

Western Legal Hegemony over Customary Law: A Critical Legal Studies (CLS) Perspective

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ABSTRACT

This study examines Western legal hegemony over customary law in Indonesia from the perspective of Critical Legal Studies. Using a normative juridical method, the research analyzes how epistemic, institutional, and ideological mechanisms shape legal hierarchies that elevate Western state law while subordinating customary law. The findings reveal that Western legal epistemology dominates the definition of law, limiting legal legitimacy to written and codified norms and marginalizing living customary systems. Institutional frameworks reinforce this hierarchy through the monopoly of state courts, codification requirements, and statutory land governance that undermine indigenous jurisdiction. Ideological hegemony further constructs Western law as modern and neutral while framing customary law as inferior, leading to internalized cultural displacement. The study concludes that customary law can gain equal legal authority only through structural and epistemic reform that acknowledges indigenous legal philosophies as autonomous sources of justice.

Keywords: CLS, customary law, decolonization, legal hegemony, Western law

INTRODUCTION

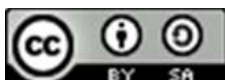
The penetration of Western legal thought into post-colonial legal systems has produced a hierarchy of norms in which state law modeled after European jurisprudence occupies the highest position, while customary law is placed at the periphery of legal authority. In Indonesia, this configuration emerged through colonial legislation that framed Western law as rational, universal, and modern, while characterizing customary law as primitive, informal, and insufficiently developed to govern society.¹

This hierarchy has continued after independence because Indonesia inherited the colonial legal structure, including codification, adjudication models, and positivistic legal reasoning rooted in civil law traditions. The formation of national law therefore prioritized uniformity and centralization, leaving limited constitutional space for customary legal autonomy and allowing Western epistemology to define the meaning of legal certainty, legitimacy, and justice.²

Critical Legal Studies (CLS) offers a framework to analyze how this legal hierarchy is constructed not only through coercive imposition but through ideological

¹ Vasuki Nesiah, "Critical Legal Studies: A Curious Case of Hegemony Without Dominance," in *The Routledge Handbook of Law and Society* (2021), 15–20

² Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," in *Law and Society in East Asia* (2017), 3–20.



power. CLS argues that state law presents itself as neutral and objective, yet its foundations reflect political interests and the dominance of certain groups, including Western elites who historically shaped colonial and post-colonial legal development.³ Western legal hegemony is also visible in the philosophical foundations of Indonesian law. Positivism and legal formalism imported from Europe became dominant academic paradigms in law schools, narrowing the intellectual imagination of legal actors and displacing indigenous legal philosophies that emphasized relational justice, social harmony, and restorative accountability.⁴

Even when law acknowledges pluralism, it often subordinates customary institutions to statutory law through conditional recognition. In the Indonesian context, customary law is recognized only if it does not conflict with national law, meaning that the framework of recognition itself preserves the superiority of Western-derived institutions and doctrines. Legal hegemony also manifests in judicial practice, where judges tend to rely on codified norms rather than customary reasoning, even in disputes concerning land, kinship, or ritual rights that are deeply embedded in indigenous worldviews. This pattern reinforces the juridical notion that formal adjudication is more authoritative than traditional mechanisms of restorative settlement.⁵

In contemporary legal reform, Western influence persists through modernization agendas that equate progress with legal uniformity, the expansion of state jurisdiction, and the codification of normative systems. These reforms, although described as neutral and technocratic, perpetuate the marginalization of living customary law by transforming it into static and state-controlled legal instruments. The hegemony of Western legal discourse also shapes the interpretation of human rights norms. Global human rights frameworks frequently become instruments to evaluate, correct, or delegitimize customary norms, presenting Western universalism as the ethical benchmark while ignoring the cultural grounding of normative authority within indigenous communities.⁶

Education in Indonesian law schools is another mechanism through which Western legal hegemony reproduces itself. Curricula emphasize European legal traditions and international conventions while rarely teaching the epistemology, logic, and values of customary law, resulting in generations of legal scholars and judges who internalize Western norms as inherently superior. Legal pluralism exists in theory but remains weak in practice because the structure of legal authority still centers state law. Customary legal decisions may be allowed at the local level, yet the state claims the final right of review and annulment, showing that pluralism operates within a hierarchical regime rather than a co-equal legal order.⁷

The marginalization of customary law has social and cultural consequences. For many indigenous communities, law embodies communal identity, cosmological values, and intergenerational obligations, so the subordination of customary law simultaneously weakens cultural autonomy and local governance. The tension between Western-derived legality and customary law becomes sharper when legal disputes concern land, natural resources, and territorial identity. These domains are central for

³ Samuel Moyn, "Reconstructing Critical Legal Studies," *Yale Law Journal* 134 (2024): 77

⁴ E. D. Indriati and H. K. Sabowo, *Filsafat Hukum* (Badan Penerbit STIEPARI Press, 2023), 1–92

⁵ Ade C. Diala, "The Concept of Living Customary Law: A Critique," *Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (2017): 143–165

⁶ Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (SUNY Press, 2016)

⁷ R. Ridwan, K. Dimiyati, & A. F. Azhari, "Perkembangan dan Eksistensi Hukum Adat: Dari Sintesis, Transplantasi, Integrasi hingga Konservasi," *Jurnal Jurisprudence* 6, no. 2 (2016): 106–115.

indigenous peoples, yet they are increasingly governed by statutory law legitimizing extractive development rather than ecological and ancestral authority.⁸

CLS is relevant because it challenges the underlying assumption that state law is neutral and universally valid. Instead, CLS exposes that neutrality is a rhetorical tool that conceals historical domination, ideological interests, and unequal power relations. By applying CLS to Indonesian legal development, Western legal hegemony can be examined not only as colonial legacy but as a continuing structure of legal consciousness. Existing research has not fully captured this dynamic. Nesiah analyzes hegemony within CLS theory but does not apply it to customary law in post-colonial national legal systems.¹⁴ Chimni critiques Eurocentrism in international law but does not explore how European dominance persists in domestic law where customary systems are subordinated.¹⁵ Mutua criticizes human-rights-based universalism but does not evaluate its implications for legal pluralism in indigenous contexts.⁹

This research therefore fills the gap by constructing a CLS-based critique of Western legal hegemony over customary law in Indonesia through three analytical dimensions: epistemic hegemony within legal theory, institutional hegemony within judicial and regulatory structures, and ideological hegemony within the symbolic hierarchy of legal legitimacy. The goal of this research is to develop theoretical propositions for strengthening customary legal autonomy within pluralistic and decolonized national legal development.

METHODS

This study uses a normative juridical method because the research concerns legal doctrines, philosophical foundations, and theoretical frameworks governing the relationship between Western legal hegemony and customary law rather than empirical social behavior. The statutory approach is used to analyze the position of customary law in Indonesia's legal hierarchy, while the conceptual approach is applied to interpret CLS theory, hegemony, and legal pluralism as analytical constructs.¹⁰ Legal materials were collected through library research and analyzed with prescriptive-analytical reasoning to develop critical theoretical propositions for decolonizing customary law within a pluralistic legal system.¹¹

RESULTS AND DISCUSSION

Epistemic Hegemony: How Western Law Defines Legal Knowledge and Marginalizes Customary Law

The domination of Western law over customary law begins at the epistemic level, where the definition of what counts as "law" is constructed based on Western philosophical assumptions. Western legal epistemology conceptualizes law as codified, written, hierarchical, and derived from sovereign authority. In contrast, customary law is rooted in community practice, unwritten obligations, collective identity, and dialogical decision-making grounded in cultural ethics. Although both are normative systems that regulate social behavior, Western legal theory historically dismissed

⁸ Fitriani, M., Sitio, A. E. S., & Syahuri, T., "Dinamika dan Pengaruh Politik Hukum Kolonial Belanda terhadap Perkembangan Hukum Islam di Indonesia," *Jurnal Batavia* 1, no. 6 (2024): 313–322

⁹ Mutua, *Human Rights Standards*, 2016.

¹⁰ Indriati, E. D., & Sabowo, H. K., *Filsafat Hukum* (2023), 1–92.

¹¹ Saputra, R., "Implementasi Paradigma Postmodernisme dalam Pembaharuan Hukum di Indonesia," *Jurnal Kajian dan Pengembangan Umat* 4, no. 1 (2021).

customary systems as irrational or pre-legal because they did not conform to the positivistic understanding of law.¹²

This epistemic hierarchy became a mechanism of marginalization because the category of “law” itself was monopolized by Western ontology. Customary law was reinterpreted as tradition, culture, or social practice instead of being recognized as law in equal terms. Consequently, the institutional legitimacy of customary law was weakened because Western knowledge became the only authoritative framework for understanding legal reasoning.¹³

Legal education in Indonesia reinforces epistemic hegemony through structural emphasis on European jurisprudence and international legal conventions, while placing customary law as a minor theme within the curriculum. Future judges, prosecutors, and lawyers are therefore academically shaped to consider state law as the primary source of authority and customary law as secondary or supplementary. This institutional reproduction of legal knowledge produces a cycle in which legal actors internalize Western law as standard and customary law as inferior.¹⁴

The neutrality claimed by Western legal science also forms part of the hegemonic project. CLS argues that the presentation of law as neutral and objective is ideological because it obscures the historical power relations that shaped legal structures. In Indonesia, neutrality is frequently invoked to justify restricting the scope of customary law in the name of legal certainty, uniformity, or modernization. However, these rationales continue to privilege Western ideas of legality while denying the cultural legitimacy of customary law as an autonomous legal order. Epistemic hegemony is further strengthened through language. Legal terminology in statutory law, academic discourse, and courtroom practice relies heavily on Western concepts of rights, property, procedure, and sovereignty, leading to an implicit assimilation of customary concepts into Western vocabulary. This linguistic dominance forces indigenous societies to articulate their norms using the state’s legal language rather than their own cultural lexicon, resulting in epistemic dependency and the erosion of indigenous worldview within the legal arena.¹⁵

Western epistemology also determines which legal sources are considered authoritative in dispute resolution. Courts prioritize statutory texts and judicial precedents, while customary principles and testimonies of cultural authorities are often treated merely as sociological information rather than binding legal norms. When customary matters are adjudicated within state courts, they are judged according to Western reasoning rather than indigenous legal logic, illustrating how epistemic hegemony dictates the hierarchy of legal arguments.¹⁶ Another manifestation of epistemic domination is the state’s power to define what counts as “valid customary law.” Customary law is considered valid only if it can be written, formalized, and standardized into state legal instruments. This expectation transforms living customary law into a codified administrative regulation and thus strips away its dynamic, flexible, and dialogical character. The process produces a paradox: customary law is allowed to exist only after it abandons its indigenous form and adapts to Western legal epistemology.

¹² Diala, A. C., “The Concept of Living Customary Law: A Critique,” *The Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (2017): 143–165

¹³ Chimni, B. S., “Customary International Law: A Third World Perspective,” *American Journal of International Law* 112, no. 1 (2018): 1–46

¹⁴ Indriati, E. D., & Sabowo, H. K., *Filsafat Hukum* (2023), 1–92.

¹⁵ Mutua, M., *Human Rights Standards: Hegemony, Law, and Politics* (SUNY Press, 2016).

¹⁶ Merryman, J., & Pérez-Perdomo, R., *The Civil Law Tradition* (Stanford University Press, 2023)

Epistemic hierarchy also affects the production of legal scholarship, where Western theories are consistently positioned as the foundation for legal reform. Legal pluralism and decolonization discourses emerging from indigenous scholars and global South perspectives often remain peripheral in mainstream academic journals. CLS emphasizes that this pattern is not accidental but structural: Western epistemology is continuously reproduced through publication standards, citation conventions, and academic gatekeeping that define whose knowledge counts as legal theory.¹⁷

The implications of epistemic domination are profound for indigenous communities. As customary law loses institutional recognition, its authority weakens not only in legal structures but also within internal social consciousness. Younger generations internalize the belief that “true law” is state law, while customary law is merely cultural heritage. This epistemic dislocation contributes to cultural erosion and undermines community-based dispute resolution and resource management systems that have sustained indigenous societies for centuries.¹⁸ Strengthening the position of customary law therefore requires not only statutory recognition but also the reconstruction of epistemic legitimacy within legal discourse and legal education.

Institutional Hegemony: State Legal Structures and the Subordination of Customary Law

Institutional hegemony refers to the way Western-derived legal structures control the mechanisms of norm production, dispute settlement, and legal authority. In Indonesia, the state establishes itself as the sole sovereign entity that determines the validity of normative systems through legislation and judicial hierarchy. This framework originates from colonial legal architecture in which European civil law traditions were embedded into the state bureaucracy, while customary law was relegated to a secondary position and permitted only when aligned with state interests.¹⁹

The structure of the court system demonstrates this hierarchy. Formal courts inheriting Western adjudicative models are given exclusive constitutional authority to issue enforceable judgments, whereas customary courts remain limited to facilitating local agreement without binding legal effect unless approved by state law. This structurally prioritizes Western legality over indigenous mechanisms of restorative justice, even in disputes deeply embedded in cultural identity.²⁰ Institutional hegemony also manifests through legislative requirements that customary law must be proven, codified, or materially documented to be accepted by the state. Codification demands that oral and dynamic customary norms be transformed into written and standardized rules, eliminating procedural flexibility and dialogical negotiation that characterizes living customary law. This requirement forces customary law to mimic Western statute-based legal form in order to be institutionally accepted.

Judicial review mechanisms further illustrate how the state retains ultimate authority over customary law. Even when customary decisions resolve local disputes, the state reserves the power to annul or override them if they contradict statutory law. As a result, customary law lacks autonomous jurisdictional sovereignty and becomes procedurally dependent on state validation. Institutional control is also visible in land

¹⁷ Odermatt, J., “Decolonising the International Law Curriculum: A Critical Literature Review,” SSRN 4857916 (2023)

¹⁸ HM, M. S., Syafiah, S., & Usman, U., “Menjaga Tradisi: Dinamika Hukum Adat dalam Perkawinan di Asia Tenggara,” *Nusantara* 20, no. 2 (2023): 128–143

¹⁹ Lev, Daniel S., “Colonial Law and the Genesis of the Indonesian State,” in *Law and Society in East Asia* (2017)

²⁰ Merryman, J., & Pérez-Perdomo, R., *The Civil Law Tradition* (2023)

governance. Customary land tenure systems historically operate through communal stewardship, kinship obligations, and spiritual relationships to territory. However, state land law prioritizes individual title, cadastral mapping, and registration procedures modeled on Western property regimes, resulting in the legal invisibility of many ancestral territories. The dispossession of indigenous land therefore occurs not only economically but institutionally through legal exclusion.²¹

The table below summarizes key differences between institutional characteristics of Western-derived state law and customary law in Indonesia, highlighting how structural priorities shape legal hierarchies.

Legal Dimension	State Law (Western Model)	Customary Law (Indigenous Model)
Source of authority	Sovereign state	Community, lineage, tradition
Legal form	Written, codified, fixed	Oral, dynamic, adaptive
Jurisdiction	National and hierarchical	Local and communal
Enforcement	Coercive sanctions by state	Consensus-based and relational
Purpose of justice	Legal certainty and uniformity	Social harmony and restoration
Decision-making	Judicial adjudication	Communal deliberation or elders' council
Validity	Guaranteed by statute	Guaranteed by cultural legitimacy
Flexibility	Low	High

The institutional dominance of state law not only regulates the practice of customary law but also reshapes its internal logic. Customary procedures, once rooted in collective participation and consensus, are increasingly replaced by adversarial or bureaucratic procedures when incorporated into state programs. This transformation changes both the meaning and practice of customary justice, aligning it with Western legal rationality rather than maintaining indigenous jurisprudence. CLS emphasizes that institutional legal dominance works not through open prohibition but through systemic restrictions that appear neutral. In the Indonesian context, the state presents limits on customary law as necessary to maintain national legal unity and prevent legal fragmentation. However, this justification obscures the fact that customary systems have historically maintained order in diverse communities without collapsing social cohesion. The rhetoric of national stability thus legitimizes institutional hegemony rather than legal equality.²²

Institutional marginalization also extends to legal development agendas. Modernization and codification initiatives frequently position customary law as an obstacle to development because it is considered resistant to investment, infrastructure expansion, or extractive projects. As a result, the role of customary law in protecting communal welfare and ecological sustainability is dismissed, while state law facilitates market-based economic agendas that disproportionately benefit capital interests. Strengthening customary law therefore requires more than symbolic recognition. Without structural equality in jurisdiction, enforcement, and institutional legitimacy, customary law cannot function as an autonomous legal system. The institutional

²¹ Safiuddin, S., "Hak Ulayat Masyarakat Hukum Adat dan Hak Menguasai Negara," *Mimbar Hukum* 30, no. 1 (2018)

²² Saputra, R., "Implementasi Paradigma Postmodernisme dalam Pembaharuan Hukum di Indonesia," *Jurnal Kajian dan Pengembangan Umat* 4, no. 1 (2021).

dominance of Western-derived state law will continue to subordinate customary authority unless legal reform explicitly challenges the hierarchical arrangement of legal power.²³

Ideological Hegemony: Legal Legitimacy, Cultural Perception, and the Symbolic Authority of Western Law

Ideological hegemony operates through cultural perceptions that construct Western state law as modern, universal, and rational while framing customary law as outdated and parochial. This perception is not merely descriptive but prescriptive because it shapes how society evaluates legal legitimacy. When communities internalize that only state courts and written statutes constitute real law, customary systems lose authority even before they are institutionally suppressed. The ideological superiority of Western law is also reinforced through national legal identity. In Indonesia, becoming a modern and developed nation was historically equated with aligning domestic legal structures to European models. The symbolic prestige of Western legality became attached to ideas of progress, resulting in public policy tendencies that promote codification and judicial centralization while treating customary norms as transitional features destined to diminish over time.²⁴

Human rights discourse further contributes to ideological dominance when international norms are invoked selectively to assess or correct customary law. Although the protection of individual rights is fundamental, the uncritical prioritization of global normative standards often disregards the cultural foundations upon which indigenous law is built. As a result, legal reform framed as rights protection sometimes functions as cultural assimilation because indigenous mechanisms of relational justice are displaced by adversarial systems imported from Western legal theory. The media and public narratives reinforce this hierarchy by representing customary law primarily through cases of conflict, violence, or discriminatory practices without equal attention to its long history of restorative justice, environmental protection, and social solidarity. When customary law is associated mainly with controversy and state law with professionalism and order, public confidence gravitates toward Western legal institutions regardless of their actual performance.²⁵

Ideological hegemony is also reproduced through economic policy frameworks. Capital investment models define land governance, resource management, and infrastructure development according to Western legal notions of property, productivity, and contractual certainty. Indigenous stewardship values, which emphasize collective responsibility and spiritual ties to territory, are construed as barriers to economic efficiency. The market therefore becomes an ideological agent that privileges Western legality over customary norms and converts legal development into a tool of cultural overreach. CLS provides a lens to expose this ideological dimension by asserting that no legal system is ideologically neutral. CLS scholarship emphasizes that state law conceals historical domination by presenting its principles as universal, rational, and objective while labeling alternative systems as irrational and culturally biased. The ideological supremacy of Western state law over customary law is therefore sustained not by coercion alone but by belief systems that naturalize the dominance of one legal ideology over another.²⁶

²³ Galloway, K., "Toward a New Legal Common Sense," in *Leading Works on the Legal Profession* (2023)

²⁴ Lev, Daniel S., "Colonial Law and the Genesis of the Indonesian State," in *Law and Society in East Asia* (2017)

²⁵ Manea, Elham, *Women and Shari'a Law: The Impact of Legal Pluralism in the UK* (2016)

²⁶ Moyn, Samuel, "Reconstructing Critical Legal Studies," *Yale Law Journal* 134 (2024): 77

At the community level, ideological hegemony has long term implications for cultural continuity. When customary law becomes delegitimized within social consciousness, younger generations lose attachment to traditional dispute resolution, kinship governance, and resource management models. As cultural transmission weakens, customary law risks becoming a symbolic artifact rather than an active legal system. This decline does not occur because customary law is inherently obsolete but because ideological narratives reframe it as incompatible with modern citizenship and national identity.²⁷ The ideological dimension of legal hegemony ultimately ensures continuity of power structures by limiting the imagination of legal reform. Policymakers and legal scholars often approach reform through the enhancement of state law rather than exploring genuine legal pluralism where customary law becomes an equal normative system. Without shifting ideological assumptions about what constitutes law, institutional and epistemic reforms remain insufficient. Legal pluralism requires a transformation in legal consciousness so that customary law is not tolerated as cultural residue but recognized as a legitimate and autonomous source of justice.

CONCLUSIONS

This study demonstrates that Western legal hegemony over customary law functions at three interconnected levels: epistemic, institutional, and ideological. At the epistemic level, the Western definition of law limits legal legitimacy to written and codified norms, restricting living customary law from being recognized as an autonomous system. At the institutional level, the hierarchical court system, legislative dominance, and property law structures prevent customary law from operating with independent jurisdiction. At the ideological level, Western law gains symbolic prestige as neutral and universal while customary systems are framed as outdated, producing internalized belief patterns that erode community confidence in indigenous law.

To achieve genuine legal pluralism, reform cannot rely only on constitutional recognition or administrative accommodation but must address hegemonic structures that shape legal theory, legal institutions, and legal consciousness. Customary law can contribute to justice, cultural resilience, and ecological sustainability only when it is treated as a coequal normative order rather than a subordinate tradition. Strengthening customary legal autonomy requires reconstructing legal education, reformulating policy priorities, and validating indigenous epistemologies so that customary law can operate not under state tolerance but as a respected pillar of Indonesia's legal development.

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²⁷ HM, M. S., Syafiah, S., & Usman, U., "Menjaga Tradisi: Dinamika Hukum Adat dalam Perkawinan di Asia Tenggara," *Nusantara* 20, no. 2 (2023): 128–143

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