



# ***HARMONIZATION OF LAW AND CUSTOM: ELIMINATING CULTURAL PRACTICES OF VIOLENCE AGAINST WOMEN***

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## **ABSTRACT**

*This article aims to describe the cultural practices of indigenous peoples that are contrary to criminal law in Indonesia and formulate efforts to harmonize cultural values adopted by indigenous peoples and criminal law in Indonesia. The research methods used are normative research methods with a statutory approach, a historical approach, a concept approach, and a case approach. The results showed that indigenous peoples have practices that are considered as certain indigenous cultures that often harm women. This is due to an inherited misconception that indigenous cultural practices are used to avoid positive state laws and commit violence against women. Some examples of cases include the practice of capture marriage adopted by indigenous peoples in Sumba, East Nusa Tenggara, the abuse of customary settlements for rape crimes to avoid state law that has occurred in Papua and East Kalimantan. Therefore, this article recommends a humanist approach to indigenous peoples to provide an understanding of actions that are considered cultural practices that are actually contrary to human values and positive law. To realize this, implementing regulations are needed to regulate technical and tools that function to disseminate values and understanding of sexual violence crimes which are currently regulated in Law Number 12 of 2022 concerning Sexual Violence Crimes.*

**Keywords:** *Custom; Law: Violence: Women*

## **1. Background**

Violence against women in the name of cultural practices is never justified. Capture marriage, circumcision of women, including trying to resolve rape cases by means of customary law are phenomena that still often occur in Indonesian society. This phenomenon shows the absence of harmonization of law, custom, and Indonesian women. Women's struggle against danger, empowering themselves to live independently without dependence, including demanding protection when their integrity is taken away. Unfortunately, the protection of

women is *wishful* thinking, even *almost desperate thinking*.<sup>1</sup> The National Commission for Women through its 2020 Annual Record presented data on violence against women which has continued to increase by almost eight hundred percent in the last twelve years. Between 2007 and 2019, violence against women in Indonesia increased almost eightfold. The number of cases of violence against women in 2019 amounted to 431,471, this figure increased compared to 2018, namely, 406,178 cases. Domestic sexual violence still dominates among the 11,105 reported cases, especially sexual violence in the form of incest and rape. The second position is crime in the public sphere with 3,602 cases, followed by the state scope with twelve cases. The description of these datums tends to show the same pattern as the previous year, that the form of sexual violence that dominates women is still in the form of sexual violence. In essence, regulation, law enforcement, and punishment aim to present the state in the midst of irregularities committed by perpetrators. The regulation of prohibited acts in a written law is intended so that the public knows what actions are prohibited to do and what actions must be done so as not to be subject to legal sanctions. This regulation of acts is known as the principle of legality (*Nullum delictum Nulla Poena Sine Praviae Lege*) that no one can be punished without written rules governing before the act or crime is committed. If there is someone who violates the rule, the state through its law enforcement officials will conduct investigations, investigations, prosecutions, until the court decides what punishment a defendant deserves. Criminal law enforcement is the concrete application of criminal law by law enforcement officials. In other words, criminal law enforcement is the implementation of criminal regulations.

Law enforcement is a system that involves the harmony between values and rules and real human behavior. This is in accordance with the nature of criminal law, where the people as a collective community have surrendered some of their rights to the state so that later the state can prevent and protect them from evil acts. A state has the right to impose a crime because the perpetrator has committed assault and rape on the rights and interests of the law that have been protected.<sup>2</sup> Law enforcement through penalties is also aimed at re-order society and preventing similar crimes from being committed by others. Nevertheless, the state still recognizes unwritten laws, including customary as stipulated in Article 18B paragraph (2) of the Indonesian constitution.<sup>3</sup>

Currently, legal instruments against sexual violence have a more adequate regulatory basis since the birth of Law Number 12 of 2022 concerning Sexual Violence Crimes. This regulation stipulates that no cases of sexual violence can be resolved through instruments outside national legal instruments, including not justifying the practice of violence against women in the name of indigenous peoples' cultural practices. This can be seen from the regulation of marriage forcing offenses that prohibit everyone from forcing marriage. If it is related to the practice of capture marriage carried out in Sumba, then how is the behavior of the community, especially indigenous peoples whose cultural practices still have things that have the potential to conflict with national law. Therefore, this article will review the cultural practices of indigenous peoples that are contrary to criminal law in Indonesia and formulate efforts to harmonize cultural values adopted by indigenous peoples and criminal law in Indonesia.

## 2. Research Methods

The research method used is normative research method<sup>4</sup>. Normative research methods are carried out with several approaches. In this study, a concept approach, a statutory approach, and a case approach were used<sup>5</sup>. The results of the search for various primary, secondary, and tertiary legal materials are then collected and analyzed to answer the problem formulation, the answers to the problem formulation are described in a qualitative descriptive manner.

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<sup>1</sup> Ibnu Sina Chandranegara, Gusta Orin Andini, and Nani Mulyati, "Perempuan Dalam Pusaran Hukum & Adat: Refleksi Darurat Kekerasan Seksual Di Indonesia," in *Hukum Indonesia Di Masa Depan*, ed. Ibnu Sina Chandranegara, 1st ed. (Jakarta: Rajagrafindo Persada, 2022), 356, <https://ebooks.gramedia.com/id/buku/hukum-indonesia-di-masa-depan>.

<sup>2</sup> Adam Chazawi, 2007, *Pelajaran Hukum Pidana*, Bagian 1, Gramedia Pustaka, Jakarta, hlm. 157

<sup>3</sup> Negara mengakui, menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip negara Kesatuan Republik Indonesia

<sup>4</sup> Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus, 1st ed., vol. 1 (Yogyakarta: Mitra Buana Media, 2020).

<sup>5</sup> Peter Mahmud Marzuki, *Penelitian Hukum (Cetakan Kedua)* (Jakarta: Kencana Prenadamedia Group, 2006).

### 3. Discussion

#### 3.1. Women, Law, and Cultural Practices of Indigenous Peoples

Custom and women are two elements that are inseparable from each other. Often women are accused and blamed for hereditary customary reasons. Women are also given limited or even no role in social life, for customary reasons that have been held for a long time. Indigenous women as part of indigenous peoples have an extraordinary role in the development of this nation. Apart from being the vanguard of protecting cultural values and local wisdom of the archipelago, indigenous women also have a major role in economic resilience, playing a social role, and in preserving the natural environment. But unfortunately, there are still many indigenous women who receive stigma and discrimination due to the thick patriarchal culture, are not involved in the development process which ultimately experiences gender-based violence. This is due to an inherited misconception that indigenous cultural practices are used to circumvent positive state laws and commit violence against women.

Some examples of cases include the practice of capture marriage adopted by indigenous peoples in West Sumatra.<sup>6</sup> The concept of capture marriage is that if a single man is caught, they will immediately be married off. However, if the man and woman caught are married, a *rembuk* or village discussion is usually held.<sup>7</sup> If, for example, the man who is caught is married while the woman is not, usually the woman will be forced to marry and the man's wife will be forced to see her husband remarry the woman who was caught alone with her husband. If a man and woman were caught after being raided, they would immediately be ordered to marry. According to customary law, a woman and her wife cannot reject the marriage. On September 7 2023, women from the Muko-Muko Tribe were victims of arrest on the side of the road by men in West Sumatra, East Nusa Tenggara.<sup>8</sup> The woman was forcibly carried into a pick-up truck and taken away. The woman had to face being forced to marry someone she didn't know. Apart from violating citizens' constitutional rights to form a family and continue their offspring through legal marriage, capture marriage also contradicts the purpose of marriage, namely to obtain peace and happiness.<sup>9</sup> Captive marriage is a form of kidnapping and violence against women. Of course this can be categorized as a criminal act and is not part of custom. This case of arrested marriages violates women's rights to live safely without violence. Cases of arrested marriages occur as friction in cultural aspects that we should stop together in order to protect women from culturally tinged sexual violence.

One of the cases that occurred in Tabangkware Village on January 22 2022 was a criminal act of rape which was resolved according to applicable customary law by being sentenced to the *Uda Nyoy Ici* customary criminal sanction, namely by paying a fine in the form of ancient treasures, livestock and money.<sup>10</sup> The act of rape is an act that is contrary to societal values such as morals and religion, causes women to suffer torture and pain and violates other people's human rights. In state law, it is regulated in Article 285 of the Criminal Code "that anyone who forces a woman or girl to have sexual intercourse with him without a marriage bond, by means of violence, can be punished with up to twelve years in prison." Furthermore, sexual violence is also regulated in Law Number 23 of 2004 Article 46 concerning the Elimination of Domestic Violence which regulates sexual violence, namely "every person can be sentenced to prison for 12 years or a fine of IDR 36,000,000.00 (three and six million rupiah) if proven to have committed an act as intended in article 8 letter a of this Law." When compared with these customary sanctions, as in the case mentioned above, the perpetrators of the crime of rape prefer to settle with customary criminal sanctions rather than state criminal sanctions, because they feel that customary sanctions are more lenient than state criminal sanctions. So, here it can be seen that the perpetrators want to avoid state law by abusing the customary settlement. A similar thing also happened in East Kalimantan, on May 11 2023, a rape case in Tanah Dayak in Pulang Pisau Regency was resolved according to customary law under the pretext that it did not enter the realm of state law.<sup>11</sup>

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<sup>6</sup> <https://www.bbc.com/indonesia/indonesia-53317050>

<sup>7</sup> Doko, Elanda Welhelmina, I Made Suwetra, dan Diah Gayatri Sudibya. "Tradisi Kawin Tangkap (Piti Rambang) Suku Sumba di Nusa Tenggara Timur." *Jurnal Kontruksi Hukum* Vol. 2, No. 3 (2021).

<sup>8</sup> <https://www.kemenpppa.go.id/index.php/page/read/29/2744/menteri-pppa-dalih-tradisi-budaya-jangan-dipakai-sebagai-kedok-untuk-melecehkan-perempuan-dan-anak>

<sup>9</sup> Kaha, Kornelis. "Komnas Perempuan: Kawin Tangkap adalah Tindakan Kekerasan Perempuan."

<sup>10</sup> <https://kumparan.com/kumparannews/papua-darurat-kekerasan-seksual-perempuan-dan-anak-ini-yang-harus-dilakukan-1zGv7y33eMQ>

<sup>11</sup> <https://www.metrokalimantan.com/2023/05/pasca-kasus-dugaan-pemeriksaan-fordayak.html>

Looking at and studying the cases above, women are a group that is very vulnerable to violence. As stated above, women often experience physical, psychological, sexual violence, and layers of violence between these in cases of forced marriage. Women experience ambiguous circumstances. Women's positions between refusing and accepting receive no less severe violence from both customary sanctions and social sanctions at a higher level than men. Even customary fines are equalized between female victims and perpetrators, on the grounds that both parties are responsible for the marriage, without considering that in every coercive practice, women experience multiple layers of coercion and violence.

First, physical violence. Physical violence is seen in cases of captured marriages in West Sumatra. The woman in this case must be willing to be taken away by the man to a place that is not her home or outside the family home or even the village where she lives. In consanguineous marriages in Flores customs which involve very close kinship, women are exposed to incest. In genetics, incestuous marriages are very vulnerable to giving birth to physically disabled offspring. When that happens, the woman as the wife is usually the one who is blamed for not being able to take good care of herself and her offspring. Meanwhile, in early marriages, especially in cases of arranged marriages such as those that occurred in East Kalimantan, women will be kept or secluded until the marriage takes place. A woman's space for movement is limited and monitored, while the man she is engaged to can go anywhere. As guardians of family honor, women are forced into marriage as a result of psychological violence, so that women's movements are increasingly limited.

Second, Psychological Violence. Psychological violence occurs because women are in a position where they cannot accept or reject marriage, as in the case of West Sumatra. Women are considered the guardians of family property and the sanctity of the family. So, women cannot refuse consanguineous marriage to strengthen family ties and family property. If he refuses, the stigma will be imposed on women more than men. What is even sadder is the case of rape. Women must marry their rapists. The feeling of fear of the perpetrator and having to live and live with the man who raped her is psychologically traumatic and violent to women. Not to mention the case of a Blind Chinese marriage, when the ex-husband, who wants reconciliation, and the woman must remarry a man she doesn't like, as a condition for reconciliation. On the other hand, her ex-husband, who wanted to reconcile, paid someone to marry her. The case that occurs is that women cannot do anything, when the man who is paid by her husband to reconcile does not want to divorce her, and women are forced to accept these conditions and situations without a choice. In cases of marrying because of pregnancy, women suffer shame and still receive fines, because they have sexual relations outside of marriage which is legal according to religion and custom. In cases of rape, customary sanctions are equated with pregnancy due to consensual relations. Another psychological violence is when men do not want to take responsibility and run away. Women experience twice as many customary sanctions. Women have to be expelled or evacuated from their villages, and cannot see their father and mother for several years. When he returns, the woman's family must perform a *kenduri* or village washing ceremony. It is considered that the act of a woman becoming pregnant out of wedlock is considered a disgrace and cannot protect her honor, even though the woman is a victim of rape. Meanwhile, in cases of arrest, it is enough to provide psychological violence, because the woman is considered a 'bad' woman. In the case of Bengkulu, even women who were caught alone were asked why they were facing the wife of a man who was alone with her. The wife herself must see and attend the wedding. This condition must have been very painful for the two women. Stigma and gossip from society as social sanctions imposed on women are heavier than men.

Third, sexual violence, like psychological violence, sexually, women are very vulnerable to experiencing violence in all types of forced marriage. In consanguineous marriages in Flores, women inevitably have to accept a man as their husband to strengthen family ties. If the woman doesn't like it, the woman experiences forced sexual relations with the man she doesn't like. The same thing also happened to women who married Blind Chinese in Sumatra.<sup>12</sup> Women must have sexual relations for an indefinite period of time as long as the man who is paid by her husband who asks for reconciliation, does not want to divorce her. Even if a woman ends up being divorced, her husband, who will reconcile, will not necessarily accept her back.

In capture marriage, the case of a man who takes advantage of customary sanctions by taking a woman away will be married to the woman he likes. Women must have forced sexual relations with men they don't like, because the wife has an obligation to satisfy her husband. Moreover, women in cases of rape provide sexual services to the person who raped them and make them pregnant. Even according to the traditional settlement

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<sup>12</sup> Siti Nurliza, 180101047 (2022) *Praktik Nikah Cina Buta Di Kecamatan Bendahara Kabupaten Aceh Tamiang (Analisis Menurut Teori Sadd Az-Zari'ah)*. Other thesis, UIN Ar-Raniry Fakultas Syariah dan Hukum.

mechanism in the Betawi tribe, women are required to abort the pregnancy resulting from rape, but in this case the woman still has to endure sexual violence. Meanwhile, in the case of early marriage, an early age has quite an impact on the girl's sexual experience. This is because a girl's uterus is not ready to conceive and give birth. Thus, underage women are vulnerable to miscarriage and the child they give birth to dies.

The constitution guarantees the right to cultural identity and the rights of traditional communities. However, from the many cases regarding practices of sexual violence against the cultural practices of indigenous communities, customs or traditions are often used as justification for acts of violence against women. These justification efforts hide contradictions, deviations or shifts in the noble values of customs and traditions which actually glorify women. Efforts to correct these deviations are often seen as actions against customs and traditions, thus preventing collective steps to restore local wisdom that provides true protection for every member of the community, including women, who are vulnerable to discrimination and violence. On the other hand, the actions of perpetrators of violence against women in the name of tradition can easily be used by other parties to stigmatize indigenous peoples or certain tribes. This results in an increasingly long series of discrimination and violence faced by them. In fact, the erosion of noble values cannot be separated from the history of structural discrimination they have faced for centuries, while the correction process is still ongoing partially and slowly. As a group, indigenous peoples have been marginalized and as individuals, they even face criminalization in defending their rights to cultural identity and traditional community rights.

### **3.2. Formulation of Harmonization of Indigenous Peoples and Criminal Law in Indonesia**

#### **Women's Human Rights in Indonesian Positive Law**

All citizens in Indonesia are constitutionally based on the 1945 Constitution of the Republic of Indonesia Article 27 paragraph 1 confirms that citizens simultaneously have equal legal status with no exceptions, which can be interpreted as meaning that in terms of rights and legal status Indonesian citizens do not exist. division between women and men. Bearing in mind that the constitution has mandated that every person has the right to recognition, guaranteed protection, and certainty of fair law and equal treatment before the law.<sup>13</sup> The cultural practice of violence against women has become a social phenomenon that is not uncommon in society's social life due to various factors that encourage violence against women in public and private. Various factors that cause violence against women are patriarchal factors, economic factors, gender factors, environment, unequal relationship factors and role modeling (behavior that results from imitation). Every act of violence experienced will result in emotional, psychological, physical and/or material damage.<sup>14</sup> The development of violence that occurs against women requires the state to make adjustments or additions to regulations to deal with this problem. The presence of Law Number 12 of 2022 concerning the Crime of Sexual Violence which is based on the principles of respect for human dignity and non-discrimination is expected to be able to reduce the problem. laws related to the practice of violence against women, however the presence of the TPKS Law has not been able to reduce existing problems due to understanding and cultural factors that are still embedded in society which are patriarchal and seem to trivialize violence that occurs against women. The humanist values in the TPKS Law still need to be further disseminated to society through government instruments in order to increase society's insight that women's human rights in positive legal terms have the same position without exception, so that in the future cultural practices that tend to commit violence against women can be readjusted to building a culture based on national legal values.

Acts of violence can happen to anyone and anywhere, but if we look closely, acts of violence are much more vulnerable to women, such as sexual violence and sexual harassment, and in the private sphere, namely the household, violence tends to be more directed at women. The concept of gender-based violence or gender violence itself refers to the subordinate position of women who are considered weak or powerless while men are considered strong or powerful, in other words there is an imbalance of power between women and men which almost touches

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<sup>13</sup> Pasal 28D ayat 1 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

<sup>14</sup> Marthin R. Haskell Lewis Yabslonswky dalam Mulyana W. Kusumah, 1982, *Analisis Kriminologi tentang Kejahatan-kejahatan Kekerasan*, Ghalia Indonesia, Jakarta, hlm. 25-26

all areas of women's lives, starting from education, social, workplace, even household. There are 4 (four) categories that cover almost all general patterns of violence, namely:<sup>15</sup>

1. Legal Violence, this violence can be violence that is justified by law, for example humanitarian intervention in cases of war, and soldiers carrying out their duties in war.
2. Social Violence, this violence is a form of social sanction itself, for example when theft or harassment occurs and is caught by the community, the act of arrest will receive social support.
3. Rational Violence, this violence takes the form of violence that violates the law but has no social sanctions, for example murder between crime syndicates.
4. Senseless violence (*Irrational Violence*), this violence occurs without prior provocation, and even without any particular motivation, in general the victim is unknown to the perpetrator. It can be said to be Raw Violence which is a direct expression of a person's psychological disorder.

The pattern of violence that occurs in Indonesia cannot be separated from cultural values and customs which create social inequality between men and women. Customary law in Indonesia itself is recognized and respected through Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia. It is very unfortunate when the recognition of the existence of customary law itself actually violates national law in the aspect of human rights, which in this case constitutes violence against women, for example the practice of Captive Marriage in Sumba which is considered to make women into objects who seem to have no rights. The position between National Law, Customary Law and Religious Law is often considered to be unable to connect with each other, the barriers that are built between positive law and customary law and religion are actually built on the foundation of social beliefs, in the *Receptio A Contrario* Theory it can be found that there are the relationship between religious law and customary law, the *Receptio A Contrario* theory can be interpreted as a theory that considers customary law only valid if it does not conflict with religious law adhered to by society.<sup>16</sup> The beliefs held by the community will influence the community's obedience to applicable law. If the existing customary law is deemed to be in harmony and does not conflict with the religious law adhered to by the community, then the customary law can operate (*Receptio A Contrario*), if the applicable customary law is mandatory. following the religious legal values adopted by the community, then the customary law can still operate but with the obligation to follow the religious legal values adhered to by the community (*Receptio In Complexu*). In terms of human rights which are the responsibility of the state, in terms of protecting women in practical state administration, society must obey the highest law, namely the 1945 Constitution of the Republic of Indonesia (*staats grund gesetz*) and Pancasila (*staats fundamental norms*) in order to realize prosperity common in national and state life.

#### 4. Conclusion

Violence against women in the name of cultural practices is a violation of women's rights. The practice of violence against women in the name of culture shows the disharmony of national law and the culture of indigenous communities. For this reason, it is necessary to take a humanist approach towards indigenous peoples to provide an understanding of actions that are considered cultural practices that are actually contrary to human values and positive law. To make this happen, implementing regulations are needed to regulate the technicalities and tools that function to disseminate values and understanding about criminal acts of sexual violence which are currently regulated in Law Number 12 of 2022 concerning Crimes of Sexual Violence.

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<sup>15</sup> Romany Sihite, 2007. *Perempuan Kesetaraan dan Keadilan (Suatu Tinjauan Berwawasan Gender)*. Jakarta:Raja Grafindo

<sup>16</sup> Nova Effenty Muhammad. 2013 *Epistemologi Pengembangan Hukum Islam*. Al-Mizan, Vol. 9 No. 1

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