restrictions. A living law applies only where the law lives.

2. The principle of subsidiarity. A living law only applies as long as it is not regulated in the National Criminal Code.

3. Value conformity test. Living law must be in accordance with Pancasila, the 1945 Constitution, human rights, and general law principles recognized by the people of nations.

4. Further arrangements. The procedures and criteria for its determination are regulated by Government Regulations, which are guidelines for local regulations.

This limitation shows that the material legality in the National Criminal Code is controlled. The expansion of the principle of legality goes hand in hand with the recognition of material unlawfulness in Article 12 paragraph (2), which views an act as a criminal act if it is unlawful or contrary to the law that lives in society.

Additional criminal philosophical foundations for the fulfillment of customary obligations

Additional crimes in the form of fulfillment of customary obligations (Article 66 paragraph (1) letter f and Article 96) is in line with the purpose of punishment in the National Criminal Code. Article 51 states that the purpose of resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of security and peace in society, is almost identical to the purpose of customary reaction. The formulation of these goals is in line with the combined theory, which not only views crime as retribution, but also as a means of maintaining order and restoring society. Article 52 also emphasizes that punishment is not intended to degrade human dignity, so the form of customary obligations imposed by judges has been limited since the stage of imposing a penalty. In the old Criminal Code, additional crimes were limited to the revocation of certain rights, the confiscation of certain goods, and the announcement of a judge's decision (Article 10 letter b), so that the fulfillment of customary obligations is a new type of additional crime. Because it is imposed as an additional penalty, customary sanctions in this scheme do not replace, but accompani, state penalties.

Comparison of characteristics

The differences in the characteristics of the two types of sanctions and their meeting points can be summarized as follows.

Aspects	State criminal sanctions	Customary sanctions
Source	Written law	Customs and decisions of customary officials
Orientation	Retributive, procedural	Restorative, restoration of balance
Implementers	Law enforcement officials and judges	Institutions or customary officials
Shape	Jail sentences, fines, additional penalties	Customary fines, cleansing rituals, compensation, symbolic expulsion
Convergence point	Additional penalties for the fulfillment of customary obligations and restorative justice	

Systematic records

The three forms of convergence form a series. Article 2 opens the door to recognition, Government Regulations and local regulations become the means of verification, and Article 96 becomes the channel for sanctions in the judge's decisions. The effectiveness of this series depends on the readiness of the implementing regulations. Without clear regional regulations, such recognition risks becoming only a symbolic norm, as discussed further in section B.2.

Implications of Convergence on Legal Certainty

Legal certainty is one of the basic values of law in addition to justice and utility. In criminal law, legal certainty is realized through the principle of legality with four derivatives: the prohibition of criminalization based on unwritten law (*nullum crimen sine lege scripta*), the prohibition of analogy (*stricta*), clarity of formulation (*certa*), and the prohibition of retroactive (*praevia*). Hasan also summarized the principle of legality in the old Criminal Code into three points of

understanding, namely that no act can be punished without the rules that apply beforehand, the prohibition of analogy, and the prohibition of applying rules retroactively, and emphasizing that legal certainty also applies in determining the type of crime imposed. The Constitution guarantees the right to fair legal certainty in Article 28D paragraph (1) and the right not to be prosecuted on the basis of the law that applies retroactively in Article 28I paragraph (1). The recognition of the law that lives in society is directly related to these principles.

There are three issues of legal certainty that arise. First, the unwritten and diversity of customary norms. Customary law grows from the habits and decisions of customary stakeholders so that the formulation of prohibitions and threats of sanctions is not always clear and differs between regions. For residents, especially immigrants or residents who no longer live in indigenous communities, it is difficult to predict what actions can be sanctioned. In Fuller's framework, good law must be known, clear, and consistent; laws that do not meet these criteria lose their internal morality. Second, there is an unclear relationship between customary sanctions and state crimes. It is not yet clear whether customary settlement negates prosecution, whether customary sanctions that have been undergone are mitigating considerations, and what if the two processes run simultaneously. This void has the potential to give birth to double criminalization that is contrary to the principle *of ne bis in idem* and causes inconsistency in decisions. Third, dependence on Regional Regulations. Regional governments are not yet uniform in drafting regional regulations regarding living laws, so that in some areas the recognition of customary law is only declarative without operational power.

To maintain legal certainty, at least several steps are needed. First, documentation and codification of customary criminal law through regional regulations that contain a list of prohibited acts and types of customary sanctions, in line with the mandate of Article 2 paragraph (3) of the National Criminal Code. Second, the establishment of guidelines for judges in assessing the applicability of living laws, for example through Supreme Court regulations, including the obligation to consider the testimony of customary stakeholders and legal anthropologists. Third, affirmation of the procedural relationship between customary settlement and the criminal justice process, so that the results of customary settlements can be the basis for terminating cases through restorative justice mechanisms or at least being considered in criminal sentencing. A clear classification of cases is also needed before alternative sanctions are applied, because not all types of crimes can be resolved in that way. The integration of

customary law into the national criminal law system can enrich the legal system, but it requires synergy between lawmakers, the government, law enforcement officials, judges, and the community, accompanied by massive socialization. By doing so, convergence does not sacrifice legal predictability, but rather makes it more responsive to social realities.

Protection of Human Rights in the Implementation of Sanctions Convergence

Recognition of customary law is not absolute. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution themselves contain restrictive phrases, while Article 2 paragraph (2) of the National Criminal Code requires the conformity of the law that lives with human rights. The Constitution also contains rights that cannot be reduced under any circumstances, namely the right to life, the right not to be tortured, freedom of mind and conscience, the right to be not enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law. Law Number 39 of 1999 concerning Human Rights affirms the same and places the state's obligation to protect, respect, and fulfill human rights.

Potential human rights violations in the practice of customary sanctions can be grouped as follows. First, sanctions that degrade dignity or cause physical and psychological suffering, such as public humiliation, physical violence, or extreme social isolation, which are contrary to the prohibition of torture and treatment that degrades human dignity in Article 28G paragraph (2) of the 1945 Constitution. Second, discrimination against women and vulnerable groups, for example when customary sanctions are imposed unequally or victims of sexual violence are burdened with customary obligations. Third, customary courts that do not guarantee the right to self-defense, the right to fair examination, and the impartiality of customary stakeholders. Fourth, forced participation, which is when individuals are not given the option to be under customary jurisdiction. In the perspective of legal pluralism, the autonomy of the normative order of the community must be balanced with the protection of the rights of the members of the community within it.

Human-oriented convergence requires a number of protection mechanisms. First, the application of the principle of proportionality and humanitarian measures. Customary sanctions received by the state are only

sanctions that do not violate human dignity, while sanctions that are contrary to human rights cannot be enforced even though customary recognition is recognized. Second, the application of the principle *ne bis in idem* and the mechanism for calculating customary sanctions that have been undergone as a factor in mitigating state crimes. Third, the role of judicial supervision. Judges do not only record customary norms, but test their conformity with Pancasila, the 1945 Constitution, and human rights as required by Article 2 paragraph (2) of the National Criminal Code. Fourth, strengthening the capacity of customary institutions through human rights training, gender equality, and fair justice procedures, as well as the presence of Komnas HAM and legal aid institutions as victims' companions.

Thus, the balance between the recognition of the collective rights of indigenous peoples and the protection of individual rights is at the heart of the convergence. This approach is in line with the UNDRIP principle which guarantees the rights of indigenous peoples to their legal system without overriding international human rights standards. Legal certainty, justice, and utility within the Radbruch framework can also be achieved if all three are considered proportionately, with justice and the protection of human dignity as the final point of correction.

CONCLUSION

The convergence of customary sanctions and state criminal sanctions in Indonesia is reflected in the recognition of living law in the community as a basis for determining criminal offenses under Article 2 of the National Criminal Code, as well as the incorporation of the fulfillment of local customary obligations as an additional criminal penalty and the delegation of further regulatory authority to Regional Regulations (Perda). This framework is grounded in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. Accordingly, customary sanctions and state criminal sanctions are positioned as complementary mechanisms that remain subject to their respective limitations rather than being fully integrated into a single system. Nevertheless, this convergence raises challenges to legal certainty, particularly because customary norms are often unwritten and diverse, the procedural relationship between customary dispute resolution and the formal criminal justice system remains

unclear, and the formulation of Regional Regulations is inconsistent. These challenges can be addressed through the documentation and codification of customary law, the establishment of judicial guidelines, and the formulation of clear procedural regulations. At the same time, the implementation of customary sanctions must remain consistent with constitutional principles and human rights standards, particularly the prohibition of degrading treatment, discrimination, and double punishment. Therefore, effective judicial oversight and efforts to strengthen the institutional capacity of customary institutions are essential to ensure that the recognition of customary law does not undermine legal certainty or the protection of human rights.

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