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The Legal Position of *Foso* and *Boboso* Customary Criminal Sanctions within the Framework of the National Criminal Code in the Jurisdiction of the Sultanate of Ternate

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Abstract: *Foso* and *Boboso* have functional customary legal force within the scope of the Ternate customary community as informal law (living law) to maintain the order of the Ternate customary community, North Maluku. This study analyzes: (1) the legal position of the customary criminal sanctions of *foso* and *boboso* in the *Se Atorang* customary tradition in the Ternate Sultanate of North Maluku and (2) the prospects and challenges of transforming customary criminal law as additional punishment in Law Number 1 of 2023 concerning the Criminal Code in the Ternate Sultanate of North Maluku. The research method used in this study is an empirical legal research method with a live case study approach. The results of the study indicate that the origin of Article 66 paragraph (1) letter f provides recognition of customary sanctions against perpetrators of criminal acts. However, there are problems in its application. This is because customary criminal sanctions, known in Ternate customary law as "*Foso se Boboso*," are based on the *Adat se-Atorang* philosophy and the principle of the relationship between the Sultan and the People, which prioritizes the implementation of the "*Ngofa se Nyeku*" custom. Violations of norms, ethics, etiquette (politeness), and customary law by *ngofa se nyeku* members will be subject to tiered customary sanctions. Initial sanctions include stern warnings, advice, or guidance from traditional elders or the customary council (*fala raha*) or spiritual leaders (*sowohi*) within the customary structure of the sultanate in North Maluku.

Keywords: Customary Criminal Sanctions, *Foso*, *Boboso*, National Criminal Code, Ternate Sultanate

INTRODUCTION

The existence of customs in the fabric of community life is a key pillar in maintaining the identity and sustainability of a culture. Each society has its own customs, which are reflected in the unique traditions, values, and belief systems they adhere to (Nurhaniffa &

Haryana, 2022). Customs are not merely a collection of rules, but also a reflection of the history and social relationships that develop within a community. As such, customs play a vital role in shaping character and social solidarity, while also serving as a cultural heritage that should be upheld by future generations. This includes the values embodied in customary criminal law (Handayani & Prabowo, 2024).

Lexically, the term customary criminal law is a translation of the Dutch term "*adat delecten recht*," or customary law for violations. Customary criminal law is a legal system implemented in a society to enforce traditional sanctions based on noble values, while also regulating behavior deemed to violate customary norms (Harahap, 2018).

The existence of Customary Criminal Law has attracted public attention following the enactment of Law Number 1 of 2023 concerning the Criminal Code on January 2, 2023 (National Criminal Code). The term Customary Criminal Law or customary offense, or also known as customary violation law, derives from the meaning and significance of customary law itself, where customary law is a law that is not written in the form of statutory regulations (non-statutory law) and is not codified.

Customary crime is understood as a living law within society and has legal consequences or sanctions if there are violations of that law. Therefore, the essence of Customary Criminal Law can be interpreted as an unwritten law, yet its existence remains alive, respected, and has customary consequences or reactions if any parties violate it (Yonatan Iskandar Chandra, 2024).

Article 2 paragraph (1) of the National Criminal Code stipulates that "The law that lives in society applies as long as it is in accordance with the values of Pancasila and the general legal principles recognized by the nation. This regulation is a form of official recognition of customary law as a source of national criminal law. Therefore, recognition of living law is a form of recognition of the legal sovereignty of the people who have been marginalized by state law (Nainggolan, 2025). This transformation changes the face of criminal law enforcement from being positivistic to being contextual and rooted in local values.

The indigenous people of the Sultanate of Ternate as an indigenous people bound by the order as joint citizens have implemented the provisions of their legal association in their daily lives and have formed a Regional Regulation on the Protection of Customary Rights and Culture of the Indigenous People of the Sultanate of Ternate, which is regulated through Regional Regulation of Ternate City Number 13 of 2009 concerning the Protection of Customary Rights and Culture of the Indigenous People of the Sultanate of Ternate. Referring to Article 2 paragraph (4) regarding the existence of indigenous peoples, it states that the Customs of the Sultanate consist of 7 (seven) basic values: along with the Customs of *Se Atorang*, the Customs of *Se Kabasarang*, the *Galib Se Lakudi*, the *Bobaso Se Rasai*, the *Ngale Se Cara*, and the *Sere Se Duniru*, the *Cing Se Cingare* have formed the moral foundation of the Sultanate of Ternate.

In Ternate custom, *foso* is a high-level customary prohibition with severe sanctions (ostracization, fines) for taboo and sacred matters, while *boboso* is a lighter rule of conduct/manners whose sanctions are reprimands, both of which regulate social life, such as violations of morality, namely the prohibition of cohabitation and concubinage (especially for bobato) are subject to moral and customary sanctions for the sake of social harmony. Thus, the objectives that can be formulated in this study are 1) To analyze the legal position of customary criminal sanctions for *foso* and *boboso* in the Ternate Sultanate of North Maluku? 2) To examine the prospects and challenges of the transformation of additional criminal sanctions for customary criminal law in Law Number 1 of 2023 concerning the Criminal Code in the Ternate Sultanate of North Maluku.

METHODS

This research is an empirical legal study using a live case study approach to address an ongoing legal event (Budiono et al., 2023). Therefore, the targeted achievement indicators, when the researcher conducted direct observations or research in the field, were used to obtain accurate truths in the process of refining this writing. The purpose and purpose of this study are essentially to show the path to solving the research problem (Alwan et al., 2022).

The research entitled the legal status of customary criminal sanctions of *foso* and *boboso* within the framework of the National Criminal Code, was conducted in the Ternate Sultanate's Legal Area. The reason the researcher chose the Ternate Sultanate as the research location, considering that the customary criminal law of the Ternate Sultanate is rooted in the philosophy of "*Jou se ngofa ngori*" (king and people), integrating local values with Islamic law, and is realized through "*Adat Segulaha*" (customary rules), which include moral and customary sanctions for violations such as excessive polygamy, cohabitation, and land disputes, regulated by the Sultan and the *Bobato* (nobles/customary leaders) to maintain social harmony in Ternate.

These customary sanctions are restorative and communal in nature, distinct from positive law, and often involve informal resolution through customary and religious leaders. Furthermore, the researcher intends to conduct a comparative study of the legal substance related to customary criminal law in Law Number 1 of 2023 concerning the Criminal Code as the National Criminal Code, and to examine the challenges of transforming additional criminal penalties to customary criminal law in Law Number 1 of 2023 concerning the Criminal Code in the Ternate Sultanate of North Maluku (Wibowo et al., 2023).

The data collection techniques used by the researcher in this study were literature review and fieldwork, including interviews. The data collection was divided into two parts: primary data and secondary data. Primary data was obtained through fieldwork, while secondary data was sourced from literature review. This paper was structured not only based on descriptive qualitative methods. The research subject collection technique used purposive sampling, which is a sample determined by appointing individuals as data sources who understand, know, and/or are involved in this research (Faisal & Ogli, 2025).

The results of the field study inventory are analyzed to draw conclusions, then analyzed using integrative and conceptual analytical methods that tend to be directed at discovering, identifying, processing, and analyzing legal materials to understand their meaning, significance, and relevance. The data obtained will be systematically compiled after being selected based on the problem and assessed for compliance with applicable regulations.

Data obtained from informants and sources using descriptive methods as a research approach that aims to describe, depict, or depict a phenomenon, object, or event systematically, factually, and accurately based on existing facts to analyze the legal position of customary criminal sanctions for *foso* and *boboso* in the Ternate Sultanate Region, North Maluku (Absori et al., 2020).

RESULTS AND DISCUSSION

History and Philosophy of the Ternate Sultanate, North Maluku

Ternate Island was one of the territories of the Ternate Sultanate. The sultanate's territory is now part of Ternate Municipality, an autonomous government unit within North Maluku Province. Etymologically, the word Ternate comes from three syllables: Tara No Ate, which means "come down and lure him." This means descending from a high place (highland) to lure immigrants into settling in this region (Ternate). The use of the name Ternate can be found in various European historical sources. De Clercq identified the name Ternate in several senses. First, the name of a residency. Second, the name of a city. Third, the name of a sultanate. Fourth, the name of an island (Hasim, 2019).

The existence of the Ternate customary law community is connected to the history of the kingdoms in North Maluku, during the pre-Indonesian independence era, namely the kingdoms of Ternate, Tidore, Bacan, and Jailolo. This can be traced through various history books, legends, and myths believed by the community for generations. Based on the records of Naidah (1859-1864), a Soa Sio (judge) law enforcer, she recounts the origins of the kingdoms in the North Maluku region, including the kingdom of Ternate, as written by P. Van der Grab (Alting, 2010; A. Amal, 2006), that the birth of the kingdoms in North Maluku came from one descendant, namely as known in the legend of Jafar Sadik or Djafar Nuh.

The people of North Maluku believe that Jafar Sadik was a nobleman from the Arabian peninsula who was the first person to land on the southern coast of Ternate, known as Ake Rica beach. Then Jafar Sadik married Nur Safah, a princess from heaven. According to Naidah's account, Jafar Sadik's marriage to Nur Safah resulted in four sons, as follows (Djafar, 2005): (1) Kaicil Buka, the eldest son who eventually became the First Sultan of the Bacan Kingdom; (2) Daradjati, the second son (who eventually became the First Sultan of the Jailolo Kingdom); (3) Sahadjati, who eventually became the First Sultan of the Tidore Kingdom; and (4) Mashur Malamo, the youngest son, who eventually became the First Sultan of the Ternate Kingdom.

In the book "Ternate Copper" it is stated that Jafar Sadik was the son of Jainal Abidin who came from Mecca to Gapi Island (Ternate). In the notes of Prinshasan A. Janhar, son of Sultan A. Janhar, it is written that Jafar Sadik arrived in Ternate in 624 H or 1204 AD / 1274 AD on February 2, then had a wife named Nur Safa and was blessed with three sons namely Tuan Zaman, Sahabat, and Darajat. As well as 4 (four) daughters, namely Boki Sahamawi, Boki Sadamawi, Boki Sagamawi, and Boki Sitidewa.

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Before the figures mentioned above, the people of Ternate lived in scattered areas across the mainland of Halmahera Island. Beginning in 1250, a mass exodus occurred, with the Halmahera people moving to various islands in the western part of Halmahera, such as Tidore, Makian, Moti, and Ternate. This was due to political conflict among the rulers of Jailolo. The people of Ternate Island then established their first settlement near the peak of Mount Gamalama, named Tobona, with the intention of covering their tracks to avoid being pursued by the rulers of Jailolo.

The Tobona community at that time was headed by a leader called Momole. Each Momole had full authority over their respective countries, even though at that time these countries were only cultural units, not yet political units, as intended in the definition of a Modern State as regulated in the Montevideo Convention of 1933, which stipulates the requirements that a state consists of territory, population, legitimate government, recognition from other countries, and the ability to conduct relations with other countries.

The first Momole in the Tobona community was named Momole Guna, thus forming new settlements on the island of Ternate, for example Foramadiahi (1254) led by Momole Ciko, and Gamlamo (Tobanga), although it is not known who the Momole who led at that time. In subsequent developments, to organize the life of the people on Ternate Island, the four traditional community units (namely Tobona, Tobanga, Tubo (Sampala), and Foramadiahi) held a meeting in 1257 (Abdulrahman, 2001), initiated by the Tobona community. The exact location of the meeting is unknown, but according to Adnan Amal, the meeting was likely first held in Tobona, as the Soa community initiated it.

However, there is a second possibility: the deliberation took place in Sampala, where the Sampala Momole was elected to lead all settlements in Ternate. The meeting resulted in the agreement that the Sampala Momole, named Ciko, would be the leader of the four Ternate communities. This decision marked the beginning of the Ternate Kingdom, with Ciko as its first king. After being crowned king, Ciko changed his name to Kaicil Manshur Malamo, and the title Momole was replaced with Kolano, meaning King. Based on the historical explanation above, the following conclusions can be drawn (Alting, 2010): (a) Ternate society was formed from diverse (plural) elements, beginning with immigrants from outside Ternate who then settled and then assimilated with subsequent arrivals; (b) Ternate society was formed scientifically through stages of cultural unity and ultimately became a political unity during the Ternate kingdom era; and (c) Deliberation was a key characteristic in the development of Ternate society and was always used as a means of establishing a kingdom.

Based on the historical description above, the territory of the Ternate Sultanate included Ternate, Moti-Makian, the islands of Kayoa, Jailolo, Ibu, Loloda, Tobelo, Galela, Morotai, East Gane and West Gane, Sula Island, Tobuku and Banggai. The territory of the Tidore Sultanate included the islands of Tidore, Mare, Obi, Weda, Buli, Wasile, Papua New Guinea and Gebe Island. The territory of the Bacan Sultanate included the islands of Bacan and Obi (Asyhari, 2008).

Today, the Ternate Sultanate is back in existence with the establishment of the Ternate Sultanate's government structure and the recognition and devotion of several regions recognized as Ternate Sultanate territories. De facto, the regions that still recognize the Ternate Sultanate are North Ternate, Batang Dua, North Halmahera, West Halmahera, South Halmahera, part of Central Halmahera, Moti Island, and Sula Island (interview results of Masyhud Asyhar with Sultan Mudaffar Syah of Ternate, February 17th, 2007 in Kedaton Ternate).

The boundary between Northern Ternate and Southern Ternate was drawn along a straight line around the current Jalan Rambutan (towards Mount Gamalama) to the West (towards Mount Gamalama) and to the East (towards the coast). Within the Ternate Sultanate's Government Structure, the highest institution was Gam Raha, meaning the Commission of Four, as it consisted of officials representing the four regions of the Ternate Sultanate: Soa Sio, Sangaji, Heku, and Cim. Under Gam Raha was a royal leader called Kolano, derived from the word koko-lanao, meaning upright and strong. Kolano was assisted by Bobato Dunia and Bobato Akhirat. Bobato Dunia consisted of the Ngaruha Commission, Sabua Raha (Supreme Judge and Religious Judge), Bobato Ma Dopolo (Council of Ministers), and Bobato Nyagimoi Se Tufkange (Bobato 18), representing the 18 clans in Ternate (Asyhari, 2008).

The Bobato Akhirat is assisted by Kali/Jo Kalim/Qadhi. Kali/Jo Kalim/Qadhi is assisted by several Imams, namely Imam Jiko, Imam Jawa, Imam Sangaji, Imam Moti, and Imam Bangsa. Each Imam is assisted by several Katib whose names correspond to the Imam's name. In addition, there are several other government institutions, namely: Kolano-Kolano Talok (a kingdom within the territory of Ternate), Sala Hakan (a governor with full authority), Sosorus (an envoy of the Sultanate of Ternate), Sadaha-Kie (Head of State Treasurer), Sowohi (Royal Protocol), and Sadaha Kadato (Head of Household) (Asyhari, 2008).

Ternate's history is complexly and descriptively constructed through generations. Despite the differences in historical narratives and philosophies, the author interviewed Haji Mulyadi, commonly known as Haji Yadi, Kiemalaha Sangaji, a close associate of the late Sultan Mudaffar Sjah, to explore the status, meaning, and history of Ternate's customary law community. He stated that custom is the primary and most important foundation of life. Long before the arrival of religion, customary law provided a legal framework and a framework for the group life of the Ternate community in ancient times. This can be seen in the legacy of the customary community, both tangible and intangible.

According to the Atorang tradition, humans are held in the highest esteem in the eyes of God. Above all other creatures. This Atorang tradition is better known as Jo'u se Ngofa Fangare. This philosophy means that we are talking about knowing ourselves more deeply before trying to understand others. Because if we understand ourselves and others, we will know the Creator, Allah SWT, more closely. Therefore, the philosophy of the words Jo'u se Ngofa Ngare is part of a confession that cannot be separated from a person. Why? Because it returns to adat matoto agama, agama ma dasar kitabullah, kitabullah se sunnah majojoko Allah ta'ala (Adat is based on religion, religion is sourced from the book of Allah and the sunnah of the Prophet and was revealed by Allah SWT). Therefore, in kitabullah majojoko Allah ta'ala, returning to adat matoto agama, there is nothing else that we find in the Qur'an, except the two sentences of the shahada, أَشْهَدُ أَنْ لَا إِلَهَ إِلَّا اللَّهُ وَأَشْهَدُ أَنَّ مُحَمَّدًا رَسُولُ اللَّهِ which in this case as our recognition grows from the essence which is based on belief and trust.

Legal Position of Foso and Boboso Customary Criminal Sanctions in the Se Atorang Customary Tradition in the Ternate Sultanate of North Maluku

In general, in the traditional Indonesian legal system, there are unwritten laws and laws that are not codified in a statute book. This unwritten law is called "Customary Law," which is a synonym for the term Customary Law. When we encounter written matters, this is recorded Customary Law (*Beschetegen Adat Recht*) and documented Customary Law (*Documenteerd Adat Recht*). Recorded Customary Law is the result of research by experts that is then published in the form of monographs (Bukido, 2017). Customary law began to be discussed in 1848, when the Dutch government allowed Indonesians to live under their own laws. Mr. Wichers investigated whether customary law could be replaced with a Western codification. However, this was ignored. In 1900, the government demanded a local codification of customary law for the Christian population, as it was considered to lack legal guarantees.

According to R. Soepomo, the term customary law is used as a synonym for law that is not written in legislative regulations (unstatutory law), law that exists as a convention in state legal bodies, law that arises from judges' decisions (judge-made law), law that exists as customary regulations that are maintained in social life both in cities and in villages (customary law) (Aprilianti & Kasmawati, 2022).

Law is the foundation of development, which means the actualization of the function of law as a tool of social engineering, a tool for dispute resolution, and a tool for regulating social behavior (social control). The vision of National Law development is the realization of a just and democratic state of law through the development of a national legal system that serves the interests of the people and the nation within the framework of the Unitary State of the Republic of Indonesia.

The position of law as a determining factor in the formation of an independent and sovereign state, and the position of law from the perspective of a modern state (law). In this case, law not only functions as a guardian of order (law in order). However, the most essential function of law in the context of a modern state (law) is how law can realize the welfare of the people in the life of the nation and state (Nurwahyuni, Sumartini, & Kholik, 2022). So the focus of the author's research is the legal position of customary criminal sanctions in the legal system in Indonesia.

The existence of customary law within the Indonesian legal system has constitutional status equal to that of general law applicable in national life in Indonesia. Customary law was the law applicable to both native Indonesians and foreign Easterners during the Dutch East Indies era. Over time, customary law has been regulated, protected, and accommodated by the constitution.

Referring to the provisions of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it states that the state recognizes and respects customary law

communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. Referring to these provisions, the state recognizes the existence of customary law communities and their constitutional rights. Recognition of these rights can be interpreted as recognition of the rights of customary law communities regarding their existence.

The fundamental difference between customary criminal law and national criminal law lies in their origins, sources, and scope. Customary criminal law is a legal system that grows and develops within a particular community, based on the traditional norms and cultural values held by that community. Meanwhile, national criminal law is a legal system recognized and implemented by a country to regulate behavior deemed to violate norms established by the government. In terms of legal sources, customary criminal law is derived from traditions, customs, and local norms passed down from generation to generation. Customary criminal law often reflects local values and focuses on harmony within society. In contrast, national criminal law is based on legislation enacted by a country's government. The sources of national criminal law include the constitution, criminal laws, and official regulations that bind the entire jurisdiction of the country (Handayani & Prabowo, 2024).

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The Essence of *Foso* and *Boboso*

The *Se Atorang* custom is a system of values and social norms that have existed in the society of the Sultanate of Ternate since the early days of its reign, associated with the leadership of the first Sultan, Mashur Malamo, around 1500. This custom serves as a guideline for regulating community life, both in family relationships, marriage, and resolving social problems. The values in the "*Se Atorang* Custom" emphasize the honor and dignity of the family, which must be maintained by each individual. Moral responsibility, especially in relationships between men and women. Customary sanctions, as a form of conflict resolution aimed at restoring social balance, not merely punishment.

The term *Adat Se Atorang* according to one of the indigenous elders of Ternate, Mr. Ko Ad as *Kapita Lao* (commander of the armed forces) in the customary structure of the Ternate Sultanate states that humans and customs are inherent in us. However, we must know the rules within ourselves, such as the rules of etiquette, for example, we must know to respect ourselves, respect the young, and respect the elderly. The basic law of Ternate is 12 strata or levels, namely *Ma Adat Se Ma Atorang*, *Ma Galib Likudi*, *Ma Istiadat Se Ma Kabasaran*, *Ma Cing Se Cingari*, *Ma Sere Se Duniru*, *Ma Baso Se Rasai*. These are the 12 strata that we must understand because they are inherent in ourselves, so the people of Ternate cannot be careless because of these 12 strata.

Discussing "*Adat Se Atorang*" means talking about manners, for example, when entering someone's house, greeting means that it is a sign of respect for the owner of the house, it is a custom that cannot be forgotten, then when entering someone's house, the owner must greet them and ask them to sit down, it is a customary procedure and rule. If *Ma Galib Se Likudi*

means that *Galib* is something that is not written and long after Allah SWT created the earth, its contents and humans, so if we *Galib*, we dig down to the point of the first people that Allah created, namely Adam and Eve.

Based on the results of an interview with Mr. Ko Hard, who served as Kapita Lao (Commander of the Armed Forces), it was understood that the concept of *Adat Se Atorang* has a deep meaning and cannot be understood simply as an ordinary social rule. According to him, *Adat Se Atorang* is a value system that combines custom and religion, so that when discussing custom, it is also substantially discussing religious teachings. Philosophically, he refers to the principle known in the Ternate community, namely "*Adat Matoto Agama, Agama Matoto Kitabullah, Kitabullah Matoto Rasulullah*." This expression shows the hierarchical and integrative relationship between custom, religion, the Qur'an, and the Prophet. This means that custom does not stand alone, but is sourced and based on religious values. In this context, custom is understood as the embodiment of Islamic values in the social life of the Ternate community.

He explained that speaking about customs means speaking about the whole person, both in social and spiritual dimensions. Within the institutional structure of Ternate customs, two main systems are recognized: the Worldly *Bobato* (*Bobato Dunia*) and the Hereafter *Bobato* (*Bobato Akhirat*). The Worldly *Bobato* regulates aspects of social life, while the Hereafter *Bobato* deals with religious and spiritual matters. This division demonstrates that the Ternate customary system integrates the worldly and the hereafter into a unified value system.

He explained that talking about customs means talking about the whole human self, both in social and spiritual dimensions. In the institutional structure of Ternate customs, there are two main devices, namely *Bobato Dunia* and *Bobato Akhirat*. *Bobato Dunia* functions to regulate aspects of social life, while *Bobato Akhirat* is related to religious and spiritual matters. This division shows that the Ternate customary system has integrated the worldly and the hereafter dimensions into a single value system. The author also conducted an interview with Mr. Iksan Bachrudin, S.H., a Ternate traditional figure (personal communication, June 2026). He explained that the way of life with oral rules that bind the Ternate community in the context of "Traditional Society" is derived from the Seven Basic Values of the prevailing Traditional Philosophy. This traditional philosophy is a legacy of our ancestors. The Seven Basic Values of the Ternate Traditional Philosophy are an implementation of the original cultural roots of the Ternate people themselves, namely; "*Adat Matoto Agama, Majojoko Toma Kitabullah se Sunnah Rasul*." (Custom is based on religion, Religion is sourced from the Book of Allah and the Sunnah of the Prophet, he is above the Prophet)".

The seven basic values of the Ternate people's traditional philosophy are a legacy from their ancestors, which in the Ternate regional language is called "*Kie se Gam Magogugu Matiti Tomdi*", which are explicitly stated in Chapter II on the Existence of Traditional Communities, specifically in Article 2 paragraph (4) of Ternate City Regional Regulation Number 13 of 2009 concerning the Protection of Traditional Rights and Culture of the Traditional Communities of the Ternate Sultanate (Customary Community of Ternate Sultanate, 2009), as follows:

First, *Adat Se Atorang*. Basic laws that are prepared and mutually agreed upon based on essential teachings must be obeyed and can be accepted by all levels of society. This means that the customs which are based on rules are rules originating from the Book of Allah and the Sunnah of the Prophet which are adapted to daily habits. In other words, they are habits that have been passed down from generation to generation that form the values implemented by society.

Second, *Istiadat Se Kabasarang*. The customary institution, in this case the Sultanate, with its authority according to the customary provisions in force according to the customs of the people above, must be upheld in order to maintain the dignity of the Ternate people.

Third, *Galib Se Likudi*. Old customs, which serve as fundamental principles, are regulated according to the principles of customary law within society and adapted to the times without any conflict. However, if there is conflict, adjustments will be made while remaining grounded in the Atorang Customs.

Fourth, *Cing Se Cingare*. Gender regulations, specifically women and men, mean that each individual and couple, male and female, constitutes a complete unit with their respective rights and obligations, and their preservation must be nurtured and maintained, as the Ternate people consistently uphold the philosophy of men and women, as explained above.

Fifth, *Ngale Se Cara/Duku*. The cultural forms of each ethnic group can be used collectively within a diverse community, in accordance with the desire to maintain unity within diversity (*Bhineka Tunggal Ika*).

Sixth, *Sere Se Duniru*. The way of life, arts and culture and customs that arise in social interactions are accepted collectively.

Seventh, *Bobaso Se Rasai*. *Bobaso Se rasai*, which means compassion, feeling each other's suffering, and caring for each other's feelings, is part of the seven humanitarian values of the Ternate Sultanate, which emphasize harmony, maintaining self-respect, and avoiding social conflict by being mindful of one's words.

The concept of *Bobaso Se Rasai* teaches the importance of respecting others' feelings in speech and behavior. This principle emphasizes ethical communication to avoid offense or social conflict. Thus, customs serve as moral guidelines that regulate harmonious interpersonal relationships.

The *Foso Se Boboso* custom has the same meaning, namely prohibition. *Foso* (Sacred Prohibition) or prohibition that must not be violated at all because it has a high level of sacredness, related to taboo or mystical matters, with severe customary sanctions. Violation of *Foso* has sanctions that are believed to bring disaster to the perpetrator or the general public, such as in the case of certain taboos when making traditional objects. Meanwhile, *Boboso* (Daily Taboo): Rules of daily behavior or etiquette, such as rules in farming, cutting down trees, or social interactions. Violations usually take the form of customary reprimands or warnings, but must still be obeyed to maintain balance. Its purpose and function is to organize social and ecological life, maintain good relations between humans and nature, and prevent social conflict.

From ancient times to the present, this custom has been maintained by the people of Ternate as part of their cultural identity. Although it has undergone adjustments to modern developments and formal state laws, fundamental principles such as justice, responsibility, and respect for norms remain highly respected. Thus, *Adat Se Atorang* is not only a traditional rule, but also an ethical and social foundation that continues to live and be passed down within Ternate society to this day. Throughout its development, *Adat Se Atorang* does not stand alone but is closely linked to religious values. This is reflected in two important concepts:

First, *Adat Matoto Agama*. This means that customs must be in line with religious teachings. All customary rules must not conflict with religious values, so that community life is always based on religious morals and ethics.

Second, *Adat Matoto Allah Ta'ala / Kitabullah*. This asserts that the ultimate source of custom is God's will, as reflected in scripture. This means that custom must be subject to divine law, thus possessing spiritual legitimacy and not merely being social.

To this day, these values are still upheld by the people of Ternate. Despite adapting to changing times and state laws, the *Se Atorang* custom remains a strong cultural identity, integrating customary rules and religious teachings into daily life. Furthermore, the Ternate customary system also recognizes the *boboso/kuffar* custom (customary prohibitions), which are rules containing taboos or actions that are prohibited by the community. This *boboso*

custom serves to: (1) Maintain social order and harmony; (2) Protect moral values and family honor; and (3) Prevent violations of morals and customs.

Meanwhile, *Foso* emphasizes the existence of strict customary sanctions for serious violations, especially those concerning morals and family honor, such as: (1) A father who impregnates his own biological daughter and (2) A husband who commits violence against his wife.

Overall, the *Se Atorang* custom, the *matoto agama* custom, and the *boboso* custom are interrelated and form a unified value system in the lives of the Ternate people. Despite the changing times, these customs remain preserved and passed down as cultural identities and life guidelines that combine elements of custom, morality, and religion.

Based on the above description, the author comprehensively analyzes the legal status of the *foso* and *boboso* customary criminal sanctions within the traditions of the Ternate Sultanate of North Maluku. In Ternate, prohibitions or taboos are generally referred to as *boboso*. Various community activities are controlled through this tradition. Specifically, in Ternate, the community is familiar with the terms not only *boboso* but also *foso*.

These two terms refer to prohibitions or taboos practiced by the people of Ternate. Although both are prohibitions, *boboso* and *foso* have different levels of prohibition. *Boboso* is equated with a simple prohibition, while *foso* falls into the category of strict prohibitions. This means that violating *foso* can result in severe customary sanctions, such as ostracism or fines. Violations of *boboso*, on the other hand, generally only result in a reprimand or warning from customary leaders.

Citing Ridwan Dero, a traditional and religious figure in Ternate whose thoughts are still alive despite his death, *boboso* is considered to be equivalent to *sunnah* in Islamic narratives, while *foso* is equated with obligation. According to this research's literature review, *boboso* is denoted by the word "taboo." According to the Big Indonesian Dictionary (KBBI), taboo means a prohibition or taboo. Therefore, *boboso* is a linguistic code that implies a prohibition or taboo against actions, words, or things that are undesirable for a particular group or community. Therefore, the word *boboso* is a local language found in areas scattered across North Maluku province.

Boboso is a taboo phrase encapsulated in a prohibition. Considering the similarities between several languages and ethnic groups in North Maluku, these terms include *boboso* or *hosan* (in the *Makian Dalam Kayoa* language/ethnic group), *boboso* or *foso* (in the Tidore language/ethnic group), and *boboso* or *foson* (in the *Makian Luar* language). All of these terms, used in their respective regional languages, share a similar implicit meaning: a prohibition against a behavior or action to avoid potential worries, difficulties, and fears about something that may or may not occur. In other words, *boboso* is a form of parental and community effort to address an event based on the lived experiences of the local community. *Boboso* is a taboo that should be avoided, as far as possible, within the traditions of North Maluku.

Within the context of local wisdom, the concept of *foso* is also known, a form of prohibition or rule passed down by ancestors to prevent people from engaging in activities prohibited by both religion and social norms. For example, the prohibition against eating fish indiscriminately. In essence, the ban is intended to limit the overexploitation of marine resources. Thus, *foso* represents a form of local wisdom among the Ternate people in maintaining environmental and social balance.

This concept later became known in customary law as the "*Foso se Boboso*" customary law. If someone violates these customary rules, the sanctions imposed are generally social, such as ostracization, expulsion from the community, or customary fines.

Boboso and *foso* represent the sophisticated thinking of the people of Ternate and North Maluku in general. Long before the introduction of positive law and religious teachings, *boboso* and *foso* emerged as a societal response to the various experiences they had gone through.

These traditions became an attempt at civilized society in the process of humanization and managing various interactions (social and ecological). To this day, *boboso* and *foso* have survived amidst the heterogeneous and modern society of Ternate. Their survival is proof that *boboso* and *foso* are not trivial. These cultural products possess strong wisdom, values, and meaning that have transcended time. The relevance of *boboso* and *foso* is further emphasized by current religious teachings and new regulations (Alhadar & Tawari, 2017).

In Ternate's traditional law, serious violations such as *foso* were traditionally referred to as "*sesone*." This sanction reflects the seriousness of the violation of morality and honor within the traditional community. However, it is important to understand that punishments such as "*sesone*" are no longer enforced. These cases are now handled according to Indonesian national law, although customary values such as maintaining honor, responsibility, and social balance remain highly valued in Ternate society.

In the author's opinion, when contextualized within applicable positive law, *Sesone* is no longer enforced; current regulations refer to the National Criminal Code. This is the author's point: progressive ideas regarding the legal status of customary criminal sanctions should be rigidly regulated through positive law if customary crimes lead to tyranny for indigenous communities, as Article 64 letter b of the Criminal Code stipulates that there are additional penalties.

The phrase "additional criminal penalties" referred to in Article 64 letter b of the Criminal Code includes the fulfillment of local customary obligations, which is further explained in Article 96 paragraph (2) of the Criminal Code stating that the fulfillment of local customary obligations as referred to in paragraph (1) is considered equivalent to a category II fine. Thus, legal subjects who violate the law living in the community are subject to a category II criminal fine, namely IDR 10,000,000.00 (ten million rupiah). Likewise, if customary obligations are not fulfilled, the fulfillment of customary obligations is replaced with compensation equivalent to a category II fine. In addition, if compensation is not filled, it is replaced with criminal supervision or social work. The application of the criminal penalty of "fulfillment of local customary obligations" can be imposed on individuals and corporations.

Challenges of Additional Criminal Transformation of Customary Criminal Law in Law Number 1 of 2023 concerning the Criminal Code in the Ternate Sultanate of North Maluku

One of the most important and controversial breakthroughs in the National Criminal Code (Law No. 1 of 2023) is the recognition of living law in society as a legitimate source of criminal law (The Government of the Republic of Indonesia, 2023). This provision is stated in Article 2 paragraph (1) of the Criminal Code which states that "The provisions as referred to in Article 1 paragraph (1) do not reduce the validity of existing laws in society which determine that a person should be punished even though the act is not regulated in statutory regulations." Historically, this norm was born from the spirit of legal decolonization, namely the effort to free the Indonesian criminal law system from the dominance of the Dutch colonial legacy which places written law as the only legitimate source of law (*lex scripta*) (Arafat, 2025).

Substantively, Article 2 paragraph (2) of the Criminal Code further explains, "The law existing in society as referred to in paragraph (1) applies in the place where the law is applied, to the extent not regulated in this Law, and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by the community of nations."

The formulation of the above article provides flexibility for the legal system to adapt to local values, traditional wisdom, and the community's sense of substantive justice. This recognition is also in line with the values of Pancasila and Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia. Philosophically, the second principle, "Just and

civilized humanity," and the fifth principle, "Social justice for all Indonesian people," emphasize that justice in the Indonesian context must not only be formal, but also contextual and participatory, respecting the diversity of customs, religions, and traditions. Therefore, living law in the National Criminal Code can be seen as a form of Indonesianization of criminal law, namely an effort to build a legal system that no longer only imitates the continental European model, but is rooted in the socio-cultural reality of the nation itself (Arafat, 2025, p. 42).

Respect and recognition of living law is a concrete manifestation of legal pluralism, recognized sociologically by experts such as John Griffiths and Franz von Benda-Beckmann. In the Indonesian context, legal pluralism is not merely a theory, but an empirical reality, as customary law, Islamic law, and national law coexist and interact with each other in social practices. Thus, living law serves as an acknowledgment of social dynamics that cannot always be addressed by written law (Arafat, 2025, pp. 41–42).

Although ideologically, living law is a progressive step, from an epistemological and legal perspective, this provision poses a major dilemma. Customary law is local, unwritten, and highly variable across regions, so its recognition as a basis for criminal punishment raises a fundamental question (Arafat, 2025, pp. 41–42): how to ensure legal certainty and equality before the law if applicable norms differ from one region to another?

Starting from this substantive question, the author outlines the tangled threads and fundamental issues, including the challenges of transforming customary criminal law, including: 1) the risk of cultural commercialization of customary criminal sanctions; 2) the problematic application of the phrase "fulfillment of local customary obligations" in the National Criminal Code; 3) the capacity of law enforcement officials and the potential disparity in judicial decisions in the Ternate Sultanate, as follows:

The Risk of Cultural Commercialization on Customary Criminal Sanctions

Book I, number 4 of the Criminal Code explains that criminal acts based on existing laws within society, or what were previously known as customary criminal acts, are recognized to better fulfill the sense of justice within society. In reality, in several regions in Indonesia, there are still unwritten legal provisions, existing and recognized as law in the relevant region, which determine that violations of these laws are punishable. In this case, the judge can determine sanctions in the form of fulfilling local customary obligations that must be carried out by the perpetrator of the crime. This means that the standards of values and norms existing within the local community are still protected to fulfill the sense of justice that exists within a particular community. Such a situation will not shake and will continue to guarantee the implementation of the principle of legality and the prohibition of analogy adopted in this Law (The Government of the Republic of Indonesia, 2023).

One region that still maintains traditions and customary law is the customary territory of the Ternate Sultanate of North Maluku, based on the "*Adat se Atorang*" tradition. The role of customary law in the new Criminal Code is interpreted as having two functions. 1) The positive function provides opportunities for customary communities to use their norms as the basis for imposing sanctions. 2) The negative function allows customary norms to remove elements of unlawfulness if the act has been resolved according to customary law. Both of these functions are considered capable of restoring social relations, although their application remains limited by the principles of justice and the public interest. The absence of operational guidelines raises questions about the limits of this function's use in practice, as authorities may assess the same case differently (The Government of the Republic of Indonesia, 2023, p. 6).

The integration of customary law into the new Criminal Code affirms the existence of legal pluralism within the national system and demonstrates that the diversity of local legal practices remains respected. However, the high flexibility of customary law often clashes with the need

for legal certainty. In practice, this can lead to differences in treatment between regions. Furthermore, the high flexibility of customary law often conflicts with the need for legal certainty.

The regulatory challenge is that the enactment of the National Criminal Code (Law No. 1 of 2023) is conceptually inseparable from the enactment of Law No. 22 of 2022 concerning Corrections (hereinafter referred to as the Corrections Law), as the two form a unified new paradigm in the Indonesian criminal law system.

The relationship between these two regulations represents an integral reform: the new Criminal Code provides the normative and philosophical basis for humanistic and restorative punishment, while the Corrections Law provides the institutional infrastructure for its implementation. In this framework, prisoners are no longer positioned as "objects of punishment" but as "subjects of development," with the ultimate goal of social reintegration.

This approach significantly changes the function of correctional institutions. Previously, correctional institutions played a dominant role as places for the execution of prison sentences, but now they have transformed into rehabilitative institutions that serve, guide, supervise, and protect inmates. This is evident in Article 54 paragraph (1) letter k of the National Criminal Code, which stipulates that the values of law and justice prevailing in society must be taken into account in sentencing.

However, this normative transformation is not necessarily easy to implement. Without adequate budgetary support, increased human resource capacity (especially for Community Guidance Officers at Correctional Institutions), and structured social reintegration policies, this paradigm shift risks becoming merely a normative aspiration—a legal ideal that is ineffective in criminal justice practice.

Therefore, there is a risk of commercializing cultural meanings, particularly customary criminal sanctions in the Ternate Sultanate, which were initially restorative and bound to community spirituality. When customary sanctions are translated into positive law, there is concern that sacred values and cultural deterrents will shift to mere administrative punishments or monetary fines.

Problems in Implementing the Phrase "Fulfillment of Local Customary Obligations" in the National Criminal Code.

The recognition of living law in the new Criminal Code is positioned as a significant change in the national criminal justice system. The provisions of Article 2 of the Criminal Code open the opportunity for customary norms to be enforced alongside formal criminal law. Furthermore, Article 597 of the Criminal Code also emphasizes that anyone who commits an act prohibited by local customary law can be subject to criminal penalties. The penalty referred to in paragraph (1) consists of fulfilling customary obligations as referred to in Article 66 paragraph (1) letter f. Through this provision, customary law is positioned as part of the source of norms that can be used as a reference in resolving criminal cases.

One change related to criminal penalties is the addition of additional penalties in the form of "fulfillment of local customary obligations" as regulated in Article 66 of the Criminal Code. Article 66 paragraph (1) letter f states, "Additional penalties as referred to in Article 64 letter b consist of "fulfillment of local customary obligations." This article recognizes customary sanctions against perpetrators of criminal acts.

The concept of applying an additional penalty of "fulfillment of local customary obligations" can be imposed when the principal penalty is insufficient to achieve the purpose of sentencing. It is important to note the meaning of the penalty "fulfillment of local customary obligations" as defined in Article 96 of the Criminal Code, which reads (The Government of the Republic of Indonesia, 2023): (a) Additional punishment in the form of fulfilling local customary obligations is prioritized if the crime committed meets the provisions referred to in

Article 2 paragraph (2); (b) Fulfillment of customary obligations as referred to in paragraph (1) is considered compensation with a category II criminal fine; (c) If the customary obligation as referred to in paragraph (1) is not fulfilled, the fulfillment of the customary obligation is replaced with compensation demanded equal to a category II criminal fine; and (d) If compensation as referred to in paragraph (3) is not fulfilled, the compensation is replaced with criminal supervision or community service.

Based on the formulation of Article 96 paragraph (1) of the Criminal Code, there are limitations to the application of additional punishment "fulfillment of local customary obligations" which must be adjusted to prevailing laws in the community. This is as emphasized in the provisions of Article 2 paragraphs (1) and (2) of the Criminal Code, which state that the imposition of criminal penalties does not diminish the validity of prevailing laws in the community, namely: (a) The provisions referred to in Article 1 paragraph (1) do not reduce the validity of existing laws in society that determine that a person should be punished even if the act is not regulated in this Law and (b) The existing laws in society as referred to in paragraph (1) apply in the place where the law is in force and to the extent not regulated in this Law and in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and so on. hukum umum yang diakui masyarakat bangsa-bangsa.

Article 601 paragraph (1) states, "Any person who commits an act that is prohibited by the prevailing law in society shall be subject to criminal penalties." Based on this, it is clear that the definition of a crime is not limited to that stipulated by statutory regulations, but also by customary criminal law.

Historically, the diversity of legal systems has been inherent in the development of law in Indonesia. State law, customary law, and religious-based legal systems have long operated in parallel and each has its own role in regulating social life. Unwritten customary law, which is continuously practiced in local communities, is also recognized as part of the living norm. However, the contextual and undocumented flexibility of customary law contradicts the principle of legality, which demands certainty and clarity of norms (Wahyudhi, Herlambang, & Sudarti, 2026).

The principle of *nullum crimen, nulla poena sine lege* requires that criminal penalties be derived from written regulations. The implementation of living law within the framework of the new Criminal Code through Article 2 shifts this understanding, creating tension between the certainty of state law and the flexibility of customary law. The use of customary law is not allowed to be unlimited. Customary norms can only be used after being regulated in formal regulations, such as government regulations. This formalization process has the potential to change the character of customary law, which has developed organically.

In the National Criminal Code, fulfilling customary obligations is treated as an additional penalty. Several studies have shown that this type of codification can limit the scope of customary norms within society, for example, in the jurisdiction of the Sultanate of Ternate. In practice, this limits the scope of customary sanctions, which typically have a holistic character (such as ngofa nyeku or village cleansing fines), so that they do not conflict with the boundaries of human rights and the principles of national criminal law.

Several issues may arise. These include inconsistent assessments across regions, the simplification of customary norms to conform to state legal formats, and the potential for the use of customary recognition for political gain. Therefore, the process of recognizing customary norms must be transparent and involve customary communities to avoid eroding trust in the state. For example, differences in administrative capacity across regions also impact the ability to adequately inventory customary norms. Some communities are able to obtain legal recognition, while others are left behind. This situation creates gaps in the implementation

of the new Criminal Code. Therefore, derivative legal instruments are needed to unify customary recognition mechanisms within the criminal system.

The customary law of the Ternate Sultanate, based on the Adat se-Atorang philosophy and the principle of the relationship between the Sultan and the People, prioritizes the implementation of the adat "*Ngofa se Nyeku*," which literally refers to children, grandchildren, the younger generation, or descendants (customary youth) within the social structure of Ternate society. Violations of norms, ethics, etiquette (manners), and customary law by *ngofa se nyeku* will be subject to tiered customary sanctions. These sanctions aim to restore social balance, provide a deterrent effect, and uphold customary honor.

Customary sanctions in Ternate are not only physical or material in nature, but rather place more emphasis on moral, social and spiritual aspects that are in line with Islamic values as follows:

First, *Foso se Bobaso* (Moral Reprimand and Advice): The initial form of sanction is a stern reprimand, advice, or guidance from traditional elders or the Fala Raha institution. The goal is to awaken the younger generation to the correct traditional path before being subjected to more severe punishment.

Second, Social Sanctions (Ostracism or *Maku Lawang*): Perpetrators of serious moral or customary violations will be ostracized from the traditional community. They will not be involved in traditional ceremonies, village celebrations, or communal activities, which is a very severe psychological punishment in Ternate.

Third, Customary Fines (Material/Ritual): For certain types of violations (such as inter-community disputes or violations of honor), the perpetrator is required to pay a fine. This fine can be in the form of goods, money, or the provision of traditional ritual equipment to clear the reputation of the tarnished village or family.

Fourth, Revocation of Titles or Customary Rights: If a violation is committed by a *ngofa se nyeku* (a member of the royal lineage) (Boki, *Ngofa Kolano*, or customary officials), their privileges and customary titles may be frozen or officially revoked by the Ternate Sultanate.

Fifth, Spiritual Sanctions (Customary Oath/*Kualat*): The Ternate people strongly believe in the concept of *kualat*, or ancestral curses (*bala*), if they intentionally violate sacred customs. Violators are believed to experience unhappiness in their lives if they do not immediately apologize according to customary law.

In the author's opinion, fulfilling customary obligations as an additional punishment leads to the deconstruction of the philosophy of punishment. On the one hand, it provides the prospect of the application of customary law being recognized through the imposition of additional criminal penalties in the form of fulfilling local customary obligations, namely as a sanction aimed at restoring the inner and social balance of the community which was disturbed as a result of the criminal act. However, there are challenges in applying additional customary penalties as regulated in Article 96 letter b and Article 97 paragraph (1) of the National Criminal Code, which stipulates that this penalty can be imposed even though it is not specifically stated in the formulation of a criminal offense.

This form of punishment requires the perpetrator to pay compensation or carry out local customary moral and social obligations. The Violation Category is imposed for certain criminal acts related to the laws that exist in society (living law), especially in areas that still adhere to customary norms. And the cumulative nature of additional punishment is that this customary obligation cannot be imposed independently, but must always accompany the imposition of the main sentence (such as imprisonment, fines, or social work).

As is known, the new Criminal Code regulates three groups/forms of criminal sanctions, namely basic penalties, additional penalties and special penalties for certain criminal acts (Article 64). The main punishment consists of imprisonment, closure, supervision, fines and social work (Article 65). The new Criminal Code also gives judges the authority to impose,

along with the main sentence, one or more additional penalties. The types of additional penalties are (Article 66 paragraph (1)): (a) Revocation of certain rights; (b) Confiscation of certain goods and/or bills; (c) Announcement of the judge's decision; (d) Payment of compensation; (e) Revocation of certain permits; and (f) Fulfillment of local customary obligations.

In principle, the nature of additional punishment is optional. This is different from the principal punishment which is mandatory for the judge to impose if the defendant is found guilty (unless the judge will impose action) (Chazawi, 2001). This is also emphasized in Article 66 paragraph (2) which stipulates that "Additional punishment as referred to in paragraph (1) may be imposed in cases where the imposition of the principal punishment alone is not sufficient to achieve the purpose of punishment." The use of the words "can", "in case" and "only" above clearly shows the optional nature of the imposition of additional punishment (Assegaf, 2023).

The fundamental problem is that the application of additional penalties in the National Criminal Code carries different sanctions than the customary "*Ngofa se Nyeku*" system in the Sultanate of Ternate. In addition to limiting the scope of customary sanctions, additional penalties are cumulative and optional. This means that they are not mandatory but can be added by the judge to the principal penalty if deemed necessary to achieve justice.

Despite their additional nature, if more than one type is imposed, their implementation can be combined. The main characteristic of the cumulative nature of additional penalties is that the judge has full discretion. If the judge believes the defendant is guilty, the judge is obliged to impose the principal penalty, but the imposition of additional penalties is not mandatory. Additional penalties are only imposed if the principal penalty alone is deemed insufficient to provide a deterrent effect or redress losses. This means that additional penalties cannot stand alone; in other words, they must accompany the principal penalty (*accessoir*). For additional penalties to be executed, the judge must always impose one or more principal penalties in the same judge's decision.

The Capacity of Law Enforcement Officials and the Potential for Disparity in Judges' Decisions in the Ternate Sultanate

The successful implementation of additional criminal sanctions under customary criminal law is highly dependent on the structural and cultural preparedness of law enforcement officials. Structurally, this requires clear implementing regulations, supporting infrastructure such as adequate correctional facilities, and cross-institutional coordination between the police, the prosecutor's office, the Ministry of Law and Human Rights, and social institutions (Miers, 2025).

Culturally, law enforcement officials must shift their perspective on criminal justice from merely punishing to rehabilitating. Without this shift in legal culture, the normative innovations stipulated in the Criminal Code risk not being effectively implemented in practice. This means that the philosophical shift in the National Criminal Code carries a number of significant consequences (Miers, 2025).

First, theoretically, the National Criminal Code marks a transition from a classical criminal law system to a modern criminal law system oriented toward substantive justice and social balance. Second, practically, this change demands significant adaptation at the law enforcement level, correctional institutions, and the community. This requires outreach, training, and a shift in the paradigm of law enforcement, which has tended to measure success by the number of people convicted, rather than by the number of conflicts resolved. Third, sociologically, this new paradigm has the potential to transform the relationship between the state and its citizens. The state will no longer act solely as a punisher but also as a facilitator of

social reconciliation. Criminals will no longer be considered enemies of society, but rather as inmates with the right to return to their role in society (Miers, 2025).

Philosophically and functionally, the National Criminal Code (KUHP) necessitates a shift in the Indonesian penal system toward a just, humane, and socially rehabilitative criminal law. However, a fundamental problem is that not all investigators, prosecutors, and judges possess a deep cultural understanding of the philosophy of Ternate customary law. This has the potential to lead to bias, misinterpretation, and disparities in the implementation of additional penalties at the judicial level.

Legally, the shift in the paradigm of customary criminal punishment in the National Criminal Code has direct implications for the role and authority of judges. In the previous system, judges were often bound by rigid normative formulations and limited to the choice of imprisonment, fines, or death (Latifah & Hairri, 2025). The National Criminal Code now provides judges with greater discretion to tailor their decisions to the individual character of the perpetrator, their motives, the consequences of their actions, their socioeconomic circumstances, and the opportunity for reconciliation between the perpetrator and the victim. This allows for a more contextualized approach to substantive justice.

Illustration of the Dilemma of Disparity in Decisions in the Implementation of Customary Criminal Law

Disparity in sentencing refers to differences in sentences or sanctions imposed by judges for crimes of the same nature, type, and level of seriousness. This inequality often sparks debate because it has the potential to undermine the sense of justice and legal certainty in society. Legally, this disparity is legitimate due to the principle of judicial independence and freedom to interpret the law (judicial discretionary power). Judges have the authority to consider mitigating or aggravating factors. However, differences in beliefs, sociological and psychological backgrounds among judges in examining cases, particularly in the application of customary law, can be a serious issue and trigger subjectivity in determining aggravating and mitigating factors.

To better understand the explanation above, let's look at the following illustration. Suppose X is deemed to have violated Ternate customary law, *Foso*—a serious customary violation in which a man impregnates a woman outside of marriage with the promise of marriage, but ultimately does not marry. Can X be prosecuted under Article 597 paragraph (2) in conjunction with Article 2 paragraph (2) of the new Criminal Code?

Of course not, because in principle the acts prohibited according to *Foso* have been adopted by national law regarding the prohibition of adultery (remember that Article 2 paragraph (2) limits the application of customary criminal law only to acts not regulated in the Criminal Code).

However, investigators, prosecutors, and judges may believe that adultery under the new Criminal Code differs from *Foso* because the latter includes other elements of the offense, namely "pregnancy," "promise to marry," and "failure to marry"—thus preventing legal dualism.

Even with this interpretation, judges will still face a deadlock when sentencing the perpetrator. As explained, the maximum penalty for violating customary law is only an additional penalty in the form of fulfilling customary obligations. To impose this additional penalty, the judge must first deem X's act wrong and impose one of the principal penalties stipulated in the new Criminal Code (e.g., imprisonment). Since the judge has already declared *Foso* a customary crime with no equivalent in the new Criminal Code, on what basis will the judge impose this principal penalty? Given that customary sanctions imposed under the customary law of the Ternate Sultanate are regulated through customary justice mechanisms

by the sultanate's apparatus, known as *Bobato Adat* and *Bobato Akhirat* (the sultanate's religious institutions).

The existence of judges, police, and prosecutors, as law enforcement officers and the spearhead of the criminal justice system, is also required to make fundamental adaptations. The new paradigm of the Criminal Code demands that they no longer think within a retributive framework that emphasizes punishment alone, but rather shift to a restorative framework, which prioritizes resolving social conflict and restoring relationships between citizens. To achieve this, reform of Standard Operating Procedures (SOPs) in investigations and prosecutions is necessary. The police must have a clear mechanism for identifying cases worthy of resolution through restorative justice (penal mediation), as stipulated in Police Regulation Number 8 of 2021, while the Prosecutor's Office needs to align with Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Coordination between these two institutions is crucial to prevent abuse of the ultimum remedium principle and to ensure victims' rights and legal certainty.

The potential conflict between the Police and the Prosecutor's Office stems from Article 132 of the Criminal Code, which stipulates that prosecution begins with the investigation process. If this formulation is not immediately elaborated through implementing regulations, it could create ambiguity in the division of functions between investigators (the National Police) and public prosecutors (the Prosecutor's Office). Yet, one of the absolute requirements for effective law enforcement is functional differentiation between law enforcement agencies. Therefore, the government, along with relevant institutions, must ensure harmonization of implementing regulations so that systemic changes to the Criminal Code do not create new conflicts of authority that would be counterproductive to the efficiency of criminal justice.

In addition to the positive legal aspects, there are also important social implications. Reorienting the penal system toward a rehabilitative and restorative approach requires active community participation, particularly in the implementation of social work programs, supervision of inmates, and the reintegration of former offenders into society. However, in sociological reality, the stigma against former inmates remains very strong. Many of them experience social exclusion, difficulty finding employment, and social rejection, which increases the likelihood of recidivism.

Based on the above description, it can be concluded that the criminal law reforms initiated by the National Criminal Code will only be successful if accompanied by social reconstruction, namely a shift in society's perspective on punishment from one that punishes to one that rehabilitates. Therefore, it can be concluded that the implementation of the National Criminal Code has far-reaching legal and institutional consequences. It demands changes in normative aspects (through implementing guidelines and regulations), structural aspects (through improvements to systems and institutions), and cultural aspects (through changes in the values and behavior of officials and the community). Without synergy at these three levels, the reforms advocated by the National Criminal Code will stagnate at the level of normative ideals.

Overall, the recognition of living law and the reform of the criminal justice system in the National Criminal Code reflect a paradigmatic reform toward a modern, humanistic, and pluralistic criminal law system. This reform seeks to integrate the three main dimensions of the legal system as proposed by Lon L. Fuller: the morality of duty (norm certainty), the morality of aspiration (ideal justice), and the morality of order (social function of law) (Murray, 1965).

The National Criminal Code (KUHP) aims to balance these three aspects: upholding legal certainty through codification, providing substantive justice through recognizing customary law, and creating social benefits through rehabilitative sentencing. However, the success of this reform depends on three strategic factors. First, the institutional readiness of law enforcement and correctional institutions to interpret and implement complex laws professionally. Officials must understand the social dynamics and customary law in various regions without losing their

commitment to national legal principles. Second, a shift in legal culture. As long as law enforcement officials, academics, and the public remain trapped in a positivistic paradigm that views law as merely a written text, the values of living law will never become an integral part of judicial practice. Third, the availability of comprehensive implementing regulations.

Without clear implementing regulations, particularly in the form of Government Regulations and Regional Regulations, the implementation of living law has the potential to create disparities in law enforcement between regions. An act may be considered a crime in region A for violating certain customary norms, but not in region B (Fadilla, Kusumajakti, & Fauzi, 2024). This inequality can violate the principles of justice and equality before the law. Furthermore, law enforcement officials accustomed to written legal systems will face difficulties in locating, interpreting, and proving the existence of relevant customary law (Amri & Anggono, 2024). Thus, it can be ascertained that without detailed operational guidelines, whether in the form of Government Regulations, Regional Regulations, or Supreme Court Circulars, the provisions of Article 2 in conjunction with Article 66 of the National Criminal Code could actually become a source of uncertainty and new inequality.

CONCLUSIONS AND RECOMMENDATIONS

Conclusion

The legal status of the customary criminal sanctions of foso and boboso within the framework of the National Criminal Code in the jurisdiction of the Sultanate of Ternate is based on Article 2 of the Criminal Code, where the amendment related to criminal penalties is the addition of additional penalties in the form of "fulfillment of local customary obligations" as regulated in Article 66 of the Criminal Code. Article 66 paragraph (1) letter f states that, "Additional penalties as referred to in Article 64 letter b consist of "fulfillment of local customary obligations." This article recognizes customary sanctions against perpetrators of criminal acts. However, its implementation presents problems. This is because customary criminal sanctions, known in Ternate customary law as "*Foso se Boboso*," are based on the *Adat se-Atorang* philosophy and the principle of the relationship between the Sultan and the People, which prioritizes the application of the "*Ngofa se Nyeku*" custom. Violations of norms, ethics, etiquette (politeness), and customary law by *ngofa se nyeku* will be subject to tiered customary sanctions. Initial sanctions include stern warnings, advice, or guidance from traditional elders or traditional councils (*fala raha*) or spiritual leaders (*sowohi*) within the customary structure of the sultanate in the North Maluku region. Thus, simplifying customary norms to conform to state legal formats makes fulfilling customary obligations an additional penalty, creating problems. Thus, simplifying customary norms to conform to state legal formats makes fulfilling customary obligations an additional penalty, creating problems. For example, the disparity in decisions often sparks debate because it has the potential to undermine the sense of justice and legal certainty within indigenous communities.

The prospects and challenges of transforming additional customary criminal penalties in Law Number 1 of 2023 concerning the Criminal Code in the Ternate Sultanate of North Maluku include several factors, including: 1) the risk of cultural commercialization of customary criminal sanctions; 2) the application of the phrase "fulfillment of local customary obligations" in the National Criminal Code; 3) the capacity of law enforcement officers and the potential disparity in judicial decisions in the Ternate Sultanate.

Recommendations

The reward and performance evaluation model, which is still oriented toward prosecution or verdict numbers, reinforces repressive rather than restorative tendencies. Therefore, continuing legal education and intensive outreach programs are needed so that all law

enforcement officers understand the spirit of restorative justice as part of their professional obligations, not merely a temporary policy.

Fulfillment of local customary obligations as additional penalties can potentially lead to disparities in sentencing, where two cases Similar cases can result in different decisions due to differences in judges' subjective assessments. Therefore, to prevent this type of legal uncertainty, the Supreme Court needs to immediately develop national sentencing guidelines that are both normative and operational. These guidelines must include objective parameters for determining the type and severity of criminal sanctions, such as the level of culpability, social impact, and remedial efforts made by the perpetrator. From a legal culture perspective, this adaptation faces serious challenges. The mindset of law enforcement officials is still heavily influenced by the old paradigm, where institutional success is often measured by the quantity of cases handled, rather than the quality of conflict resolution achieved.

Author Contributions

All authors made significant contributions to this study. These contributions included research conceptualization, development of the theoretical framework, data collection, data analysis, interpretation of results, manuscript preparation, scholarly revision, and final approval of the manuscript for publication. All authors confirm that they have read and approved the final version of the article.

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