

CONFLICT BETWEEN CUSTOMARY LAW AND HUMAN RIGHTS STANDARDS: A LITERATURE REVIEW OF CUSTOMARY PUNISHMENT PRACTICES AND GENDER EQUALITY ISSUES

Ika Dewi Sartika Saimima

Universitas Dirgantara Marsekal Suryadarma

ika.saimima@unsurya.ac.id

Al-Amin

Universitas Airlangga, Surabaya, Indonesia

al.amin-2024@feb.unair.ac.id

Abstract

This study examines the conflict between customary law and human rights standards, focusing on the practice of customary punishment and gender equality issues through a literature review method. Customary law, which is deeply rooted in community traditions, often conflicts with human rights principles that demand the protection of individual rights without discrimination, especially in the implementation of customary punishments that can violate the rights to freedom and physical integrity. In addition, the patriarchal structure of customary law creates gender inequality that hinders the rights of women and other gender groups in various aspects of life. This study presents a critical analysis of existing literature to understand the dimensions of this conflict and find common ground between local cultural norms and universal human rights principles. The results of the study indicate the need for inclusive and dialogical reform of customary law, respecting local wisdom without neglecting human rights, as an effort towards a fair, inclusive, and sustainable legal system.

Keywords: customary law, human rights, customary punishment, gender equality, legal conflict, literature review.

Introduction

Customary law is a legal system deeply rooted in the culture and traditions of communities in various regions of Indonesia and countries with legal pluralism. This legal system governs various aspects of community life, including social norms, rules of conduct, and dispute resolution mechanisms (Fenrich, 2011). Historically, customary law has been a reflection of the values and knowledge of local communities that have been passed down from generation to generation. However, the existence of customary law, which is strongly characterised by local characteristics, often poses challenges, especially when confronted with universal and globally recognised human rights standards (Bond, 2011).

Human rights standards, as products of international and national law, demand the protection of the basic rights of every individual without discrimination. Human rights principles include respect for freedom, equality, and fair treatment regardless of social, cultural, or gender background. In this context, customary law and human rights

sometimes clash, especially when certain customary practices are considered contrary to human rights norms. This conflict becomes even more complex when it concerns punishments imposed under customary law that can be considered a violation of individual rights according to human rights standards (Salahuddin, 2023).

One of the most prominent issues in the conflict between customary law and human rights is the practice of customary punishment. Various indigenous communities have systems of sanctions or punishments that are adapted to traditional values and norms. These indigenous punishment practices often include actions that are considered inhumane or violate personal freedom rights according to human rights standards, such as physical punishment, discrimination, or arbitrary restrictions on individual freedom (Schabas, 2021). Therefore, it is important to critically review how these customary punishment practices coexist with or conflict with human rights principles.

In addition to the issue of customary punishment, gender equality is also an important point of conflict between customary law and human rights. Many customary laws historically contain patriarchal elements that give men a dominant position and regulate gender roles in a traditional manner, which has the potential to marginalise or discriminate against women and other gender groups. The human rights approach emphasises gender equality as one of its fundamental pillars, so that the inconsistency of gender roles and treatment in customary law raises important discourses related to social justice and the fulfilment of human rights (Broughton, 2024).

The conflict between customary law and human rights, particularly through the lens of gender equality, is a strategic subject of study in the context of legal development in various countries, including Indonesia. Differences in the concept and application of gender roles in customary law and human rights create major challenges in efforts to harmonise and synergise the two systems (Deviana, 2023).

In the context of national law, Indonesia, as a country that recognises the existence of customary law in its national legal system, still faces problems in integrating customary law with human rights principles, particularly in terms of protecting the rights of individuals and vulnerable groups such as women. National regulations do refer to human rights standards, but in practice, overlaps and inconsistencies still occur, particularly in the implementation of customary punishments and gender equality.

Thus, this study attempts to explore and detail the tensions that arise in the practice of customary law relating to punishment and the recognition of gender equality based on existing literature.

Research Method

The research method used in this study is a literature review with a descriptive qualitative approach. This study collects and analyses various secondary sources in the form of scientific journals, books, human rights organisation reports, customary law

documents, as well as national and international regulations related to customary law and human rights, particularly regarding the practice of customary punishment and gender equality issues (Eliyah & Aslan, 2025). The data obtained was systematically selected, classified, and analysed to identify and understand the conflicts between customary law and human rights standards, including the social and legal implications of these inconsistencies. The analysis techniques used aim to provide a comprehensive and critical overview of the existing literature, thereby producing in-depth conclusions and recommendations for harmonising customary law with human rights principles (Rothstein et al., 2006).

Results and Discussion

Conflict between Customary Punishment Practices and Human Rights Standards

Customary punishment practices are an integral part of the customary legal system implemented in various traditional communities. Customary punishment serves as a mechanism for social control and dispute resolution based on norms and values that have long been ingrained in these communities. Although considered effective in maintaining local social order and harmony, the practice of customary punishment often causes controversy when compared to universal human rights standards that emphasise the protection of individuals (Betty Friedan, 2024).

Human rights standards require the state and all legal systems, including customary law, to respect and protect the rights of every individual without discrimination and to avoid any form of treatment or punishment that is torturous, degrading, or inhumane. This means that some traditional punishments can be categorised as human rights violations, especially when they take the form of physical punishment, arbitrary restrictions on freedom, or discriminatory treatment based on social status, gender, or particular groups (Syofyan, 2020).

One form of customary punishment that is often in the spotlight is physical punishment such as flogging, exile, or fines imposed collectively on members of the community who violate customary norms. From a human rights perspective, these punishments are considered to violate the right to freedom and physical integrity. In addition, the implementation of these punishments is often not accompanied by fair and transparent judicial procedures, thus creating the potential for abuse of authority and injustice (Rahman, 2021).

Unlike the formal judicial system, which has legal protection mechanisms and guarantees a fair trial for suspects or defendants, customary law relies on deliberation and collective decisions made by customary leaders or customary councils. This situation poses a major challenge in terms of accountability and the protection of individual rights, as decisions are made based on community consensus rather than the principles of individual justice that characterise human rights standards (Moniaga, 2018).

In addition, the practice of customary punishment often has profound social consequences, such as stigmatisation, social marginalisation, and ongoing negative labelling of individuals who are sanctioned. These impacts not only harm victims psychologically, but can also violate their social and human rights, such as the right to live without discrimination and the right to human dignity as stipulated in various international human rights instruments (Ndulo, 2017).

This conflict becomes even more complicated when customary law remains part of cultural identity and local wisdom protected by the constitutions of several countries, including Indonesia. The recognition and respect for the existence of customary law guaranteed in legislation often conflicts with the state's obligation to implement and enforce human rights standards that promote universal protection. As a result, a dilemma arises between preserving tradition and adapting customary law to human rights norms (Prasetyo & Herawati, 2025).

Several studies show that in many cases, countries with legal pluralism have difficulty harmonising customary law and human rights-based national law. Some indigenous communities reject national legal intervention on the grounds of preserving cultural sovereignty and ancestral heritage.

This rejection hinders the necessary reform of customary law to bring it more into line with human rights principles, particularly with regard to eliminating discriminatory or harsh punishment practices (Tobin, 2014). Case studies from various regions show that the implementation of customary punishment often does not adequately consider the rights of victims.

In some communities, customary punishment focuses more on restoring social balance within the community than on the rights of individual victims, so that victims of violence or rights violations often do not receive adequate justice. This clearly contradicts the spirit of human rights, which places the rights and dignity of individuals as the top priority (Panjabi, 1990).

The disregard for procedural standards in the implementation of customary law is also a major cause of human rights violations. The lack of guarantees for legal counsel, fair defence, and appeal processes allows customary decisions to be implemented unilaterally and without adequate oversight. This has the potential to create legal uncertainty and vulnerability to fundamental human rights violations (Meron, 1989).

On the other hand, there are also efforts by various customary communities and governments to reform and improve customary punishment practices to bring them more in line with human rights standards. These efforts include dialogue between parties, human rights education for customary leaders, and the integration of restorative justice principles that better respect the rights of victims and perpetrators (Gafnel, 2024). This approach is expected to bridge the gap between customary law and human rights without eliminating fundamental cultural values. However, the biggest challenge in this reform is sensitivity to the identity and cultural sovereignty of

indigenous peoples who highly respect old traditions and norms. Any change imposed from outside is often seen as a form of national legal domination that threatens the existence and autonomy of indigenous peoples. Therefore, inclusive dialogue and recognition of the role of indigenous peoples in the reform process are crucial (Serlika, 2021).

Furthermore, in the context of international law, countries have adopted a number of human rights instruments that recognise the existence of customary law as long as it does not conflict with basic principles. For example, the UN Declaration on the Rights of Indigenous Peoples affirms the protection of indigenous identities while demanding respect for human rights. However, the implementation of this principle at the national level still faces various practical obstacles that complicate the protection of human rights at the indigenous community level (Z. Lubis, 2025). Therefore, it is important to recognise the complexity of the relationship between customary law and human rights as a dynamic and contextual dialogue. Not all aspects of customary law conflict with human rights, and many elements of customary law can actually strengthen the protection of individual rights if developed in an inclusive and civilised manner. A critical review of customary punishment practices must be complemented by a deep understanding of local values and their potential adaptation to human rights standards (M. Lubis, 2022).

Thus, the conflict between customary punishment practices and human rights standards is not only a technical legal issue, but also an intrinsic and complex socio-cultural issue. A comprehensive understanding and harmonisation efforts that are sensitive to local values and human rights principles need to be prioritised in order to create a legal system that is fair, inclusive, and respects the dignity of all parties.

Gender Equality Issues in Customary Law and Human Rights

The issue of gender equality is a crucial aspect in the relationship between customary law and human rights. In many indigenous communities, the positions of women and men are traditionally regulated by social norms and structures that often place women in subordinate positions. The patriarchal system inherent in customary law often limits women's rights, freedoms, and participation in various aspects of social, economic, and political life (Mubangizi, 2023).

Human rights standards, particularly through instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), affirm the importance of gender equality as a fundamental right that must be respected and protected by all legal systems, including customary law. This principle requires the elimination of gender-based discrimination in all its forms, providing equal access to resources, legal protection, and participation in decision-making (Athahirah, 2022).

The incompatibility between customary law and human rights principles in gender cases often gives rise to serious tensions. In practice, customary rules often

prevent women from obtaining their basic rights, such as the right to land and inheritance, freedom of movement, and protection from gender-based violence. These provisions are often embedded in customary laws governing kinship and authority within communities (Erleni, 2024).

Several studies reveal that in some customary laws, women do not have equal inheritance rights to men, which leads to injustice in resource management and family welfare. These restrictions have an impact on the economic and social marginalisation of women, reinforcing existing gender inequalities and suppressing efforts to empower women more broadly (Nwajiaku, 2025). Apart from inheritance issues, women's roles in the traditional dispute resolution process are also often marginalised. In many communities, the positions of traditional leaders and council members who make decisions are generally dominated by men, so that women's voices are less heard and less taken into account. This condition creates a gap in opportunities for women to participate in determining the rules that affect their own lives (Onokah, 2022).

Another form of gender discrimination that arises in customary law is the restriction of women's personal freedoms, including restrictions on choosing a partner, freedom of movement, and self-expression. These deeply rooted customary norms often cause women to become objects of social control, with consequences for the violation of their personal rights and freedoms (Raji, 2019).

Practices of gender-based violence are also often protected or not dealt with seriously in the realm of customary law. In many cases, violence against women is considered an internal community matter that must be resolved according to customary law, which often results in minimal legal protection and redress for victims. This clearly contradicts human rights standards that demand full protection for victims of violence and fair law enforcement (Williams, 2011).

Gender equality in customary law also faces challenges due to strong gender stereotypes and norms that limit women's roles to the domestic sphere. These role restrictions not only harm women individually, but also hinder the social and economic progress of the community as a whole, as women's potential contributions are not maximised (Kammerhofer, 2017).

However, there are also indigenous communities that have begun to open up space for gender equality through more inclusive customary law reforms. Several regions have introduced changes that give women inheritance rights, access to customary leadership, and better protection against gender-based violence. These developments often go hand in hand with a dialogical approach between indigenous peoples and human rights stakeholders (Nwajiaku, 2025).

The human rights approach to gender equality emphasises the principle of non-discrimination and the protection of women's rights as an integral part of the human rights of all people. This requires recognition of cultural diversity while ensuring that women's rights are not marginalised by discriminatory customary practices. This

approach requires cooperation and adaptation from both sides in order to achieve gender justice (Williams, 2011).

The relevance of gender equality issues in the context of customary law is also evident in the framework of sustainable development and global efforts to eradicate poverty and social injustice. Without the equal fulfilment of women's rights, inclusive and sustainable development goals are difficult to achieve, especially in indigenous communities that often live in marginalised conditions (Edwards, 2018).

In the context of Indonesian national law, although there is legal protection for gender equality in various laws and regulations, its implementation faces serious challenges due to the dominance of patriarchal customary norms. Existing regulations have not been fully able to overcome gender inequality in customary law, so there is a need for more effective and gender-sensitive legal and policy interventions (Eddie, 2018).

Other studies also highlight the important role of indigenous women in initiating social and legal change in their communities. Through various indigenous women's movements and civil society organisations, awareness of women's rights and the importance of gender equality is increasing, opening up opportunities for customary law reform that is more responsive to human rights principles (Sihotang, 2023). However, these efforts are not easy due to resistance from groups that maintain the status quo and women's limited access to education, resources, and political power. These conditions require comprehensive and sustainable empowerment strategies so that indigenous women can play a more optimal role in decision-making processes that affect their lives (Fenrich, 2011).

Other research confirms that the conflict between customary law and human rights in the issue of gender equality is not merely a legal conflict, but also a deep struggle of values and culture. Efforts to harmonise the two must involve open dialogue, respect for cultural identity, and the enforcement of fundamental principles of justice and equality for all human beings (Bond, 2011).

Thus, critical analysis of gender equality issues in customary law and human rights is essential to promote fair, inclusive, and sustainable legal change. This literature review approach can provide a comprehensive overview and in-depth understanding, as well as a basis for developing legal policies and practices that are more responsive to the needs and rights of women in indigenous communities.

Conclusion

The conflict between customary law and human rights standards is a complex and multidimensional phenomenon, especially when examined through the lens of customary punishment practices and gender equality issues. Customary punishment practices rooted in traditional norms often conflict with human rights principles that prioritise the protection of individual rights from inhumane and discriminatory

treatment. This conflict poses a significant challenge to efforts to harmonise customary law with universal human rights standards, as the process of dispute resolution and the imposition of customary sanctions do not yet fully guarantee justice and comprehensive protection of human rights.

In the context of gender equality, customary law often reflects patriarchal social structures that limit women's roles and rights in various areas of life, such as inheritance rights, participation in decision-making, and protection from gender-based violence. Human rights standards, on the other hand, emphasise the importance of eliminating gender discrimination and fulfilling women's rights as an integral part of human rights. These differences have led to deep tensions and require a culturally sensitive approach and open dialogue to find solutions that respect local wisdom without sacrificing the principles of justice and equality.

Overall, the results of this literature review indicate that conflicts between customary law and human rights standards can be minimised through inclusive and dialogical customary law reform efforts, involving indigenous communities and human rights stakeholders. Successful harmonisation requires recognition of local cultural values as well as the fair and non-discriminatory enforcement of individual rights. This research provides an important academic foundation for the development of more equitable, inclusive legal policies and practices that respect the dignity of all parties in a pluralistic legal system.

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