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## Customary Law of Dou Donggo Bima from the Perspective of Islamic and Indonesian Positive Law

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### Abstract:

The community (dou) of Donggo uses their local wisdom and customary law to deal with legal matters within its society. Both are believed as truth and fulfilling the sense of justice within the community that upheld peace values. Therefore, it has been preserved for a long time until today. Practically, customary law enforcement is implemented by a customary law institution called Lembaga Adat dan Syari'at Donggo/Donggo's Customs and Sharia Council (LASDO). This study is a normative legal study with statutory, comparative, and case approaches putting three legal decisions of LASDO as its material object. Data are collected through interviews and studies of the relevant documents consisting of primary ones; customary law, jurisprudence, and Islamic law references, and the secondary one; relevant research results, and the works of legal experts. The statutory and comparative analysis employed in this study led to the finding that the contemporary Donggo community still employs the customary laws, such as baja and flogging law in solving the criminal cases namely rape, theft, and adultery. The sanctions imposed by LASDO in these three cases are different from the punishments contained in the KUHP. While compared to Islamic law, there are similarities in spirit and type of punishment yet different in the sentence form.

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**Keywords:**

Dou Donggo Bima; Customary law; Indonesian positive law; Islamic law

**Abstrak:**

Masyarakat (dou) Donggo biasa menggunakan kearifan lokal dan hukum adat untuk menyelesaikan masalah hukum yang terjadi. Bagi mereka, keduanya merupakan sistem yang diyakini sebagai kebenaran dan memenuhi unsur keadilan yang mengutamakan nilai-nilai perdamaian. Karenanya, sistem hukum adat tersebut tetap bertahan hingga kini. Penegakan hukum adat yang demikian dijalankan oleh sebuah lembaga adat bernama Lembaga Adat dan Syariat Donggo (LASDO). Penelitian ini adalah penelitian hukum normatif dengan pendekatan perundang-undangan, komparatif dan kasus dengan mengkaji tiga putusan LASDO sebagai obyek material penelitian. Data dikumpulkan dengan wawancara dan studi dokumen, baik yang sifatnya primer berupa referensi hukum adat, yurisprudensi, hukum Islam, maupun yang sekunder, yakni hasil penelitian yang relevan dan karya-karya para ahli hukum. Analisis statutory dan comparative mengantarkan pada sebuah kesimpulan bahwa masyarakat adat Donggo kontemporer masih menerapkan hukum adat berupa baja dan cambuk dalam menyelesaikan masalah hukum pidana seperti pada kasus perkosaan, pencurian, dan perzinaan. Sanksi yang dijatuhkan oleh LASDO pada 3 kasus tersebut berbeda dengan hukuman yang terdapat dalam KUHP. Sementara jika dibandingkan dengan hukum Islam, terdapat kesamaan spirit dan jenis hukuman meski berbeda dalam bentuk hukuman yang diberlakukan.

**Kata Kunci:**

Dou Donggo Bima; Hukum adat; Hukum positif;  
Hukum Islam

**Introduction**

Bima is historically one of the kingdoms that have been established for a long time in the archipelago. In the archive of *Dana Mbojo* Custom Agency of Bima, it was established in the 14<sup>th</sup> century based on the agreement of the small kings (*ncuhis*) in Bima.<sup>1</sup> It had successfully developed a political and cultural/customary pattern due to its prosperity from trade.<sup>2</sup> In the archipelagos' history of the trade, Bima was acknowledged as a transit port in its eastern part. Several merchants from Malaka heading toward Maluku in the 15<sup>th</sup> century transited in Bima.<sup>3</sup> Embroidery fabrics, sandalwood, candle materials, and various forest products were easily available through this port. Its strategic location on the bank of the bay and surrounded by mountains in the East of Sumbawa Island and the Flores Sea in the North has made Bima bay looks like a gate. Behind this gate, there were a large port and the capital of Bima in Nusa Tenggara Barat. The kingdom stretches half of East Sumbawa and Manggarai in the west of Flores.<sup>4</sup>

Bima had had its own legal system and customary law/common law obeyed by all of its population since the era of *nakas* (pre-historic kings). It was under the ruling of *ncuhi* (local customary leaders) and based on the customs and local wisdom. The agreements and common practices during the *ncuhi* era are the basis for the common law/customary law. The previous common law was influenced by Hinduism and Buddhism although the fact that the Bima people believed in Animism (*Parafu, ma kakamba ma kakimbi*, or old belief of Bima people). This means that the social institutions,

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<sup>1</sup> Muhammad Mutawali, "Implementasi Hukum Islam Di Kesultanan Bima," *Schemata* 3, no. 2 (2014): 182.

<sup>2</sup> Henri Chamber Loir dan Siti Maryam R. Salahuddin, *Bo' Sangaji Kai: Catatan Kerajaan Bima* (Jakarta: Ecole Francaise d'Extreme-Orient, Yayasan Pustaka Obor, 2012).

<sup>3</sup> J. Noorduyn, "Makasar and The Islamization of Bima," *Bijdragen Tot de Taal-, Land- En Volkenkunde* Deel 143, no. 2/3de Afl (1987): 316.

<sup>4</sup> Muhammad Mutawali, *Islam Di Bima: Implementasi Hukum Islam Oleh Badan Hukum Syara` Kesultanan Bima (1947-1960)* (Mataram: Alamtara and IT Press, 2013).

including the legal way of the Bima people at that time, had animism characteristics in addition to the influence of Hinduism and Buddhism.<sup>5</sup>

Throughout history, the practice of customary law aims to ensure that all problems in society can find complete solutions. Customary law resolves them thoroughly and answers all existing aspects or those which may exist so that in the future, there will not be any unsolved similar problems.<sup>6</sup> Nowadays, it turns out that customary law can still solve legal issues among contemporary indigenous people. It furthermore serves as a balance to determine the goodness or badness, right or wrong, and appropriateness or inappropriateness of an action or event within the society.

The customary law is also the guideline for enforcing and ensuring the preservation of manners, ethics, decency, morals, and common values within the society.<sup>7</sup> Within the framework of the restorative justice approach, the value expected in the traditional community such as balance, harmony, and peace among the society is all enforced in the customary laws. Therefore, it makes very much sense to find several countries whose customary courts are preserved to settle disputes or legal problems, including criminal cases.<sup>8</sup>

Among others, this is true and obvious in the community (*dou*) of Donggo which resides on the mountain in the western part of Bima Regency of Nusa Tenggara Barat Province, Indonesia. To solve legal issues within the community, the Donggo community has a customary law institution called *Lembaga Adat dan Syari'at Donggo*/Donggo's Customs and Sharia Council (LASDO). LASDO as

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<sup>5</sup> Ridwan, "Perkembangan Dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi Hingga Konservasi," *Jurnal Jurisprudence* 6, no. 2 (2016): 109, <https://doi.org/https://doi.org/10.2391/jurisprudence.v6i2.3008>.

<sup>6</sup> Dahlia Farida Et.al, "Legal Protection for Disputing Parties Through the Aceh Customary Court," *Legal Protection for Disputing Parties Through the Aceh Customary Court* 5, no. 1 (2020): 32, <https://doi.org/https://doi.org/10.19105/al-ihkam.v15i1.2250>.

<sup>7</sup> A. Suriyaman Mustari Pide, *Hukum Adat, Dahulu, Kini Dan Akan Datang* (Jakarta: Prenada Media Kencana, 2017).

<sup>8</sup> Yusi Amdani, "Konsep Restorative Justice Dalam Penyelesaian Perkara Tindak Pidana Pencurian Oleh Anak Berbasis Hukum Islam Dan Adat Aceh," *Al-Adalah* XIII, no. 1 (2016): 73, <https://doi.org/https://doi.org/10.24042/adalah.v13i1.1130>.

a sort of customary court is authorized to solve civil and criminal problems. The principles used in solving the legal matters in Donggo community are peacefulness, fairness, and liberation to preserve the harmony among people and between people and nature. Meanwhile, the customary sanction for the perpetrator of criminal laws ranges from advice-giving, warning-giving, married by force, being paraded around the village (*baja*), *dua kali waru* (two-times compensation) sanction, fines, to flogging.<sup>9</sup>

*Baja* and the flogging law are respectively sanctioned as punishment for the perpetrator of theft and adultery. Implementation of *baja* law is flogged while being paraded all over the village following the customary meeting. This sentence is expected to create shame for the perpetrator and create a deterrent effect by teaching others that such a criminal act has a detrimental effect and the perpetrator is publicly humiliated.<sup>10</sup>

Relating to this, some studies on the customary law of Donggo had been conducted. One of which is Peter Just in his study<sup>11</sup> which described the customs, culture, and customary law of the Donggo community. He focused on the aspect of justice and morality among the *dou Donggo* that offers an innovative approach to understanding the way of the law and dispute resolution. Just argued that the implementation of any kind of legal system should be based on and understood within the context of the moral ontology of a community. He further revealed the arguments on legal ethnography and anthropology before describing the village constitution as a moral community ontology and the basis of their lives.

Likely, The Team of Customary Law Revitalization in Bima carried out research on customary law and institutions in Bima. The team described that their research is an initial step in the process of customary agencies' empowerment in Bima. This study reveals that

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<sup>9</sup> Interview with customary leader and the former chairman of LASDO Council, Abdul Karim, in his residence on the 6<sup>th</sup> of July 2019, and The Chairman of LASDO, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 9<sup>th</sup> of June 2018.

<sup>10</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 9<sup>th</sup> of June 2018.

<sup>11</sup> Peter Just, *Dou Donggo Justice: Conflict and Morality in an Indonesian Society* (Lanham, Md: Rowman dan Little field, 2001).

people in Bima are still willing the implementation of Bima customary law, including the *baja* law, as an alternative one. It is also found that a large number of crimes were still happening within the society, and the customary law as living law is believed able to suppress its increasing number.<sup>12</sup>

Meanwhile, discussion related to the *baja* customary law within the context of corruption was the focus of Irfan and Israfil's study.<sup>13</sup> It reveals that *baja* law is critical to be implemented because of the increasing case of corruption in Bima. Thus, implementation of *baja* customary law can be an alternative punishment for corruptors through the Bima customary institution known as *Sara Tua Majlis*. Additionally, Honest Dody Molasy carried out research on Islamic and customary law in Donggo traditional community. Molasy described that the Donggo community simultaneously implements Islamic law and customary law through a customary agency established by the local community called Customary and Sharia Agency of Donggo (LASDO).<sup>14</sup>

This study comprehensively discusses the implementation of LASDO's legal decision to resolve three types of criminal cases and then views it from the perspective of Indonesian positive and Islamic law through a comparative scheme. This method of study differentiates this present study from the previous studies highlighted above.

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<sup>12</sup> BPMPP Kabupaten Bima Tim Revitalisasi Hukum Adat Bima (ForPuan, FKPT, Nasyiatul Aisyiah, CeDes, "Adat-Adat Bima Yang Tercecer, Dari Penelitian Tentang Revitalisasi Lembaga Adat Di Tengah Kegagalan Identitas Diri," *Center of Development Studies*, 2008.

<sup>13</sup> Muhammad Irfan and Israfil, "Baja Bima Customary Sanction an Alternative Policy of Corruption Actors in Bima Regency West Nusa Tenggara," *ULREV: Unram Law Review* 1, no. 1 (2017), <https://doi.org/DOI:https://doi.org/10.29303/ulrev.v1i1.10>.

<sup>14</sup> Honest Dody Molasy, "The Implementation of Islamic Law in Indonesia; What Should We Learn from Suku Donggo," in *Conference Proceedings 12th AICIS* (Surabaya, 2012).

### **Method**

This is a normative legal study that discusses relevant documents as its secondary data.<sup>15</sup> Permanent legal decisions issued by LASDO as the material objects of this research consist of 3 cases that have been decided by LASDO. They are the rape case in 2007, the theft case in 2015, and the adultery case in 2017. There were three approaches employed in this study; statutory, case, and comparative approaches.<sup>16</sup> The first approach is by reviewing relevant laws and regulations be it customary, national, and Islamic, while the second is through three criminal that cases occurred within the Donggo society, and the last is by comparing the laws of a legal system with others, namely customary with Indonesian positive, and Islamic law in Indonesia.<sup>17</sup> The data used in this study were primary and secondary data. Primary data were data obtained through interviews with some key persons, ranging from the former chairman of the LASDO, the current one, to the Head Police of Donggo Subdistrict. Meanwhile, secondary data were relevant literature to support the primary one.

The in-depth interview was chosen to obtain detailed data and meaningful information. More importantly, it was carried out because the decisions were verbally decided and rarely written down, including in the three cases discussed here. In the next stage, this study employed two methods of analysis, namely statutory and comparative analysis.<sup>18</sup> The former analyzes the regulations related to the discussed legal issues. Whereas, the later is comparing those decisions by LASDO with the perspectives of Indonesian positive and Islamic law.

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<sup>15</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Raja Grafindo Persada, 2015).

<sup>16</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Kencana, 2016).

<sup>17</sup> Muhammad Atho Mudzhar, "Kreativitas Mencari Judul Dan Pisau Analisis Dalam Studi Syari'ah Dan Hukum" (Jakarta, 2019).

<sup>18</sup> This analysis puts a legal system, such Indonesian law, in comparison to another legal system, with the legal system of another country, between one court to another, or comparing a rule of law in two different times. Muhammad Atho Mudzhar, "Kreativitas Mencari Judul dan Pisau Analisis dalam Studi Syari'ah dan Hukum".

## Discussion and Result

### LASDO Decisions in Criminal Cases

Among others, several criminal acts are sentenced using *dou* Donggo customary law punishments: *baja*, *dua kali waru*, and flogging. They are respectively used for the cases of rape, theft, and adultery as below:

#### 1. Rape Case

In December 2007, there was a rape case in Mpili Village. It was committed by Imar (a pseudonym) against a girl named Mawar (a pseudonym), who happened to be his niece. The victim's family cannot accept this as the rapist has raped the victim and destroyed her future. They reported the case to the customary council and the council decided to arrest the rapist. They then convened to determine the appropriate punishment.

The council considered that the rapist was fully aware of violating both Islamic and customary law of Donggo. His crime has destroyed the dignity and the future of an innocent girl. In fact, he happened to be his uncle. Following various considerations, the LASDO sentenced the rapist with flogging and *baja* all over the village. In addition to these punishments, he was also sanctioned with *dua kali waru* (two-time compensation). The compensation cost depended on material loss and immaterial loss of the victim's future. Rape is the most serious crime and will get the most severe punishment as well. Compensation is determined by the decision of the customary council with the victim's family considering that the victim has lost his future. The rapist is obliged to pay compensation in the form of money and livestock such as cows and buffalo. The rapist will typically pay compensation with all his assets otherwise he will be impoverished. It is considered equal to the suffering of the victim.<sup>19</sup>

#### 2. Theft Case

A buffalo theft case happened in 2015 and was committed by five thieves. They stole buffalos of a Donggo resident who, after the

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<sup>19</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019 and via phone on the 20 April 2020.



incident, suffered material loss. The owner reported the case to the customary law council so that its members in each village got to hand in hand to arrest the thieves. The council then held a meeting in *pesanggarahan adat* (customary assembly meeting place) to settle the case about the appropriate sentence. LASDO decided that the punishment for the thief was being paraded around and flogged. After the sentence was decided, the LASDO administrator carried out the execution, namely by getting the thieves paraded on the highway witnessed by the community who had stood along the road. When paraded around, they were also whipped by the executioner along the way while carrying the stolen goods namely the animal. They are also required to express remorse and apologize to the victim and the public for having committed a harmful crime.<sup>20</sup>

The customary council considered that the thieves were fully aware of doing their action and intentionally did it. Meanwhile, *dou* Donggo considers theft as one of the crimes that violate the established norms and rules of the community as well as disturbing the social order. It is, furthermore, indeed against the law that the perpetrators do deserve punishment.

Based on the result of the council meeting, they decided the points below on the case: *First*, thieves are convincingly proven to have stolen the buffalo. *Second*, the buffalo as the evidence of the stolen property proved the action of the theft. *Third*, thieves were sentenced with *baja* punishment (parading all over the village roads) while being flogged by the executioner.

The customary council did not sentence the thieves with a penalty because the thieves are economically poor and their motive for stealing is due to the economic needs. Moreover, they confessed that that was the first crime they committed.<sup>21</sup>

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<sup>20</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

<sup>21</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

### 3. Adultery Case

In 2017, Donggo people were shocked by a consensual adultery case between a married man and a married woman. The couple committed it under no pressure from anyone. The community, then, reported it to the council considering that adultery is a type of crime against the local customary law. Moreover, adultery among married couples is deemed a severe crime and incurs severe punishment. Following the community report, the council held a session to determine the punishment at the *Pesanggarahan*. The couple was then decided to have committed a serious offense of the customary law. Based on the decision of the customary council, the two adultery perpetrators were punished with caning and paraded around the village, and fined. The amount of the fine is determined by the decision of the customary council. This punishment was imposed so that the adulterers would be humiliated while creating a deterrent effect so that they would not do the act anymore. Likewise, people who witnessed it wished not to dare to do such a thing.

Within the Donggo community, there was a saying called *maja labo dahu* (shame and fear). It means an appeal to be shy to commit mistakes and fear to commit immoral actions. Adultery, meanwhile, is violating not only Islamic sharia law, but also customary rules. Therefore, the council decided that both criminals were sentenced to flogging while being paraded all around the village (*baja*) and paying the fines. The sentences are considered appropriate for criminals as the action breaks both religious and customary norms. The perpetrators were flogged while being paraded all around the village to be seen by the community.<sup>22</sup>

#### ***Dou* Donggo Customary Law in the Perspective of Indonesian Positive Law and Islamic Law**

Based on the information above, an analysis based on the perspective of Indonesian positive and Islamic laws on the cases is then carried out through a comparative scheme as follows:

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<sup>22</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

## 1. Rape Case

### a. The Perspective of Indonesian Positive Law

The above-mentioned rape case is a disgraceful one for Donggo community because it so rarely happens. Moreover, the rapist is a relative of the victim as he happens to be her uncle. In this case, LASDO sentenced the criminal with the most severe sentence in their custom namely *baja*, flogging, and *dua kali waru* (paying all the indemnities both materials and non-materials to the victim). The last-mentioned one is different from another kind of fine, as *dua kali waru* is the most severe sanction that is traditionally applied in the Donggo community and is only sentenced to the doer of any serious crime like rape.

Within the perspective of Indonesian positive law or KUHP (*Kitab Undang-undang Hukum Pidana*), the rape in Donggo has fulfilled all the criteria of a criminal case. In the KUHP, rape is defined as an immoral action. Article 285 mentions that “anyone who, by using force or threat of force, forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years”. Because the rapists have typically and intentionally planned the rape, the word ‘force’ implies intentional criteria although the Article does not verbally mention it.

In addition to the sentence stipulated in article 285 of KUHP, the rapist can also be charged with Child Protection Act No. 35 of 2014 on Amendment of Child Protection Act No. 23 of 2002. To incur a deterrent effect for the rapist, he is possibly charged with PERPPU No. 1 of 2016 on Child Protection. This PERPPU aims at preventing a similar crime of sexual abuse toward a child by sentencing the rapist with the most severe sentence of the death penalty and announcing his identity, giving chemical castration, and installing an electronic detection device on the body to monitor his activities. Such sentences mentioned in this PERPPU are deemed suitable for the rapist as he has destroyed the chastity of an innocent girl and as such, has destroyed her future.<sup>23</sup>

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<sup>23</sup> Zainuddin, “Hukuman Bagi Pelaku Perkosaan Anak Di Bawah Umur,” *ISTI'DAL: Jurnal Studi Hukum Islam* 4, no. 2 (2017): 133.

Implementation of the *baja*, *flogging*, and *dua kali waru* for the rapist has therefore some similarities with the sentences in PERPPU No. 1 of 2016 which gives the rapist the most severe sentence. This is different from the KUHP which only sentences the rapist with a maximum of 12 years imprisonment. According to Donggo community, this 12-year imprisonment may not be sufficient to provide justice and failed to make him wary of repeating his crime.

Within the perspective of the customary law of *dou* Donggo, rape is one of the most despicable and forbidden crimes. In addition to being a crime, it also violates the customary norms and rules of the community and thus, has disturbed peace and harmony. It is furthermore against the value of obedience, safety, sense of justice, and legal awareness of the community. Therefore, it makes very much sense for the rapist to be sentenced with the most severe sentence. Rape is not only disturbing the balance and harmony with the community but also detrimental to the victim and her family both physically and mentally as well as affecting the future of the victim.<sup>24</sup>

The rape case in Donggo community is a real legal problem because, in addition to violating the customary law, it has also violated the Islamic law. Moreover, the sentences are considered appropriate enough for the rapist as the victim was his underage niece. It is believed to have fulfilled the sense of justice for the community so that the case was not further filed with the police and the state's court.<sup>25</sup>

Additionally, when the rapists are being paraded around the village, they are required to recite the oath not to repeat their actions and apologize to the victim, her family, the elders, and the community.<sup>26</sup> The flogging, meanwhile, is a physical sentence aiming to give the rapist severe pain while suffering hard feeling as same as what the victim would face in her future. Whereas, the *dua*

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<sup>24</sup> Zainuddin.

<sup>25</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

<sup>26</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019 and via phone on the 20 April 2020.

*kali waru* fines serve as a form of criminal's responsibility toward the victim for his crime which will impact the victim's life both physically and psychologically.

#### **b. The Perspective of Islamic Law**

Within the Islamic criminal law, rape is categorized as *jarimah hudud* (a crime for which the perpetrator is punished by *hudud* or punishment that has been determined by religious texts/the Qur'an or the hadith) as there is no specific *nash*/verse that specifically describes its sentence. However, considering that both are crimes against morality in the form of sexual intercourse, adultery can be used as a stepping stone to the crime of rape and be treated using the principal law for the rape case even though both are different. Adultery is based on consensual aspects, whereas rape is carried out by force and threats.<sup>27</sup> Rape contains an element of aggravation which is of a higher quality than adultery because it contains attempts at violence and coercion.<sup>28</sup>

The adultery sentence applicable in the rape case is the *hadd*, which is being flogged 100 times for the unmarried perpetrator (*ghairu muhsan*) and stunned for the married perpetrator (*muhsan*). In addition to *hadd* sentence, the rapist can also be sentenced with *ta'zir* (discretion of the judge).<sup>29</sup> This applies to the rapist but not to the victim which was forced to commit adultery. Moreover, she is typically powerless whether or not she has committed an offense. Therefore, the victim is not subject to any punishment according to the majority of scholars' interpretations in QS. al-Nûr: 33 and al-An'am: 119.<sup>30</sup>

In the case of rape that occurred in Donggo, the customary institution sentenced the perpetrators to *baja* punishment, flogging, and *dua kali waru* (compensation) sanctions. This multiple punishments are in line with Islamic law because apart from

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<sup>27</sup> Nurhayati, "Pelaksanaan Tindak Pidana Pemerkosaan: Studi Komparasi Antara Hukum Islam Dan Qanun Jinayat Di Aceh," *Al-Manahij* XII, no. 1 (2018): 22.

<sup>28</sup> Rahmat Abduh, "Tindak Pidana Perkosaan (Studi Komparatif Antara Hukum Pidana Dan Hukum Islam)," *Wahana Inovasi* 3, no. 1 (2014): 221.

<sup>29</sup> Syarif Hidayatullah, "Tindak Pidanan Kesusilaan Dalam Perspektif Hukum Pidana Islam," *Al-Mizan* 4, no. 1 (n.d.): 49.

<sup>30</sup> Hidayatullah.

violating customary norms and Islamic teachings, it has also harmed the victim both materially and mentally. Both *baja* accompanied by lashes according to Donggo customary law and flogging followed by stoning in the Islamic law are physical punishments that aim to provide a deterrent effect and shame for the perpetrators.

Substantially, they both have similarities just like *dua kali waru* sanctions in Donggo and the *ta'zir* in Islamic law. *Ta'zir* punishment is typically decided and determined by the judge using the authority to impose sanctions based on his/her discretion in formulating the law according to the type of case and the losses suffered by the victim, be it in the form of *diyat* (fines) or compensation. Sanctions of *dua kali waru* for the Donggo community, meanwhile, usually take a material form, such as money, buffalo, or guarantees for the living and future costs of the victim up to a time limit determined by the traditional institution.<sup>31</sup>

The comparison among the three is presented in the table 1 below:

**Table 1:**  
**Comparison of the Rape Case Resolution Process**  
**According to Customary Law, Islamic Law, Positive Law**

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Rape	<i>Al-Wath'u bi Al-Ikrah</i>	Immorality, molestation, or rape
DECISION MAKER	Customary Institution (LASDO)	<i>Qadi</i>	Judge of court

<sup>31</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
LEGAL FOUNDATION	Donggo Community Customary Law	Qs. Al-Nûr: 33 and al-An'am: 119. The former means: "And do not force your female slaves to commit prostitution, while they themselves desire chastity, because you seek worldly gain. And whoever compels them, then indeed Allah is Forgiving, Most Merciful (to them) after they were forced." The later reads: Whoever is in a state of necessity, while he does not want it and does not (also) transgress, then indeed your Lord is Forgiving, Most Merciful".	Article 285 of the Criminal Code reads: Whoever by force or threat of violence forces a woman to have sex with him outside of marriage, is threatened with a rape sentence with a maximum imprisonment of twelve years.
DECISIONS/ SANCTIONS	The toughest sanction applied by the Donggo customary law, namely the <i>baja</i> , flogged	<i>Hadd</i> of <i>zina</i> is being lashed 100 times and <i>ta'zir</i> punishment depends on the judge's	Maximum imprisonment of 12 years

RATIO	CUSTOMARY LAW	ISLAMIC LAW	POSITIVE LAW
	and fines ( <i>dua kali waru</i> ).	consideration in terms of the level of the crime. It can also be in the form of the death penalty, stoning, exile, and fines.	

The table 1 above is a comparison between Donggo customary law, Islamic law, and positive law in rape cases. It shows differences in the punishment forms for the perpetrators of the three laws. Donggo customary law punishes them with *baja*, flogging, and *dua kali waru* (fines) sanctions, Islamic law with *hadd zina* punishment, namely 100 lashes, and *ta'zir*, while the Indonesian Criminal Code sentenced 12 years in prison.

## 2. Theft Case

### a. The Perspective of Indonesian Positive Law

The objective and subjective elements of buffalo theft case by a group of theft in Donggo were sufficient to be tried in the court. The theft is against Article 363 of the Indonesian Penal Code (KUHP) which stated that the offender shall be punished with a maximum of seven years imprisonment.<sup>32</sup> However, LASDO decided that the criminals were punished with the customary law instead of the provision in KUHP. If the council applied the KUHP by sentencing them with a maximum of seven years imprisonment through the court, it will likely be time and money consuming as well as considered not providing a sense of justice for the victim.

The sentencing given by the LASDO for the thieves was rather in the form of *baja* (paraded around the village) and flogging aiming for making them ashamed while providing a deterrent effect so they will not repeat their crime anymore. In addition to *baja* sentence, the thieves were also ordered to return the stolen property. In the case that the stolen property is still available (alive,

<sup>32</sup> Redaksi Sinar Grafika, *KUHAP Dan KUHP* (Jakarta: Sinar Grafika, 2014).



in this context), they will be required to pay fines to the victim depending on the agreement between both. However, because the economic factor is one that needs consideration, LASDO which is required to be meticulous and thorough in sanctioning the thieves very much adjusts the fine to thief's economic ability.<sup>33</sup>

In the parade of the village punishment (*baja*), the thieves are flogged while apologizing and stating their regrets for committing the crime and promising not to repeat it anymore. Verbally, they say: *Wahai para warga masyarakat, saya telah melakukan kejahatan pencurian. Jangan mengikuti kejahatan yang telah saya lakukan. Karena itu, saya memohon maaf dan berjanji tidak akan mengulangi perbuatan itu lagi.* (Dear citizens, I have committed the crime of theft. Do not follow what I have done. Therefore, I ask for forgiveness and I promise not to repeat this crime).<sup>34</sup>

The sense of justice and willingness to settle various kinds of disputes by this sort of win-win solution are also evident within the practices of the customary councils all over Indonesia, such as *Adat Badamai* in Banjar, the *Bendesa Adat* in Bali, the *Kerapatan Suku*, *Kerapatan Kaum* and *Kerapatan Adat Nagari* in Minangkabau. In Aceh, for instance, they are known by the names of *di'et*, *sayam*, *suloh*, *peusujuk* and *peumet jaroe*. In this context, LASDO's customary decision through customary law of *baja* while apologizing and expressing their regrets and promises not to repeat their crime does the same. It very much reflects the restorative justice concept through deliberation and customary law. This is different from the litigation process in formal courts which are costly and time-consuming, as well as putting one party as the winner and another one as the loser.

#### **b. The Perspective of Islamic Law**

Settlement of the theft case within the perspective of Islamic Law is categorized as *hudud* where its punishment was already set by the holy scripture/*nash*. Within the Qur'an, it was described that the punishment for the theft is corporal punishment by cutting off

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<sup>33</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

<sup>34</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

his/her hand. However, different opinions among the ulema do exist regarding the interpretation of the verse (QS. Al-Maidah: 38). Regardless of this debate and different opinions, it is certain that the thief is punished with corporal punishment according to Islamic law, particularly in the Qur'anic text.

In a closer look, this corporal punishment in the Islamic law is the similar spirit with the Donggo customary law for the theft criminals. The hand-cutting punishment and *baja* psychologically have some similarities to incur shame, fear, and deterrent effects for the criminals not to repeat their actions. This corporal punishment is seemingly expected to create regrets and awareness that the crime they committed has caused loss for others and possibly damage the well-maintained social order.

The *baja* customary punishment decided by LASDO is rooted in the same aspiration as Islamic law. The chairman of LASDO council insisted that *baja* is the way the Donggo community implemented Islamic law. Implementing *baja* means implementing Islamic law regardless of the physical differences in how corporal punishment is executed. He further argued that *baja* is a part of the implementation of Islamic law combined with the customary law of the *dou* Donggo. This, according to him, is clearly reflected in the name of LASDO which means the Customary and Sharia Council of Donggo. He maintained that the law implemented for the criminals is the Donggo customary law, whereas the Islamic law serves as the social control and the engineer for the implementation of customary law.<sup>35</sup>

To sum up, a comparison between the three is clear in the table 2:

**Table 2:**  
**Comparison of the Theft Case Resolution Process**  
**According to Customary, Islamic, and Indonesian Positive Law**

RATIO	CUSTOMAR Y LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Buffalo theft	<i>Al-Sariqah</i>	Livestock theft

<sup>35</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019.

<b>DECISION MAKER</b>	Customary Institution (LASDO)	<i>Qadi</i>	Court judge
<b>LEGAL FOUNDATION</b>	Donggo Community Customary Law	QS. Al-Maidah: 38 that explains that those who steal anything will be cut off at hands (as) in retribution for what they have done and as a punishment from Allah.	The act of theft violates articles 362-363 of KUHP. Article 362 of the Criminal Code reads: Whoever takes something, wholly or partly belonging to another person, with the intention of unlawfully possessing, is threatened with a maximum imprisonment of five years or a maximum fine of nine hundred rupiahs. Meanwhile, article 363 reads: (Thieves will be) threatened with a maximum imprisonment of seven years.
<b>DECISIONS/ SANCTIONS</b>	<i>Baja</i> and flogging	Punishment of cutting hands and <i>ta`zir</i>	Maximum imprisonment of 7 years

The table above is a comparison between Donggo customary law, Islamic law, and positive law in the case of theft. This table shows that there are differences in the punishments for the thieves from the three laws. Donggo customary law punishes them with *baja* and flog, Islamic law applies the punishment of cutting hands and *ta'zir*, while the Criminal Code sentenced a maximum of 7 years in prison.

### 3. Adultery Case

#### a. The Perspective of Indonesian Positive Law

The adultery case in Donggo between a married man and a married woman has fulfilled the criteria for adultery based on the Indonesian Penal Code. According to Article number 284 of KUHP, those who committed adultery are punished with 9 months imprisonment.<sup>36</sup> It defines adultery as a sexual relationship between a man and a woman who are not bound in a legal marriage, each or one of the two is not in a legal marriage or is not in a state of married or married to another person. In other words, adultery is punished solely because of the moral obligation to be faithful to the husband or wife. This is quite problematic because sexual relations between a widower and a widow or between two singles are excluded from the article above.<sup>37</sup>

Basically, any sexual relationship between a man and a woman out of legal marriage is considered adultery. The Donggo community in this case believes that harmonious and prosperous life will only be achieved by following the customary law. The relationship between a man and a woman, meanwhile, is believed to should only be held within a sacred marriage and through cultural wedding rituals. Consequently, any sexual relationship out of it is an offensive action against the cultural and customary values as well as religious norms. The adulterers would be punished with a severe punishment of *baja*, flogging, and fines. These punishments are believed adequate for an offense against this customary rule.

In settlement of the adultery case, the Donggo customary council administered a severe sanction where the criminals were paraded around the village (*baja*) while being flogged and being required to pay the fines. According to the customary law of the *dou* Donggo, adultery is a despicable act that violates the agreed customary law. The doers have violated and disturbed the long-established norms of the custom society. Therefore, the decision reached by the council to punish them with the most severe

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<sup>36</sup> Grafika, *KUHAP Dan KUHP*.

<sup>37</sup> Jimly Asshiddiqie, *Pembaharuan Hukum Pidana Indonesia* (Bandung: Angkasa, 1996).

punishment was considered appropriate. The consideration of the council was taken from the legal norms and the legal philosophy believed by the community. All kinds of actions against the legal norms shall be punished with the applied laws in order to restore balance to the social order.<sup>38</sup>

#### **b. The Perspective of Islamic Law**

In Islamic criminal law, adultery is forbidden sexual intercourse carried out by two people or more the non-married couple. This definition is not only limited to married persons, but also to any sexual intercourse between man and woman who are not bounded by marriage. Islamic law considers each sexual intercourse between non-legally married couple as forbidden and therefore, the doers should be punished regardless of their marital status. Anyone convincingly proven to have committed adultery will be punished by *hadd* (singular form of *hudud*) of adultery. Islam forbids all types of adultery and all actions leading to adultery.<sup>39</sup>

The Qur'an clearly explains the sanctions that will be imposed on the perpetrators of adultery at An-Nur verse 2 as follows:

الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ

Meaning: The woman who commits adultery and the man who commits adultery, then lash each one of them a hundred times.

Jimly Asshiddiqie is of the opinion that the provisions contained in the verse above are general in nature, namely that all forms of adultery are punishable by a penalty of 100 lashes. However, according to various hadiths regarding adultery, the adultery referred to in the verse above is adultery for unmarried (*ghairu muhsan*) doers. Meanwhile, for married ones (*muhsan*), apart

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<sup>38</sup> Interview with the chairman of LASDO Council, Arifin J. Anat, SH., in his residence in O'o village of Donggo on the 6<sup>th</sup> of July 2019

<sup>39</sup> Asadulloh Al-Faruk, *Hukum Pidana Dalam Sistem Hukum Islam* (Bogor: Ghalia Indonesia, 2009).

from being punished with flogging, they are also stunned which is one of the operational forms of the death penalty.<sup>40</sup>

The flogging punishment implemented in *dou* Donggo has some similarities with the *jild* (flog) in Islamic criminal law. Flogging in Arabic is *jald* which is derived from the word *jalada* and means to hit the skin or to hit with the whip made from animal skin. The flogging sentence inflicts severe pain in the skin although its real intention is more to incur shame and prevent others from committing the same mistake than inflicting the pain.<sup>41</sup> The *jild* does the same to the flogging punishment applied by Donggo people. Both have the same type of punishment, namely a physical one.

Likely, flogging and *baja* sentences aim at shaming and creating a deterrent effect for the criminals. When the doers were paraded around the village, it was expected that they feel ashamed and become deterred from repeating the same crime. Meanwhile, those who witness the *baja* sentencing and the flogging are expected to be frightened to commit the same crime.

Philosophically, this is in line with the *Majo Labo Dahu* (ashamed and afraid) values of the Donggo community and Bima people in general. It indicates that anyone who went against God's and Prophet's orders should feel ashamed and afraid of God, ashamed toward others, and ashamed toward himself/herself. When anyone violates this *Majo Labo Dahu* philosophy, it means that they violate both religion and custom values right away. For a long, this value has caused Bima people always obey their religion and customs.<sup>42</sup>

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<sup>40</sup> Wahbah Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuh* (Dimashqa: Dar al-Fikr al-'Ilmiyah, 1997).

<sup>41</sup> Rusjdi Ali Muhammad, *Revitalisasi Syari'at Islam Di Aceh: Problem, Solusi Dan Implementasi* (Jakarta: LOGOS, 2003).

<sup>42</sup> M. Hilir Ismail, "Maja Labo Dahu Sebagai Falsafah Hidup Pada Masa Kini" (Bima, 2001).

Comparison among the three is clear in the table 3 below:

**Table 3:**  
**Comparison of the Adultery Case Resolution Process**  
**According to Customary, Islamic, and Indonesian Positive Law**

RATIO	CUSTOMAR Y LAW	ISLAMIC LAW	POSITIVE LAW
TYPE OF CASE	Adultery	<i>Zina</i>	Immoral offense
DECISION MAKER	Customary Institution (LASDO) Donggo	<i>Qadi</i>	Judge of court
LEGAL FOUNDATION	Donggo Community Customary Law	QS. Al-Nur : 2 which means that woman who commits adultery and the man who commits adultery are subjected to lashes each one of them a hundred times	The adulterer has violated Article 284 of the Criminal Code which reads: 1) Threatened with a maximum imprisonment of nine months. a. A married man who commits <i>gendak</i> ( <i>zina</i> , adultery), even though it is known that Article 27 BW <sup>43</sup> applies to him b. A married woman who commits <i>gendak</i> ( <i>zina</i> , adultery), even though it is known that Article 27 BW applies to her

<sup>43</sup> Article 27 BW says that a man can only marry a woman, and a woman can only marry a woman at the same time. Those who are subject to this article, both men and women, are not allowed to have sex with anyone other than their own wife or husband.

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			2)
			a. A man who participates in the act, even though he knows that the guilty party is married
			b. An unmarried woman who participates in the act, even though it is known to her that the guilty party is married and Article 27 BW applies to her.
<i>Baja and flogging</i>	In Islam, non-married adulterers are subject to 100 lashes while married ones are for stoning.	A 9-month prison sentence. The crime of adultery is imposed on the perpetrator who is already married or having a partner. Apart from the category, it is not mentioned as adultery, but intercourse or damage of the honor.	

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The table above is a comparison of Donggo customary law, Islamic law, and positive law in adultery cases. It shows that there are differences in the penalties for the adulterers from the three laws. Donggo customary law punishes adulterers with *baja* and flog, Islamic law imposes lashes of 100 times for unmarried offenders and stoning for those who are married, while the Criminal Code is sentenced to 9 months in prison.

In connection with LASDO's decisions in resolving criminal cases by applying the customary law, the police responded positively. The Head Police of Donggo Subdistrict, Mr. IPDA Sukardin, SH., said:



“The police do not interfere or intervene in the implementation of the Donggo customary law as long as the custom is carried out because of the community's compliance and obedience to their customary law and there are no complaints from the community. The police only monitor and supervise the implementation of customary law or sanctions so as not to cause any new problems. Criminal cases in Donggo are very rare and this is probably the impact of the implementation of customary law.<sup>44</sup>

### **Conclusion**

This study revealed that Donggo Customary and Sharia Council (LASDO) implemented the customary law in a form of *baja*, *dua kali waru*, flogging, and fines for resolving the criminal cases ranging from rape, theft, to adultery. Regarding sanctions and sentences applied by LASDO, there are differences in sentences applied by Indonesian positive law. Meanwhile, from the perspective of Islamic law, the criminal cases handled by LASDO, in general, are regulated within the Islamic law and the sanctions have some similar substances to those of Islamic law's punishment although come in different forms.

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<sup>44</sup> Personal interview with the Head Police of Donggo Subdistrict, Mr. IPDA Sukardin, SH. at the Donggo Police Station on October 27, 2020.

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