

Living Law Multiculturalism in Interfaith Determination: Formal Integration in Criminal Justice System as a Challenge to Prevent Criminalization Vulnerable Groups

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Abstract

The customary law provisions contained in Article 2 Paragraph 1 of the New Criminal Code allow customary law to determine whether a person can be punished or not, acting as a counterbalance to the national legal system. However, the problem lies in the inclusion of violations of customary law in Regional Regulations (Deprivation of Rights), which contradicts the dynamics of customary law, changing it from the right to live to the right to die. The interpretation of customary law violations through the codification of regional regulations, if not approached carefully, will lead to the criminalization of

communities, especially vulnerable groups such as women and children. The determination of the types of actions classified as customary law through regional regulations allows for arbitrary and discriminatory practices. This study uses a normative legal method, which refers to legislation and a conceptual approach based on the doctrine of legal positivism, as well as a literature review of various research publications, books, journals, and other legal materials. The results of the study show that in the concept of interfaith determination using the analytical tool of PP 55/2025, there are five examples of customary law: Bali (Hindu), Aceh (Islam), Minangkabau (Islam), Baduy (Sunda Wiwitan), and Toraja (Aluk Todolo and Christianity). Initial trends show that religious-based customary norms are the most readily and quickly adopted into local regulations. One possible solution is the establishment of a community-led, decentralized oversight model for the process of cataloging customary law. However, criticism of Article 15(1) of Government Regulation No. 55 of 2025 is that it should be revised and need not be regulated, given the diversity of fines under each customary law, so as not to undermine their legal rationale, and urge to put the supervisions authority to indigineous community.

KEYWORDS *Criminal Justice, Living Law, Religious Multiculturalism*

HOW TO CITE

Chicago Manual of Style (Footnote)

Daffa Ladro Kusworo, Eva Achjani Zulfa, Saima Arifiah, Rizky Julranda, and Masail Ishmad Mawaqif, "Living Law Multiculturalism in Interfaith Determination: Formal Integration in Criminal Justice System as a Challenge to Prevent Criminalization Vulnerable Groups," *Contemporary Issues on Interfaith Law and Society* 5, no. 1 (2026): 261-306 <https://doi.org/10.15294/ciils.v5i1.44899>

Chicago Manual of Style (Reference List)

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Introduction

This article aims to identify, explain, and map issues surrounding Article 2 of Law No. 1 of 2023 concerning the Criminal Code (KUHP), which regulates the concept of "living law" within society. The existence of this provision requires customary law to be formalized through Regional Regulations, a mandate that inherently alters the nature of living law by stripping away its dynamism once adopted into the rigid national legal system.¹ This study stems from concerns that the drafting of regional regulations may disproportionately discriminate against vulnerable groups, particularly women and indigenous peoples. This concern is rooted in an analysis of the statutory wording—which grants customary law the authority to determine criminal liability—and the historical precedent of several discriminatory local regulations.²

The official elucidation of the new Criminal Code emphasizes that the recognized "living law" refers to customary laws, the majority of which are unwritten and apply to specific regions.³ The provision on living law, explicitly formulated in Article 2(1) of the Criminal Code, dictates that existing societal laws can determine whether an individual is subject to punishment, even if the committed act is not expressly codified in the KUHP. Concerns have emerged that this article possesses the potential to criminalize political dissenters, exacerbated by identity politics in certain regions. For instance, the practice of forced marriage in East Nusa Tenggara historically degrades women, highlighting their vulnerability from a humanitarian perspective.⁴ However, these issues are theoretically mitigated by the limitations stipulated in Article 2(2), which prohibits customary law provisions from contradicting the values embodied in Pancasila and the 1945 Constitution of the Republic of Indonesia. This ensures

¹ Kei Hannah Brodersen, Nadja Capus, and Damian Rosset, "Politik Informalitas dalam Prosedur Pidana" [*The Politics of Informality in Criminal Procedure*], *Jurnal Internasional Hukum, Kejahatan dan Keadilan* [*International Journal of Law, Crime and Justice*] 74 (2023): 100612, <https://doi.org/10.1016/j.ijlcj.2023.100612>.

² Lalu Saipudin et al., "The Concept of Corporate Criminal Liability in the Indonesian Criminal Law System," *Jurnal IUS Kajian Hukum dan Keadilan* [*IUS Journal of Law and Justice Studies*] 13, no. 2 (2025): 475–99, <https://doi.org/10.1016/j.heliyon.2023.e21602>.

³ John Kenedi, *Buku Kebijakan Hukum Pidana (Penal Policy) Dalam Sistem Penegakan Hukum Di Indonesia* [*Criminal Law Policy (Penal Policy) in the Indonesian Law Enforcement System*] (Bandung: Pustaka Pelajar, 2017).

⁴ Mark Finnane, "'Balas Dendam', Hukum Adat dan Hukum Pidana di Australia yang Dijajah" [*Revenge', Customary Law and Criminal Law in Colonized Australia*], *Jurnal Internasional Sosiologi Hukum* [*International Journal of the Sociology of Law*] 29, no. 4 (2001): 293–310, <https://doi.org/10.1006/ijsl.2001.0153>

that customary laws contravening the constitution and universal human rights cannot be applied absolutely.⁵

Consequently, the application of customary law does not deviate from the principle of legality that underpins the national legal system, as this principle remains the primary benchmark for criminal law reform.⁶ The incorporation of unwritten laws expands the traditional meaning of the legality principle, allowing customary norms to serve as a basis for punishment provided they do not conflict with constitutional values. According to Barda Nawawi Arief, this conceptual reform introduces new dimensions to the legality principle, making it less formalistic and more integrated with societal norms. The interpretation of Article 2 suggests that recognizing living law balances legal certainty with substantive justice within national criminal law.⁷ Legal certainty in this context is interpreted as the recognition of customary criminal offenses (*delik adat*), allowing certain regions to continue imposing customary sanctions. This conceptual extension empowers law enforcement officials to address offenses through local customary law mechanisms, rather than relying exclusively on statutory penalties. The inclusion of Article 2 is therefore a constructive effort to accommodate prevailing customary laws, ensuring that justice is served in alignment with community values.

Although customary law acts as a supplementary element to national law, its substantive content requires rigorous examination in relation to customary criminal offenses. This involves evaluating the authority of indigenous institutions, judicial jurisprudence, and empirical research on the customary laws adhered to by local communities.⁸ The integration of customary law in Article 2 is a crucial manifestation of the state's commitment to recognizing the continued relevance of societal norms and respecting the unity of customary law communities.

Indonesia's socio-cultural diversity has forged a unique configuration of legal pluralism, where state law coexists with various local normative systems. A defining characteristic of living law is its profound connection to religious values

⁵ Junaedi, Oding. "Relevansi Nilai-Nilai Pancasila Dalam Menghadapi Tantangan Globalisasi." *Lex Omnibus: Jurnal Hukum Tata Negara dan Administrasi Negara* 1.2 (2024): 73-83.

⁶ Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (London: Routledge, 2017)..

⁷ Duwi Handoko, *Dekriminalisasi Terhadap Delik-Delik Dalam KUHP [Decriminalization of Offenses in the Criminal Code]* (Jakarta: Hawa dan AHWA, 2016)..

⁸ David Nelken, "Eugen Ehrlich, Living Law, and Plurality of Legality," *Theoretical Investigations in Law* 9, no. 2 (2008): 43–71.

and belief systems. In many communities, religion functions not merely as a system of faith but also as a source of moral legitimacy, a normative structure, and the foundation for social regulation manifested in customary law. This dynamic illustrates that the intersection of custom and religion is a multicultural phenomenon shaping both identity and conflict resolution mechanisms within local communities.⁹

The integration of custom and religion is highly evident across several Indonesian communities. In Bali, for example, customary law evolved within the framework of Hindu teachings, emphasizing harmony between humans, God, and the environment. Customary norms articulated in the *awig-awig* regulate social life while encompassing religious dimensions; thus, customary violations are perceived as disruptions to spiritual harmony. In this context, religion serves as both the philosophical and normative foundation for customary law execution.

A similar symbiosis is observable in Acehnese society, where custom and Islamic law constitute a complementary normative system. Customary principles operate alongside Islamic legal values, forming the basis for dispute resolution through institutions possessing both religious and social legitimacy. This demonstrates that Islam influences social practices and operates as an integral component in the construction of customary law¹⁰

1. In Minangkabau, the integration of custom and religion is philosophically captured by the maxim *Adat basandi Syarak, Syarak basandi Kitabullah* (Custom is based on Sharia, Sharia is based on the Holy Book). Social frameworks—such as inheritance, marriage, and customary leadership—reflect a synthesis of local traditions and Islamic values, despite the community's adherence to a matrilineal kinship system. The collaborative roles of customary leaders (*ninik mamak*) and religious figures (*ulama*) reinforce this complementary normative structure.
2. Conversely, in the Baduy community, customary law is deeply rooted in the indigenous Sunda Wiwitan belief system. Customary norms dictating human interactions with nature, ancestors, and spiritual forces possess a sacred

⁹ Afandono Cahyo Putranto and Irwan Triadi, "Konsep Hukum Pidana Adat Pasca Pemberlakuan Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana Perspektif Living Law" [*The Concept of Customary Criminal Law Post-Enactment of Law Number 1 of 2023 concerning the Criminal Code from a Living Law Perspective*], *Al-Zayn: Jurnal Ilmu Sosial & Hukum* [*Al-Zayn: Journal of Social Sciences & Law*] 3, no. 5 (2025): 7317–38.

¹⁰ Extrix Mangkeprijanto, *Hukum Pidana Dan Kriminologi* [*Criminal Law and Criminology*] (Jakarta: Guepedia, 2019).

character that binds the community socially and religiously. Here, the traditional belief system provides the primary legitimacy for customary law.

3. The phenomenon of cultural assimilation is also prominent in Toraja society, where the ancestral belief system (Aluk Todolo) has been preserved despite extensive interaction with formal religions such as Christianity. Customary practices surrounding life and death cycles reflect an ongoing integration between local traditions and religious teachings, generating highly adaptive social norms

These examples highlight that across numerous customary legal systems in Indonesia, religion and belief function as foundational value sources, bases for legitimacy, and normative frameworks for social regulation. Consequently, the articulation of religious values within customary law is a concrete manifestation of legal multiculturalism, reflecting the diverse value systems characterizing Indonesian society.¹¹

The recognition of living law possesses a strong normative foundation within national legal policy. Provisions governing existing societal laws affirm that individuals can be sanctioned based on prevailing customary norms, provided these norms are actively practiced by the local community and do not contravene Pancasila, the 1945 Constitution, human rights, and universally recognized general legal principles. This regulatory framework also delegates authority to local governments to codify customary laws, including customary criminal offenses, through Regional Regulations.¹²

This recognition is operationally reinforced by Government Regulation (PP) No. 55 of 2025, which provides the framework for customary criminal law. This regulation categorizes customary offenses as punishable acts and integrates customary criminal law as a complementary subset of the national penal system. Governed by the principle of subsidiarity, the regulation stipulates that if an act is explicitly governed by the Criminal Code, national provisions take precedence. This mechanism prevents legal dualism and double jeopardy in law enforcement.¹³

¹¹ Fany Nur Rahmadiana Hakim and Triny Srihadiati, "Living Law and The Struggle for Indigenous Forest Rights: A Critical Criminology Study of The Baduy Community," *Deviance Jurnal Kriminologi* 9, no. 1 (2025): 21–35.

¹² Adhitya Widya Kartika, Wiwin Yulianingsih, and Yana Indawati, "Legal Position of Awig–Awig in the National Legal System as a Source of Law (Written Customary Law)," *VJF* 2, no. 1 (2020).

¹³ Joycelyn M. Pollock, "Kasus-Kasus yang Berkaitan dengan Bab 13 - Kitab Undang-Undang Hukum Pidana AS: Pelanggaran Terhadap Orang dan Properti" [*Cases Relating to Chapter 13 - US Criminal Code: Offenses Against Persons and Property*], in *Hukum Pidana* [Criminal

Not all customary norms automatically qualify as a basis for legal sanctions. A norm is legally recognized as a customary criminal offense only if it aligns with constitutional and human rights values and is practiced by a legally verified customary law community (Masyarakat Hukum Adat). Furthermore, an act must be deemed unlawful under local norms, be punishable by customary obligations, remain unregulated by the Criminal Code, and apply universally to anyone committing the act within the respective customary jurisdiction.¹⁴

The state's recognition of customary law extends beyond normative declarations to formalization mechanisms. Customary offenses must be codified into Regional Regulations to acquire binding legal force. The formulation process initiates with proposals from the regional executive, the Regional People's Representative Council (DPRD), or the customary law community itself. These proposals undergo rigorous examination via field studies involving indigenous representatives, academics, and civil society to verify the norms' vitality and compliance with established criteria. Based on this empirical review, the local government and DPRD determine whether to enact the proposal into a formal Regional Regulation following standard legislative procedures.

The resulting Regional Regulation must explicitly detail the identity of the customary law community, the territorial boundaries of its jurisdiction, the specific prohibited acts, dispute resolution procedures, the nature of customary obligations, and the designated sanctions. This complex mechanism illustrates a concerted effort to integrate the customary legal framework with the state legal system through systematic legal and administrative verification¹⁵

However, formulating customary law violations into local regulations implies that these regulations remain static until amended by district or city governments. A significant logical consequence arises here: this formalization intrinsically contradicts the nature of living law. By cataloging customary violations in this manner, the living law loses its defining characteristics—spontaneity and adaptability—and transforms into a rigid legislative product

Law], 9th ed., ed. Joycelyn M. Pollock (Boston: Anderson Publishing, Ltd., 2009), 777–87, <https://doi.org/10.1016/B978-1-59345-504-0.50031-7>.

¹⁴ Ahmad Auri Aji Zarianto and Nadhira Wahyu Adityarani, "Eksistensi Sosiologi Hukum Pada Masyarakat Indonesia (Literature Review Atas Teori Living Law Eugen Ehrlich)" [*The Existence of the Sociology of Law in Indonesian Society (Literature Review on Eugen Ehrlich's Living Law Theory)*], *Juridische: Jurnal Penelitian Hukum [Juridische: Journal of Legal Research]* 2, no. 3 (2025): 203–19.

¹⁵ Rita Purwanti, "Overcoming Land Burning in Kalimantan: Between Legal Policy, Government Synergy, and Community Involvement," *KnE Social Sciences* 10, no. 26 (2025): 424–33.

akin to national law. The true essence of a customary law violation is that it does not require a pre-existing written statute; an act disturbing communal harmony can be punished based on unwritten consensus.¹⁶

Recognizing customary law violations solely through the parameters of Regional Regulations is contradictory, as customary law violations inherently exist prior to the codification of the act. Furthermore, customary criminal law is naturally open to incorporating new elements originating from evolving community norms adapted to changing places, circumstances, and eras.¹⁷ While incorporating living law into the Criminal Code theoretically aims to mitigate conflicts between national law and customary law—which historically disproportionately criminalized indigenous peoples—the formal accommodation of customary offenses drastically alters their fundamental legal nature.¹⁸

This stark contrast is evident in the foundational construction of the laws: customary law is particular, emanating from local regional identities, whereas national law is universally rooted in general regulations (common sense). Canonizing customary violations through local regulations inevitably leads to the standardization of customary law. Consequently, the dynamic nature of customary law is reduced to a rigid law enforcement mechanism, creating a dualism. This results in two divergent versions of customary law: a state-sanctioned version codified in local regulations, and the organic customary law internalized within actual community behavior.¹⁹ Clearly, this dualism introduces significant ambiguity for law enforcement when conflicts arise between the two versions, requiring officials to continuously navigate between statutory local regulations and the actual legal values living in the community.

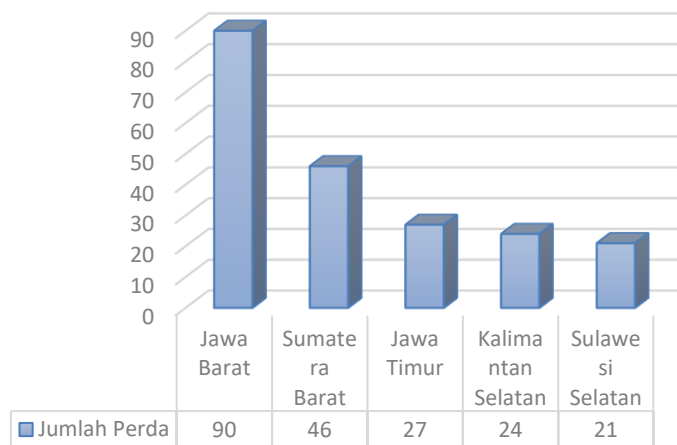
Graph 1: Provinces with the highest number of discriminatory local regulations

¹⁶ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana [Anthology of Criminal Law Policy]* (Jakarta: Prenada Media, 2016).

¹⁷ Jian Zhang, Ke Li, and Yang Feng, "Sanksi Pidana atas Pencurian Identitas di Shanghai: Analisis Kasus Hukum Empiris" [*Criminal Sanctions for Identity Theft in Shanghai: An Empirical Legal Case Analysis*], *Jurnal Hukum, Kejahatan dan Keadilan Internasional [International Journal of Law, Crime and Justice]* 71 (2022): 100562.

¹⁸ Nina Persak, "Di Luar Hukuman Publik: Peran Emosi dalam Kebijakan Hukum Pidana" [*Beyond Public Punishment: The Role of Emotion in Criminal Law Policy*], *Jurnal Internasional Hukum, Kejahatan dan Keadilan [International Journal of Law, Crime and Justice]* 57 (2019): 47–58, <https://doi.org/10.1016/j.ijlcj.2019.02.001>.

¹⁹ Lilik Mulyadi, "Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik Dan Prosedurnya" [*The Existence of Customary Criminal Law in Indonesia: A Study of Principles, Norms, Theories, Practices, and Procedures*], *Jurnal Hukum Dan Peradilan [Journal of Law and Adjudication]* 2, no. 2 (2013): 225–46.



Source: National Commission on Women 2009-2018

The codification of customary law violations via local regulations, if not meticulously managed, will precipitate the criminalization of communities, specifically targeting vulnerable groups such as women and children. Delegating the determination of customary offenses to local regulations enables arbitrary and discriminatory legislative practices. Although Article 2(2) of the Criminal Code theoretically prevents customary law from violating constitutional norms, in practice, local governments possess the authority to legitimize discriminatory provisions with minimal hindrance. According to reports from the National Commission on Violence Against Women (Komnas Perempuan), between 2009 and 2018, 208 local regulations contained substance discriminating against women, encompassing curfews, dress codes, and prostitution regulations.

Additionally, 45 local regulations explicitly marginalized minority groups, contravening the constitutional mandate to protect all citizens. The proliferation of discriminatory local legislation generates significant apprehension regarding the delegation of criminalizing authority to local governments, raising fears that this will legitimize further discriminatory regional laws.²⁰

The fundamental issue does not lie with the existence of living law itself—as conceptualized by Eugen Ehrlich and reinforced by Barend ter Haar’s anthropological jurisprudence—but rather with the risks inherent in formally adopting fluid social and religious norms into state law without robust oversight mechanisms. In pluralistic and multicultural societies, inventorying and formalizing customary law without adequate constitutional safeguards risks legitimizing majoritarian moral dominance, ultimately resulting in the systemic criminalization of vulnerable populations, including women, religious minorities, and indigenous sub-groups.

²⁰ Jeffrey W Swanson et al., “Criminal Justice and Suicide Outcomes with Indiana’s Risk-Based Gun Seizure Law,” (2019).

Beyond discrimination and majoritarian co-optation, another critical challenge is the erroneous assumption that religion-based customary sanctions are inherently compatible with the monetized fine-categorization system established under Government Regulation No. 55 of 2025. While customary sanctions in Bali, Aceh, Minangkabau, Baduy, and Toraja frequently employ compensatory and restorative mechanisms, these cannot be proportionally translated into state-imposed monetary fines. A fundamental contradiction exists between the magical-religious rationale embedded in customary law and the logic of monetization underpinning secular criminal law. Within these communities, violations are perceived not merely as acts inflicting individual harm, but as disruptions to social, spiritual, and cosmic equilibrium. Consequently, sanctions such as restorative rituals, customary animal offerings, or communal compensation hold profound meanings transcending economic value; they are sacred instruments for restoring collective harmony. Compelling the conversion of these metaphysical obligations into Category I, II, or III monetary fines creates severe operational friction, risking the distortion of customary law's original purpose by reducing sacred collective reconciliation rituals to mere administrative financial transactions.

Method

Methodologically, this research employs a normative legal approach grounded in statutory analysis, examining relevant laws and regulations.²¹ This is supplemented by a socio-legal and comparative perspective to elucidate how the law functions contextually across five distinct regions (Bali, Aceh, Minangkabau, Baduy, and Toraja). Furthermore, a conceptual approach based on expert legal doctrines is utilized. Data was collected via a comprehensive doctrinal literature review of research publications, academic books, journals, and relevant legal materials, applying deductive reasoning to synthesize broad legal theories with specific empirical phenomenon.²²

²¹ Indraswara, Dede. "Rekonstruksi Metodologis Hukum: Diversifikasi dan Integrasi Penelitian Hukum Normatif (Doktrinal), Empiris (Non-Doktrinal), dan Studi Sosio-Legal. *Legal Methodological Reconstruction: Diversification and Integration of Normative (Doctrinal), Empirical (Non-Doctrinal), and Socio-Legal Research*." *IPMHI Law Journal* 5, no. 2 (2025): 205–246. <https://doi.org/10.15294/ipmhi.v5i2.41599>

²² Depri Liber Sonata, "Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum" [*Normative and Empirical Legal Research Methods: The Distinctive Characteristics of Legal Research Methods*], *Fiat Justitia: Jurnal Ilmu Hukum* [*Fiat Justitia: Journal of Legal Science*] 8, no. 1 (2015).

Result & Discussion

A. Conceptualization and Dynamics of Living Law in Legislation

The conceptualization of unwritten law is rooted in a morality striving for social harmony; consequently, sanctions are imposed on individuals for actions that disrupt public order. The manifestation of justice through sanctions ensures that the community remains unharmed. This aligns with Paul Scholten's assertion that the pursuit of justice within the law is intrinsically determined by morality; therefore, society, as a legal subject, cannot be divorced from established moral frameworks.²³

Unwritten law, commonly recognized as "living law," perpetually exists within society. A significant component of this living law is customary law (*bukum adat*), which constitutes the ancestral heritage of specific regional populations. The existence of customary law and its position within the national legal system undeniably accompany state law, serving as a counterbalance in communal life. According to Eugen Ehrlich's framework, living law—which mirrors the empirical reality of the Indonesian nation—tends to be internalized within the behaviors and actions of indigenous communities. The formal manifestation of living law is often articulated through legislative products or judicial decisions, rather than merely recognizing informal customary practices governed by traditional mechanisms. Nevertheless, the essence of customary law derives from the crystallization of societal norms, which possesses constitutional legitimacy under Article 18B(2) of the 1945 Constitution. This article explicitly mandates that "The State recognizes and respects the unity of customary law communities and their traditional rights."²⁴

This constitutional provision demonstrates the formal recognition of customary law as an integral component of society's living law. In the context of the recent Criminal Code reform, this recognition represents the state's effort to accommodate and protect customary law without contravening human rights provisions or creating disparities in law enforcement. Incorporating living law into the Criminal Code juxtaposes it with written law as a complementary force, thereby balancing the national legal system and advancing the overarching objectives of national criminal law.

²³ Zelfeni Wimra et al., "An Interlegality-Based Ethnography Of Living Fiqh In Minangkabau Marriage Practices," *Akademika: Jurnal Pemikiran Islam* 30, no. 2 (2025): 175.

²⁴ Mega Rahmi Putri, "Inheritance of Property in Minangkabau: Review of Customary Law and Islamic Law," *GIC Proceeding* 1 (2023): 387.

The Academic Draft of the Criminal Code posits that this legal equilibrium reflects the societal sense of justice. Although integrating these laws into the new Criminal Code has generated debate, the primary objective remains the eradication of colonial legacies embedded within the penal system. Simultaneously, the necessity to recognize customary law as a legitimate basis for punishment compelled the drafters to formally incorporate it into Indonesian criminal law, as stipulated in Article 2 of the Criminal Code:

1. The provisions referred to in Article 1(1) do not diminish the validity of laws applicable in society which stipulate that a person is subject to punishment even if their actions are not explicitly regulated in this Law.
2. The societal laws referred to in paragraph (1) apply within their respective jurisdictions, provided they are not regulated by this Law and align with the values embodied in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and the general legal principles recognized by civilized societies.²⁵

The recognition of living law under Article 2(1) of the Criminal Code is further specified in the context of criminal acts, specifically customary offenses. The limitations imposed on customary law are delineated in Article 2(2) to ensure strict adherence to inherent constitutional values. Integrating living law explicitly redefines the principle of legality. Historically, this principle operated as a closed system, meaning the parameters for criminal liability were exclusively confined to written statutory regulations; without explicit supplementary regulations, an act could not be prosecuted.²⁶

Currently, the Criminal Code, by accommodating customary law, expands the legality principle into an open system. This paradigm shift allows for prosecution based on unwritten societal norms, indicating that the legality principle no longer relies solely on written statutes but also encompasses the living law. The formal inclusion of customary law necessitates subsequent regulations detailing customary violations, punitive bases, judicial considerations, and compliance sanctions to operationalize Article 2 effectively. The conceptual integration of customary law into the penal system yields the constructive consequence of requiring a comprehensive inventory of customary norms, which are subsequently codified in Regional Regulations.

²⁵ Siti Ropiah and Syafi'i Syafi'i, "Contextualized Islamic Family Law in Practice: Divorce and Child Custody Disputes in Cikarang, Indonesia," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 13, no. 1 (2026): 42.

²⁶ Derita Prapti Rahayu et al., "The Semiotics of Extractive Legality: Symbolic Law and Tin Mining Governance in Indonesia," *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 39, no. 2 (2026): 451.

The integration of customary criminal law into the national legal framework is executed through a regional formalization mechanism, as governed by Government Regulation (PP) No. 55 of 2025. This regulation establishes a normative framework affirming that societal laws can be recognized and enforced, provided they satisfy specific criteria and are formally stipulated in Regional Regulations (Perda).

Article 1 of PP No. 55 of 2025 defines "Living Law in Society" as customary law dictating that a specific act warrants criminal sanctions. Accordingly, a Customary Criminal Offense (*Delik Adat*) is defined as an act classified as criminal based on enduring customary norms recognized by the local community.

This regulation positions customary offenses as complementary to national criminal law. The principle of subsidiarity is reinforced in Article 3, which mandates that if an act is already regulated or shares elements with a statutory offense in the Criminal Code (KUHP), the national provisions shall prevail. This mechanism is designed to prevent legal dualism and double jeopardy in law enforcement. Furthermore, not every customary norm qualifies as a punitive basis. Article 5 establishes that an act can only be categorized as a customary criminal offense if it satisfies four cumulative conditions:

1. It is unlawful or contrary to the prevailing laws within the society.
2. It is punishable by sanctions requiring the fulfilment of customary obligations.
3. It is not explicitly regulated in the Criminal Code.
4. It applies universally to any individual committing the act within the respective customary law jurisdiction.²⁷

Additionally, customary criminal offenses are enforceable only upon formal stipulation through a Regional Regulation. The formalization mechanism initiates with a proposal phase. Proposals to codify customary offenses into Regional Regulations can originate from:

1. The Regional Government (*Pemerintah Daerah*).
2. The Regional People's Representative Council (*DPRD*).
3. The Customary Law Community (*Masyarakat Hukum Adat*).

Proposals originating from the customary law community must be channeled through the Regional Government or the DPRD. Following the proposal submission, the Regional Government or DPRD is mandated by Article 7 to conduct comprehensive research involving:

²⁷ Ali Masyhar et al., "Reclaiming the Unwritten: Living Law's Prospects under Indonesia's 2023 Penal Reform," *Jambe Law Journal* 8, no. 1 (2025): 255.

1. Members of the customary law community.
2. Academics or researchers.
3. Civil society organizations with a vested interest in indigenous communities.

If the research validates that the established criteria are met, the legislative process for drafting a Regional Regulation proceeds. To guarantee legal certainty, regional regulations governing customary offenses must incorporate the following minimum elements:

1. The formal identity of the customary law community.
2. The territorial boundaries within which the customary law operates.
3. A precise description of prohibited acts or violations of customary obligations.
4. Procedural guidelines for handling and adjudicating customary offenses.
5. Mechanisms for fulfilling customary obligations.
6. The specific types of sanctions, manifested as local customary obligations.

This rigorous framework ensures that formalized customary norms possess distinct jurisdictional boundaries and structured enforcement protocols. Article 15 stipulates that sanctions for customary offenses are executed through the fulfillment of customary obligations, as defined in the local regulations. For individual offenders, the financial equivalent of these customary obligations is capped at a Category II fine under the Criminal Code. Conversely, for corporate entities, the fulfillment of customary obligations adheres to prevailing statutory provisions.²⁸

Within the national criminal justice system, fulfilling customary obligations is recognized as an additional penalty under Article 66(1)(f) of the Criminal Code. However, in the context of living law offenses, this fulfillment can operate as a principal penalty. Fundamentally, the adjudication of customary offenses relies on non-litigation, deliberation-based mechanisms (*musyawarah*). This process is facilitated by the Customary Institution in collaboration with the Civil Service Police Unit (*Satpol PP*), actively involving the victim, the alleged offender, and the local customary community.²⁹

If the deliberation conclude that a customary offense occurred and the perpetrator is guilty, the offender is mandated to fulfill the customary obligations

²⁸ Bismar Siregar, "Living Law Dan Dinamika Sosial: Integrasi Nilai-Nilai Kearifan Lokal Ke Dalam Hukum Nasional," *Lex Lectio Law Journal* 4, no. 1 (2025): 14

²⁹ Sri Wahyu Kridasakti et al., "The Legitimacy Crisis of Customary Villages under Indonesia's Village Law," *Sriwijaya Law Review*, 2025, 432.

outlined in Article 15. Conversely, if the allegations are unproven or the act is not deemed a customary offense, the accused is absolved of any obligations. The Customary Institution subsequently submits the deliberation outcomes to the Head of the District Court, via the Head of the District Attorney's Office, to secure a formal court ruling free of charge. This procedural step imbues customary settlements with formal legal legitimacy. Customary offenses bypass the formal criminal justice system under three conditions:

1. The perpetrator has successfully fulfilled their customary obligations.
2. The perpetrator is exonerated during the customary deliberation.
3. The act in question is determined not to constitute a customary offense.

However, failure to fulfill customary obligations triggers Article 22, escalating the case to formal criminal proceedings. Under these circumstances, a judge may impose a verdict demanding compensation equivalent to a Category II fine for individuals, or statutory compensation for corporations. This compensation is awarded to the victim and/or the customary law community. Non-compliance with this judicial order subjects the perpetrator to standard law enforcement execution mechanisms.³⁰

Within this framework, the deliberation outcomes facilitated by the Customary Institution serve as the primary determinant for the incident's legal status and the respective parties' responsibilities. This adjudicative process yields several potential decisions, each carrying distinct legal consequences.

First, if the deliberation confirms a customary offense and identifies the perpetrator, the offender must fulfill their customary obligations pursuant to Article 15 of PP No. 55 of 2025. These obligations function as the primary sanction designed to restore social equilibrium within the community. Second, if a customary offense is confirmed but the suspect is not proven to be the perpetrator, the individual is exempt from any obligations, ensuring no sanctions are unjustly imposed. Third, if the investigated incident does not legally qualify as a customary offense, all suspected parties are absolved, legally affirming that no violation of applicable customary norms occurred.³¹

To confer formal legal force upon the deliberation outcomes, the Customary Institution files a cost-free request for a ruling with the Head of the District Court via the Head of the District Attorney's Office. This judicial ruling

³⁰ Klara Dawi et al., "Pengakuan Hukum Yang Hidup Dan Asas Legalitas Dalam KUHP Nasional: Kajian Perbandingan Antara Indonesia Dan Belanda," *Arus Jurnal Sosial Dan Humaniora* 5, no. 2 (2025): 2945.

³¹ Alif Arhanda Putra, "The Politics of Law Regarding Capital Punishment and the Protection of the Right to Life in Indonesia: A Perspective from Law Number 1 of 2023," *SIGn Jurnal Hukum* 7, no. 1 (2025): 188.

acts as the state's formal recognition of the customary settlement, thereby guaranteeing legal certainty within the broader national judicial architecture.

B. Determination of Religious-Based Customary Criminal Sanctions in Inventorying Local Regulations

Selecting religiously based customary criminal law as the focal point of this inventory is grounded in robust sociological and normative justifications. Religiously based customary systems inherently possess a magical-religious character, deriving normative legitimacy from spiritual beliefs, sacred values, and moral obligations deemed collectively binding. Consequently, communal compliance is driven not merely by the threat of formal sanctions, but by profound religious consciousness and moral responsibility.³²

In the context of conflict resolution, this magical-religious orientation fosters an approach centered on peace and restoration. Violations are perceived not strictly as legal infractions, but as disruptions to social and spiritual equilibrium. Therefore, the resolution mechanism emphasizes deliberation, reconciliation, and the restoration of both interpersonal relationships and communal harmony. This paradigm aligns seamlessly with the restorative justice principles guiding contemporary customary penal policy.³³

Compared to secular or purely socially oriented customary systems, religiously based customary law is relatively easier to inventory and formalize. This is attributable to several factors. First, living norms rooted in religious teachings generally command strong and stable societal legitimacy. Second, the institutional structures within religiously based customary communities are typically well-established, possessing clear social authority. Third, public acceptance of amicable resolutions is significantly higher, as such settlements are viewed as fulfilling moral and religious obligations.³⁴

³² Situngkir, Tumpak Parulian, and K. M. S. Herman. "Miscarriage Of Justice And The Paradox Of Judicial Independence: The Doctrine Of Judge Accountability In The Criminal Justice System." *Lex Progressium: Jurnal Kajian Hukum Dan Perkembangan Hukum* 3.1 (2026): 31-42.

³³ Agus Widjanto, I Gde Pantja Astawa, and Muhammad Rulyandi, "Decolonising Restorative Justice in Indonesia: A Comparative Study across Customary Law Traditions," *Legality: Jurnal Ilmiah Hukum* 33, no. 2 (2025): 470.

³⁴ Saldi Isra, Ferdi Ferdi, and Hilaire Tegnan, "Rule of Law and Human Rights Challenges in South East Asia: A Case Study of Legal Pluralism in Indonesia," *Hasanuddin Law Review* 3, no. 2 (2025): 117.

It is imperative to reflect upon Sustainable Development Goal (SDG) 5, which establishes gender equality as the cornerstone of sustainable development, mandating equal legal and social protection for women and girls. Within the framework of the new Criminal Code, acknowledging living law serves to respect local values and customary legal traditions. However, challenges arise when these values are codified into regional regulations based on specific moralities that disregard a gender equality perspective.³⁵ Various local ordinances—such as the prostitution regulations in Tangerang and Demak—have faced criticism because their enforcement disproportionately targets women through mobility restrictions, dress codes, and moral assumptions that foster structural discrimination. This reality directly contradicts the spirit of SDG 5, as laws ostensibly designed to protect women may inadvertently exacerbate their vulnerability by institutionalizing discriminatory social norms.

From Eugen Ehrlich's perspective, the essence of law does not reside exclusively in written statutes or state legislative products, but rather emerges and evolves within societal practices as *das lebende Recht*, or the living law. Ehrlich posited that the primary source of legal validity lies in the dynamics of social relations, where norms derive legitimacy through collective recognition, consistent practice, and communal obedience. Accordingly, legal validity is determined not solely by formal state recognition, but by its social efficacy in maintaining order and preserving societal harmony. This perspective was subsequently reinforced in legal anthropology by Barend ter Haar, who conceptualized customary law as a normative system sustained by communal decision-making and local social authority. According to Ter Haar, customary law must be understood not as a collection of abstract rules, but as a living legal order sustained through concrete social interactions, deliberative processes, and dispute-resolution mechanisms oriented toward restoring balance. Within this framework, customary and interreligious norms are inherently dynamic and contextual, prioritizing the restoration of social relations over the imposition of formal punishment.

This paradox generates a dualism within the living law, characterized by the simultaneous operation of two normative regimes: customary law functioning organically within social life, and customary law formalized through Regional Regulations (*Perda*). On one hand, customary communities continue resolving disputes via deliberation, reconciliation, or social restitution to restore

³⁵ Khaidar, Naufal, and Maulana Adi Nugraha. "Protection of Indigenous Peoples (Local Beliefs) in the Context of Human Rights in Indonesia." *Contemporary Issues on Interfaith Law and Society* 1, no. 2 (2022): 99-122. <https://doi.org/10.15294/ciils.v1i2.31363>

communal equilibrium. On the other hand, regional regulations establish a novel normative regime backed by the state's coercive apparatus. This dichotomy creates potential conflicts between fundamentally divergent sources of legal legitimacy. For example, an offense within a customary community may be deemed resolved once the offender completes restorative measures or provides social compensation; however, under a Regional Regulation, the identical conduct may concurrently be classified as an administrative violation or criminal offense necessitating formal adjudication. It is at this juncture that the subversion of living law occurs: a legal system that was originally dynamic, restorative, and rooted in social consensus is reduced to a static, formal instrument. Rather than bolstering legal pluralism, careless codification risks eroding the normative autonomy of communities and inflaming tensions between social law and state law.³⁶

Furthermore, the formalization of social norms into Regional Regulations precipitates a fundamental shift in the authority to interpret and enforce the law. Authority previously vested in customary institutions or communal leaders—such as the *Tuha Peut* in Aceh or the *Paruman Adat* in Bali—is transferred to secular state actors, including the police, municipal public order officers (*Satpol PP*), public prosecutors, and the judiciary. This shift is not merely administrative; it represents an epistemological transformation in legal comprehension and application. Whereas customary institutions evaluate conflicts based on social relationships, the parties' intentions, communal balance, and restorative necessities, state institutions employ a rigid, binary legalistic framework focused strictly on fulfilling the legal elements of a violation to determine guilt. Such a framework systematically strips customary and interreligious norms of their restorative and protective qualities. This risk is amplified when these formalized norms enter local political arenas, where they may be co-opted by regional elites utilizing Regional Regulations as instruments of moral policing or identity-based political legitimization. Consequently, legal norms initially designed to preserve social harmony may metamorphose into tools for criminalizing vulnerable groups, including women, children, and religious minorities.

The core issue arises when these living norms are transformed into formal legal instruments via Regional Regulations, utilizing the legislative mechanisms outlined in Law No. 12 of 2011 on the Formation of Laws and Regulations. Conceptually, this codification process induces a fundamental tension, as the state legislative system demands normative certainty, behavioral categorization, and clear sanction mechanisms—requirements that starkly contrast with the

³⁶ Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017).

flexible and adaptive nature of living law. Regional regulations necessitate rigid formulations regarding prohibited conduct, accountable legal subjects, and specific legal consequences. At this point, an ontological paradox emerges: norms deriving legitimacy from social fluidity are constrained within the rigid architecture of positive law. Consequently, legal norms that remained vital through their adaptability to local contexts become crystallized into static written rules. Codification thus ceases to function merely as the recognition of customary law; instead, it fundamentally alters its ontological essence, transforming an organic living norm into a bureaucratic administrative regulation.

Therefore, implementing the "living law" provision within the new Criminal Code requires an interfaith, intercultural, and human rights-based approach to prevent its domination by the moral interpretations of any single demographic group. Local values are inherently dynamic and flourish through the community's social consciousness; thus, overly rigid formalization via local regulations risks suffocating the very essence of the living law. A more proportionate alternative involves strengthening social education, customary mediation, community ethical guidelines, and non-punitive policies that respect diversity without codifying discriminatory rules. Through this approach, the state can accommodate local values without compromising the principles of gender equality and the protection of women's rights, as mandated by SDG 5.

In regional policy practice, initial trends indicate that religiously based customary norms are the most readily and rapidly adopted into local regulations. Their inherent restorative nature minimizes potential friction with the national legal system, particularly concerning restrictions on imprisonment and the prioritization of restorative sanctions. Furthermore, their high social legitimacy expedites the verification process required by Government Regulation No. 55 of 2025 to prove these norms function as active living laws within the community.

Regulating customary criminal sanctions within Regional Regulations must be situated within a harmonization framework bridging societal laws and the national legal system. This context involves three interrelated normative regimes: the provisions of the Criminal Code, Government Regulation No. 55 of 2025, and the legislation governing the formation of Regional Regulations.

First, Article 66(1)(f) of the Criminal Code stipulates that fulfilling local customary obligations constitutes an additional criminal penalty. However, for criminal offenses originating from societal laws and codified in local regulations, fulfilling these customary obligations functions as the principal punishment. This provision illustrates the state's recognition of the unique nature of customary sanctions, which prioritize restoring social equilibrium over

imprisonment. Second, national legislative policy generally restricts the imposition of imprisonment through local regulations. Article IV(1) of Law No. 1 of 2026 mandates the conversion of imprisonment provisions in local regulations to fines; specifically, imprisonment of less than six months is converted to a maximum Category I fine, while imprisonment of six months or more is converted to a maximum Category II fine.³⁷

Furthermore, Article IV(2) dictates that fines below Category II remain effective, whereas fines exceeding Category II are capped at a maximum of Category III. Article IV(3) mandates that if a local regulation prescribes both imprisonment and a fine, the imprisonment must be abolished, retaining only the fine. Crucially, this provision exempts local regulations governing customary criminal offenses. This exemption underscores that customary criminal acts possess distinct characteristics that cannot be entirely subjected to the standardization schemes of regional administrative offenses. Third, limitations on criminal provisions within local regulations are also governed by Article 15 of Law No. 12 of 2011, in conjunction with Law No. 13 of 2022, which dictates that criminal provisions may only be enacted through laws or regional regulations, with penalties restricted to a maximum Category III fine.³⁸

This provision is reinforced by Article 238 of Law No. 23 of 2014 concerning Regional Government, as amended by Law No. 6 of 2023, which stipulates that Regional Regulations may impose enforcement costs on violators, mandate criminal penalties exclusively in the form of fines up to Category III, and include sanctions aimed at restoring the original condition alongside administrative sanctions.

Based on this normative framework, the inventory of religiously based customary criminal law requires concrete analysis to evaluate its readiness for formalization into Regional Regulations. This analytical approach is vital for identifying the extent to which the prerequisite elements outlined in Article 10 of Government Regulation No. 55 of 2025—including the identity of the customary law community, territorial boundaries, types of prohibited acts, settlement mechanisms, forms of customary obligations, and specific sanctions—are empirically observable in each community's social practices. Consequently, a comparative analysis of five religiously based customary communities—Bali, Aceh, Minangkabau, Baduy, and Toraja—was conducted

³⁷ Lukman Hakim, Qatrunnada Hamparan Melati, and Purnawan Dwikora Negara, "Integrating Adat Law in Indonesia: Challenges and Opportunities in a Centralized Legal Framework," *Indonesian State Law Review* 8, no. 1 (2025): 58.

³⁸ Umi Rozah and Aldi Yudistira, "Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP," *Indonesian Journal of Criminal Law Studies* 10, no. 1 (2025): 83.

to delineate their normative and sociological readiness, providing a foundational basis for the inventory and formulation of local regulations.³⁹

Table. 1 Characteristics Five Religion-Based Customary Laws (Bali, Aceh, Minangkabau, Baduy, and Toraja)

Indigenous Communities	Name of Customary Law Community	Territorial Boundaries	Prohibited Acts	Procedures for Handling	Forms of Customary Sanctions
Bali (Hindu)	Customary villages/Pa kraman villages are formally identified	Clear, based on customary village territory	Encoded in <i>awig-awig</i> (social and religious violations)	Village deliberation (<i>paruman adat</i>)	Restoration of social and spiritual balance
Aceh (Islam)	Gampong and Mukim	Clear based on customary structures and local government	Violations of social norms related to Sharia values	Resolution through Tuha Peut, Imum Mukim, and customary forums	Restorative and communal
Minangkabau (Islam)	Nagari as a customary community unit	Clearly based on the nagari territory	Violations of custom and religious norms according to the principle of <i>adat basandi syarak</i>	Consultation between ninik mamak and religious leaders	Restoration of dignity and social harmony

³⁹ Muh Akbar Fhad Syahril, Hardi Lestari Adi Hafid, and Arini Asriyani, "Integrasi Hukum Adat Toraja Sebagai Living Law Dalam Pembangunan Hukum Nasional Indonesia Tahun 2024–2025" [*The Integration of Toraja Customary Law as Living Law in the Development of Indonesian National Law in 2024–2025*], *Jurnal Litigasi Amsir* [*Amsir Litigation Journal*] (2025): 112.

Baduy (Sunda Wiwitan)	Baduy Community (Inner and Outer)	Relatively clear and recognized as a closed customary area	Violations of rules regarding sacredness, natural balance, and tradition	Decisions made by traditional leaders through internal mechanisms	Social sanctions, exclusion, customary obligations
Toraja (Aluk Todolo & Christianity)	Customary communities based on tongkonan territories	Relatively clear in customary territorial structure	Violation of social norms and ritual obligations	Family deliberations and traditional leaders	Restoration of social relations and community balance

Source: Authors' Analysis

Based on the table assessing the readiness for formalization among five religiously based traditional communities (Bali, Aceh, Minangkabau, Baduy, and Toraja), a consistent pattern emerges: customary sanctions generally eschew imprisonment in favor of social, material, or ritual obligations. This paradigm fundamentally aligns with the national policy of abolishing imprisonment in local regulations and converting such penalties into fines, as stipulated in Article IV of Law No. 1 of 2026.⁴⁰

An inventory of religiously based customary criminal sanctions across these five communities demonstrates that sanctions predominantly take the form of restorative obligations—such as customary fines, victim compensation, ritual duties, or reconciliation—rather than imprisonment. This pattern conforms to the national decriminalization policy under Article IV of Law No. 1 of 2026, which replaces imprisonment in local regulations with a category-based fine system. Normatively, if an offense is equivalent to a prison sentence of less than six months, it is converted into a maximum Category I fine, whereas more severe offenses are mapped to a maximum Category II fine. Should the economic value of the fine exceed this limit, it must be statutorily capped at Category III.⁴¹

⁴⁰ Firdaus Arifin et al., “Recognition of Customary Norms Within the Framework of Indonesian Legal Positivism,” *Khazanah Hukum* 7, no. 1 (2025): 92–104.

⁴¹ Surya Ningsih, Muhammad Hendri Nuryadi, and Rima Vien Permata Hartanto, “The Role of Pikukuh Karuhun in the Decision-Making of Indigenous Communities in Daily Life: A Case Study of the Baduy Traditional Village,” *Journal of Citizenship*, (2026).

In customary practice, the majority of infractions in Bali—such as neglecting customary duties or committing minor social offenses—incur customary fines or ceremonial obligations, which align structurally with Category I fines. More severe violations, such as desecrating sacred sites or acts necessitating major restorative rituals, correlate with Category II. Similarly, in Aceh, minor altercations or disputes are resolved through customary peace mechanisms and compensation (*sayam*), typically falling under Category I. Conversely, conflicts resulting in substantial material losses are escalated to Category II.

In Minangkabau society, sanctions predominantly involve customary fines aimed at restoring familial honor. Minor social infractions correspond to Category I, while conflicts that tarnish a group's dignity or cause significant harm are mapped to Category II. In the Baduy community, sanctions are inherently more social and ritualistic, involving reprimands, restorative obligations, or temporary exile. Due to their negligible monetary equivalent, the vast majority of these violations naturally fall under Category I, with exceptions made only for offenses causing severe environmental degradation.⁴²

Meanwhile, customary sanctions in Toraja frequently mandate the surrender of livestock or the financing of elaborate rituals. While minor offenses fit within Category I, obligations possessing substantial economic value—such as the provision of buffalo—can easily fall under Category II or even exceed its limits. Consequently, these high-value sanctions must be legally capped at Category III, in accordance with legislative provisions.⁴³ Overall, the restorative and compensatory orientation of religiously based customary sanctions across these five communities facilitates their seamless adaptation into the standardized fine categorization system required for Regional Regulations.

The comparative analysis of these communities—Bali (Hindu), Aceh (Islam), Minangkabau (Islam), Baduy (*Sunda Wiwitan*), and Toraja (*Aluk Todolo* and Christianity)—demonstrates that religiously based customary legal systems operate on a magico-religious rationale. Norms are adhered to due to profound moral and spiritual foundations, prompting resolution mechanisms that prioritize peace, reconciliation, and relational restoration. This humanistic

⁴² Jelia Patiung, Muhammad Dassir, and Astuti, “Tenure Conflict Resolution Strategy For Pongtorra Protected Fores Area In North Toraja,” in *IOP Conference Series: Earth and Environmental Science*, vol. 1553 (IOP Publishing, 2025), 12039.

⁴³ Yoland Suryamodjo Pratama, “Penerapan Hukum Adat Aluk Todolo Dalam Penyelesaian Delik Adat Pada Masyarakat Toraja” [*The Application of Aluk Todolo Customary Law in the Settlement of Customary Offenses in Toraja Society*], *Ekspose: Jurnal Penelitian Hukum Dan Pendidikan* [*Ekspose: Journal of Legal Research and Education*] 25, no. 1 (2026): 36

character resonates deeply with the restorative justice paradigm and national policies designed to limit penal imprisonment at the regional level. Consequently, religiously based customary law emerges as the most stable and structurally prepared framework for inventorying and formalization during the initial implementation phase of Government Regulation (PP) No. 55 of 2025.

Procedurally, the adjudication of customary offenses commences with deliberation (*musyawarah*) facilitated by the Customary Institution in conjunction with relevant authorities. If the deliberation is successful and the offender fulfills the requisite customary obligations, the outcomes are channeled through the Head of the District Attorney's Office to the District Court, securing formal state recognition. Under these circumstances, the case is removed from the formal criminal justice system. Conversely, if the offender fails to fulfill their obligations or a consensus cannot be reached, the dispute is escalated and resolved through the national criminal procedure law. However, the inventorying process faces a critical hurdle: the potential overlap with statutory offenses in the Criminal Code. The principle of subsidiarity dictates that if a customary act shares elements with a statutory criminal offense, the provisions of the national Criminal Code must prevail.⁴⁴ Therefore, to prevent legal dualism, the specific customary offenses codified in local regulations must be selected with meticulous precision.⁴⁵

The inventory of religiously based customary laws in Bali, Aceh, Minangkabau, Baduy, and Toraja indicates that this humanistic, magico-religious approach serves as the most viable operational model for the initial formalization stage. This viability is contingent upon the customary laws continually meeting human rights standards, avoiding jurisdictional overlap with the Criminal Code, and recognizing the national criminal procedure law as the definitive fallback mechanism should customary resolutions fail.

⁴⁴ Ensuring Legal Certainty for Customary Law Communities in Indonesia: Analyzing the Ratification Process of the Customary Law Communities Bill". 2024. *Contemporary Issues on Interfaith Law and Society* 3 (1): 177-202. <https://doi.org/10.15294/ciils.v3i1.31395>.

⁴⁵ Muhyidin Muhyidin and Budi Setyawan, "Legal Unification And Pluralism In Customary Marriage Registration: Lessons From The Baduy Indigenous Community," *Masalah-Masalah Hukum* 54, no. 3 (2025): 462–85.

C. Criticizing the Codification of Fines in Government Regulation No. 55 of 2025 As A Diminishment of Magical Ratio

Although the inventory of religiously based customary criminal sanctions in Bali, Aceh, Minangkabau, Baduy, and Toraja demonstrates a strong emphasis on compensation and restorative settlement, the assumption that these characteristics automatically render these systems compatible with the fine-categorization framework under Government Regulation (PP) No. 55 of 2025 requires critical reconsideration. This assumption harbors a fundamental contradiction: it overlooks the epistemological divide between religiously based customary law and secular criminal law. Within these communities, sanctions are rooted in a magico-religious rationale—a normative worldview in which a violation is perceived not merely as an unlawful act or a cause of individual harm, but as a disruption of social, spiritual, and cosmic equilibrium. Consequently, sanctions such as customary fines, ritual obligations, communal compensation, or the offering of sacrificial animals cannot be reduced to mere economic liabilities, as their primary function lies in their symbolic and sacred role in restoring collective harmony. In this context, the restorative nature of religiously based customary law cannot be simplistically equated with the monetized sanctioning mechanisms found in state criminal law. Article 15 of Government Regulation No. 55 of 2025 states:

- (1) Customary criminal offenses are subject to the sanction of fulfilling local customary obligations as set forth in the Regional Regulation on Customary Criminal Offenses.
- (2) The fulfillment of local customary obligations as referred to in paragraph (1) for individuals shall be deemed equivalent to a Category II fine under the Criminal Code.

Article 15(1) and (2) of PP No. 55 of 2025 raise significant concerns within the framework of legal pluralism, particularly because they normatively equate all forms of compliance with local customary obligations imposed upon individuals with a Category II criminal fine under the Criminal Code. While this formulation appears administratively efficient for legal standardization, it simultaneously risks undermining the diversity of customary sanctions that have evolved organically across different indigenous communities. An examination of customary sanction systems in Bali, Aceh, Minangkabau, Baduy, and Toraja demonstrates that such sanctions have never been structured around a single, uniform monetary benchmark. Rather, each community applies its own internal

normative logic in determining the severity of sanctions, weighing factors such as the extent of disruption to social harmony, violations of spiritual sanctity, and genealogical relations among community members. Consequently, reducing all customary obligations to a single state-imposed fine category disregards the reality that customary law operates through a plurality of values rather than through monetary uniformity.

The first major concern lies in the elimination of substantive differentiation among customary sanctions. In practice, minor violations within the Baduy community in Banten—such as customary warnings or simple restorative obligations—carry a significantly different normative weight from obligations in Tana Toraja requiring the surrender of buffalo, which embody substantial economic, genealogical, and spiritual burdens. Similarly, customary sanctions in Bali, which may involve ritual purification ceremonies, cannot be equated with the *sayam* mechanism in Aceh, which emphasizes compensation and reconciliation between disputing parties. By categorizing all such obligations under a single Category II fine, the state effectively imposes equal monetary treatment upon fundamentally unequal normative burdens. As a result, sanctions that were originally calibrated according to nuanced local contexts are reduced to a uniform financial metric, thereby eroding the flexibility that constitutes a central feature of living law.

The second concern relates to the ontological distortion of the underlying purpose of customary sanctions. As previously discussed, most religiously based customary sanctions emerge from a magico-religious rationale, a worldview in which violations are understood as disturbances to cosmic, spiritual, and communal equilibrium. Accordingly, the value of a sanction is measured not solely in economic terms, but rather by its capacity to restore disrupted harmony. Once Article 15(2) fixes all customary obligations within the framework of a Category II fine, their restorative and spiritual functions are displaced by a secular penal logic centered on monetization. The state effectively assumes that all customary obligations can be translated into a single financial scale. This presents a severe risk, as rituals that were once sacred and symbolically meaningful may be transformed into mere administrative obligations that can simply be “paid off.” In this sense, the Category II fine functions not merely as a standardization mechanism, but as an instrument that gradually freezes and neutralizes the philosophical foundations of customary sanctions.

Ultimately, Article 15(2) illustrates a profound paradox in the state’s recognition of customary law: while formally acknowledging the existence of customary legal systems, the state simultaneously restricts and homogenizes their expression through a single fine category. Rather than strengthening the diversity

of living legal systems, this approach risks catalyzing the homogenization of customary sanctions. In effect, the Category II fine operates as a legal ceiling that suppresses the dynamic and context-sensitive nature of sanctioning practices that have historically distinguished indigenous communities.

This contradiction becomes even more pronounced when the state attempts to translate such customary sanctions into standardized fine categories (e.g., Category I, II, or III). The fine classification system in modern criminal law is constructed upon principles of standardization, proportionality, and monetary measurement, where every violation must be assessed according to a uniform financial scale. In stark contrast, religiously based customary law does not necessarily determine the severity of sanctions through material valuation alone, but through the extent to which the offense disturbs communal and spiritual balance. For example, the obligation to provide buffalo in Torajan customary practice represents far more than an economically valuable asset; it embodies genealogical status, ancestral respect, and sacred significance within reconciliation rituals. When the state imposes a rigid monetary ceiling on such obligations, substantial operational friction emerges, as spiritual duties imbued with metaphysical meaning are forced into standardized financial parameters. The core issue, therefore, is not merely whether customary sanctions *can* be converted into monetary values, but whether their ontological meaning survives once subjected to secular penal classification. In many cases, such conversion inevitably strips these sanctions of their deeper normative significance.

Accordingly, the claim that religiously based customary legal systems are the most prepared for formal codification during the initial implementation of PP No. 55 of 2025 must be reassessed. A more accurate position is that while these communities possess relatively stable and identifiable normative structures, this does not necessarily mean they are organically compatible with incorporation into state criminal law. On the contrary, the stronger the religious, spiritual, and cosmological dimensions embedded in a customary sanction, the greater the risk of normative distortion once it is formalized within a secular penal framework. Therefore, the appropriate approach should not rely exclusively on monetized legal inventorying. Instead, it must adopt a hybrid model that preserves non-economic restorative mechanisms, including ritual obligations, communal reconciliation, and symbolic restitution. Such an approach allows the state to transcend merely translating customary law into numerical sanctions, ensuring the preservation of the restorative and spiritual foundations that constitute the core legitimacy of religiously based customary legal systems.

D. Potential Criminalization and Challenges in Drafting Customary Criminal Law in Regional Regulations

The government assumes that regional regulations (*Perda*) drafted in respective jurisdictions will serve as definitive guidelines for law enforcement officials, establishing the parameters of legal violations applicable within society.⁴⁶ However, codifying customary law into regional regulations presents a fundamental paradox. Customary law is inherently unwritten and dynamic; formalizing it effectively merges it into the rigid national statutory system. According to Barend ter Haar, customary law is essentially the accumulation of decisions made by customary officials regarding value-based disputes, which dynamically evolve alongside indigenous communities. Soepomo further emphasized that customary law is rooted in unwritten legal customs inherent to communities whose structures exist out of formal statutory frameworks).⁴⁷

Furthermore, codifying customary offenses into regional regulations risks conflicting with judicial obligations. Article 5(1) of Law No. 48 of 2009 concerning Judicial Power mandates that judges must explore, follow, and understand the legal values and sense of justice living in society.⁴⁸ Article 50 reinforces this by requiring court decisions to articulate not only statutory foundations but also the unwritten laws considered by the judge.⁴⁹ The central concern here is the emergence of legal dualism: customary laws crystallized within regional regulations versus those that remain uncoded and dynamically evolving alongside societal development.⁵⁰

⁴⁶ Laurens Bakker, "Custom and Violence in Indonesia's Protracted Land Conflict," *Social Sciences & Humanities Open* 8, no. 1 (2023): 100624, <https://doi.org/https://doi.org/10.1016/j.ssaho.2023.100624>.

⁴⁷ Gusti Ayu Made Suartika, "Territoriality and the Market System—Adat Land vs. State Regulations on Land Matters in Bali," *Habitat International* 31, no. 2 (2007): 167–76, <https://doi.org/https://doi.org/10.1016/j.habitatint.2006.11.001>, <https://doi.org/https://doi.org/10.1016/j.habitatint.2006.11.001>.

⁴⁸ Kazuhiro Harada et al., "The Role of NGOs in Recognition and Sustainable Maintenance of Customary Forests within Indigenous Communities: The Case of Kerinci, Indonesia," *Land Use Policy* 113 (2022): 105865, <https://doi.org/https://doi.org/10.1016/j.landusepol.2021.105865>.

⁴⁹ Rodd Myers et al., "Claiming the Forest: Inclusions and Exclusions under Indonesia's 'New' Forest Policies on Customary Forests," *Land Use Policy* 66 (2017): 205–13, <https://doi.org/https://doi.org/10.1016/j.landusepol.2017.04.039>.

⁵⁰ K von Benda-Beckmann, "Folk, Indigenous, and Customary Law," in *International Encyclopedia of the Social & Behavioral Sciences*, ed. Neil J Smelser and Paul B Baltes (Oxford:

This friction between state-codified customary law and organically evolving customary law inevitably creates confusion among law enforcement officials regarding the precise conditions for criminalization. Drawing upon Eugen Ehrlich's concept of *living law*, customary norms that are rigidly codified by the state lose their organic essence and can no longer be authentically categorized as living law operating within society.⁵¹

Drafting regional regulations based on customary offenses constitutes a rejection of customary law's dynamic nature. The selective codification of specific violations inevitably leads to the standardization of customary law, raising profound concerns that it will cease to reflect the community's authentic sense of justice.⁵²

If customary norms evolve in the future, updating these regulations requires rigid and protracted legislative procedures, which clashes with the adaptive nature of customary law. This legislative lag serves as a precursor to the emergence of uncoded customary violations, potentially sparking backlash from traditional leaders and local communities. While the intention to accommodate customary offenses is positive, the current formalization mechanism yields realities contrary to the true spirit of customary law recognition.⁵³

Efforts to incorporate customary law into the national legal framework have inadvertently paved the way for bureaucratic arbitrariness in determining culpability. This confusion among law enforcement agencies compromises legal certainty for justice seekers due to structural inconsistencies within the criminal justice system. Ultimately, regional regulations originally intended to provide legal protection for local communities may instead create loopholes that

Pergamon, 2001), 5705–8, <https://doi.org/https://doi.org/10.1016/B0-08-043076-7/02786-8>.

⁵¹ Sandra F Joireman and Rosine Tchatchoua-Djomo, "Post-Conflict Restitution of Customary Land: Guidelines and Trajectories of Change," *World Development* 168 (2023): 106272, <https://doi.org/https://doi.org/10.1016/j.worlddev.2023.106272>.

⁵² Faustin P Maganga et al., "Implications of Customary Norms and Laws for Implementing IWRM: Findings from Pangani and Rufiji Basins, Tanzania," *Physics and Chemistry of the Earth, Parts A/B/C* 29, no. 15 (2004): 1335–42, <https://doi.org/https://doi.org/10.1016/j.pce.2004.09.008>.

⁵³ David le Bris, "Testing Legal Origins Theory within France: Customary Laws versus Roman Code," *Journal of Comparative Economics* 47, no. 1 (2019): 1–30, <https://doi.org/https://doi.org/10.1016/j.jce.2018.10.003>.

legitimize the structural discrimination of vulnerable groups at the local level, particularly women.⁵⁴

The current content of various regional regulations frequently emphasizes the restriction of women's civil liberties, imposing dictates on dress codes and nighttime mobility. Regulations that disproportionately burden citizens place women in a negative social light. This inevitably impacts women's livelihoods, directly contravening their constitutional right to a decent standard of living.

In this context, Article 12 paragraph (2) should be understood as requiring that the assessment of an act is not confined solely to its conformity with the textual formulation of statutory law, but must also consider the extent to which the act conflicts with the values, moral standards, and living legal norms embedded within society. In essence, Article 12 paragraph (2) broadens the evaluation of unlawfulness beyond written legal provisions by incorporating socially recognized norms, including religious and customary values that continue to function within specific communities. This provision therefore reflects an expansion of the concept of unlawfulness from a purely formal legal framework toward a materially grounded understanding rooted in social reality.

Nevertheless, expanding the concept of material unlawfulness carries significant risks within pluralistic and multicultural societies. The primary danger lies not in recognizing the living law, but in the potential for dominant social groups to monopolize the definition of what constitutes "living law." During the drafting of Regional Regulations, prevailing moral standards—particularly those shaped by majoritarian religious sentiments—can easily acquire formal legal authority. Once institutionalized, these moral standards can be utilized to classify specific conduct as unlawful, even when such conduct causes no concrete harm to legally protected interests. As a result, the doctrine of material legality risks devolving into an exclusionary mechanism that legitimizes the moral preferences of dominant groups.

Within this framework, the potential criminalization of vulnerable groups—including women, indigenous populations, and religious minorities—becomes glaringly apparent. When majoritarian moral sentiments are weaponized through Regional Regulations under the justification of protecting "living law," the concept of material unlawfulness shifts from an instrument of social protection to one of repressive social control. Minority practices diverging from dominant moral standards may be stigmatized as deviant or unlawful, even

⁵⁴ P Osei-Tutu, L K Brobbey, and F K Agyei, "Customary Authorities and Decentralized Natural Resource Management: A Review," *Geoforum* 125 (2021): 185–87, <https://doi.org/https://doi.org/10.1016/j.geoforum.2021.03.016>.

if they do not infringe upon the rights of others. Therefore, the central critique of Article 12(2) concerns the absence of robust constitutional safeguards necessary to prevent the hijacking of the "living law" concept by identity politics and majoritarian interests in the formation of Regional Regulations.

Even if there are no material and formal elements in the actions committed by the perpetrator, it is still part of a criminal act that is contrary to the laws that apply in society. This kind of legal policy encourages the drafting of regional regulations to be more flexible in incorporating applicable laws in accordance with the government's interpretation, without emphasizing the obligation to understand local practices that have developed in the local community.⁵⁵

Therefore, there is an escalating risk of criminalizing vulnerable populations. Records from the National Commission on Violence Against Women (Komnas Perempuan) indicate that while the government may harbor good intentions, a profound lack of understanding regarding constitutional principles and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, ratified via Law No. 7 of 1984) often results in discriminatory policies. This human rights deficit raises critical questions about whether the formalization of customary offenses actually represents a regression in the new Criminal Code that erodes the rights of vulnerable groups.

If an action technically violates a state regulation but does not contravene the living values of the community, it should not automatically fulfill the element of unlawfulness. The current law enforcement design often yields excessive punitive measures against indigenous peoples. As documented by the Indigenous Peoples Alliance of the Archipelago (AMAN) between 2013 and 2015, 25 cases of criminalization occurred, resulting in 33 indigenous individuals being sentenced under the Law on the Prevention and Eradication of Forest Destruction (P3H Law).

Even though indigenous peoples only intended to utilize the forests in their local areas, law enforcement officials denied the legitimacy of these actions.⁵⁶ A just criminal justice process requires a clear demarcation between national statutory law and uncoded customary law to prevent bureaucratic domination.

⁵⁵ Republic of Indonesia, *Undang-Undang Nomor 18 Tahun 2013 tentang Pencegahan dan Pemberantasan Perusakan Hutan* [Law Number 18 of 2013 concerning the Prevention and Eradication of Forest Destruction] (State Gazette of the Republic of Indonesia of 2013 No. 130, Supplement to the State Gazette No. 5432).

⁵⁶ Demak Regency, *Peraturan Daerah Kabupaten Demak Nomor 2 Tahun 2015 tentang Pengendalian Penyakit Menular di Kabupaten Demak* [Demak Regency Local Regulation Number 2 of 2015 concerning the Control of Infectious Diseases in Demak Regency]

Arbitrary legal application empowers dominant political forces to enact discriminatory regional regulations, as evidenced by:

1. Local Regulation No. 8 of 2005 on the Prohibition of Prostitution in Tangerang. This regulation is inherently discriminatory against women. It stipulates that anyone exhibiting a "suspicious attitude or behavior" can be deemed a prostitute and barred from public spaces at night. This vague phrasing enables law enforcement to criminalize women based on mere assumptions regarding their attire or nighttime mobility. This regulation notoriously resulted in the wrongful arrest of a married woman returning from her restaurant job, generating widespread public anxiety and unconstitutionally restricting women's freedom of movement.⁵⁷
2. Demak Local Regulation No. 2 of 2015 concerning the Control of Infectious Diseases. This regulation contains highly problematic provisions, particularly Article 15, which lacks precise behavioral parameters. It dictates that individuals exhibiting the "suspicious appearance" of a commercial sex worker are prohibited from frequenting public places or crowds, utilizing subjective visual profiling as a basis for legal restriction.⁵⁸

The existence of such discriminatory regional regulations clearly contradicts higher statutory mandates, notably Law No. 7 of 1984, which obligates the state to eliminate all forms of discrimination. Alarmingly, the proliferation of discriminatory local regulations continues to rise. There are grave concerns that such legislative practices will establish a dangerous precedent for the implementation of Article 2(1) of the Criminal Code, weaponizing the law against political or social adversaries under the guise of enforcing "living societal laws."

If customary norms are to be formalized into regional regulations, a rigorous humanitarian and gender-sensitive analysis is paramount. Without it, there is a severe risk of legalizing oppressive cultural practices and identity politics—such as "captive marriage" (*kawin tangkap*), the resolution of rape through forced marriage to the perpetrator, and arbitrary social ostracization. Although Article 2(2) of the Criminal Code explicitly demands that applicable living laws align with constitutional values and human rights, practical

⁵⁷ Tangerang City, *Peraturan Daerah Kota Tangerang Nomor 8 Tahun 2005 tentang Pelarangan Pelacuran di Kota Tangerang* [Tangerang Municipality Local Regulation Number 8 of 2005 concerning the Prohibition of Prostitution in Tangerang Municipality].

⁵⁸ Kaila Intan Fatihah and Ali Masyhar Mursyid, "Legal Analysis of Cohabitation and Adultery Delict in Law No. 1 of 2023 On the Criminal Code," *Law Research Review Quarterly* 12, no. 2 (2026).

implementation without strict oversight will inevitably perpetuate the criminalization of vulnerable groups.

Another fundamental dilemma stems from Article 2 of PP No. 55 of 2025, which mandates that customary offenses be explicitly codified within a Regional Regulation (Perda). While normatively providing administrative certainty, sociologically, this requirement strips customary law of its inherent adaptability, freezing dynamic norms into rigid statutes. Crucially, Article 20 dictates that the outcomes of deliberations between the Customary Institution and the Civil Service Police Unit (Satpol PP) must be submitted to the District Court for a formal ruling. This intersection of social mechanisms and state bureaucracy implies that judges cannot act merely as administrative ratifiers.

Judges bear the critical responsibility of conducting a substantive judicial review of the deliberation process. They must ensure authentic victim participation (as mandated by Article 16(3)), verify that decisions were reached free from intimidation or customary elite domination, and guarantee strict adherence to human rights principles. This oversight is vital to ensure that customary settlements are both socially legitimate and procedurally just.⁵⁹

A further complication arises from Article 15(2), which standardizes the fulfillment of individual customary obligations as equivalent to a Category II fine (IDR 10,000,000). This nominal state approach risks reducing profound customary sanctions to mere financial transactions. While Article 21 enshrines a localized *ne bis in idem* principle preventing formal prosecution if customary obligations are met the judicial focus must transcend monetary equivalence. The critical questions remain: Does implementation truly center the victim? Is the process free from elite domination? Are human rights upheld?

Conversely, if the perpetrator defaults and the case proceeds to court under Article 22, the judge possesses the authority to impose compensation. In such instances, the judge must ensure that any imposed compensation is not solely financially oriented, but actively serves the primary objective of customary law: the holistic restoration of social and communal equilibrium.

To mitigate these risks, a community-led decentralized oversight framework must be established during the inventory and formalization of customary laws. This model centers indigenous communities, civil society organizations, academics, legal aid institutions, and vulnerable groups in

⁵⁹ Fabrizio Richardo Marvil Wanggai, Made Sugi Hartono, and Ni Putu Ega Parwati, "Penerapan Living Law Dalam KUHP Baru Dan Pengaruhnya Terhadap Asas Legalitas Serta Kepastian Hukum Di Indonesia" [*The Application of Living Law in the New Criminal Code and Its Impact on the Principle of Legality and Legal Certainty in Indonesia*], *Al-Zayn: Jurnal Ilmu Sosial & Hukum* [*Al-Zayn: Journal of Social Sciences & Law*] 4, no. 1 (2026): 6993.

evaluating the substantive content of customary norms prior to codification. Such a participatory mechanism is essential to prevent regional governments and local elites from monopolizing interpretation or weaponizing customary law for social control. Through this inclusive process, a norm's legitimacy is assessed not solely on historical claims, but on its consistency with constitutional principles. Consequently, community-based oversight acts as a bottom-up constitutional safeguard, ensuring customary law remains an instrument of social harmony rather than exclusion.

Complementing this participatory oversight, lawmakers must develop rigorous vetting guidelines containing four core parameters: non-discrimination review, proportionality assessment of sanctions, protection of vulnerable groups, and constitutional compatibility review. Every proposed customary norm must be meticulously evaluated to ensure it does not institutionalize discrimination based on gender, religion, or social identity, nor infringe upon constitutionally guaranteed freedoms. Furthermore, the outcomes of these assessments must be transparent and accessible, allowing communities to challenge potential human rights violations. By synthesizing decentralized community oversight with stringent human rights mechanisms, the codification of customary law can be executed accountably, preserving legal diversity while fiercely protecting vulnerable populations.

Conclusion

The logical consequence of codifying customary law into regional regulations is a fundamental contradiction of the essence of *living law*. This formalization strips living law of its inherently dynamic characteristics, transforming organically evolving customary norms into rigid legislative products of national law. Moreover, while the incorporation of customary law through regional regulations was originally intended to recognize customary violations and ensure legal protection for local communities, it inadvertently creates avenues for abuse. Such codification risks enabling structural discrimination against vulnerable groups at the local level, particularly women. The proliferation of discriminatory local regulations raises significant concerns, setting a dangerous precedent where Article 2(1) of the Criminal Code could be weaponized by authorities to enforce exclusionary policies or suppress dissent. If qualifying customary laws are enforced as regional regulations, they must be rigorously reviewed to ensure they uphold humanitarian perspectives toward women, thereby preventing the legalization of identity politics. Nevertheless, when applying the analytical framework of Government Regulation (PP) No. 55

of 2025 to interfaith contexts across five distinct customary systems—Bali (Hindu), Aceh (Islam), Minangkabau (Islam), Baduy (*Sunda Wiwitan*), and Toraja (*Aluk Todolo* and Christianity)—initial trends indicate that religiously based customary norms are the most readily and rapidly adopted into regional regulations. This rapid adoption is primarily because their restorative nature minimizes potential friction with the national legal system, particularly concerning restrictions on imprisonment and the prioritization of restorative sanctions. Therefore, local governments must exercise extreme caution during the inventorying process to mitigate the inclusion of norms that discriminate against or criminalize vulnerable groups. A viable solution is the establishment of a community-led, decentralized oversight model for cataloging customary law. This model positions indigenous communities, civil society organizations, academics, legal aid institutions, and vulnerable groups as central actors in evaluating the substantive content of customary norms prior to their formal legislative adoption. Finally, Article 15(1) and (2) of PP No. 55 of 2025 require critical revision. Given the immense diversity of sanctions across customary legal systems, standardizing these obligations into fixed state fine categories undermines their foundational magico-religious rationale and should therefore be reevaluated or entirely deregulated to preserve the ontological integrity of the living law.

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DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

This article was published with financial support from the Indonesia Endowment Fund for Education/ Lembaga Pengelola Dana Pendidikan (LPDP).

ACKNOWLEDGMENT

The authors gratefully acknowledge the financial support provided by the Indonesia Endowment Fund for Education (Lembaga Pengelola Dana Pendidikan—LPDP) for this research and the publication of this article. The authors also extend their appreciation to all parties who contributed valuable insights and support throughout the research process.

Generative AI Statement

The authors used generative artificial intelligence (AI) tools for language editing and readability enhancement. All AI-assisted outputs were critically reviewed and verified by the authors. Generative AI was not used to conduct the legal analysis or formulate the conclusions of this study. The authors take full responsibility for the content, accuracy, and integrity of this article.

History of Article

Submitted : March 2, 2026

Revised : May 9, 2026

Accepted : June 19, 2026

Published : June 30, 2026

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