

# CHAPTER I

## INTRODUCTION

### A. Context of Study

The kawin tangkap tradition is an indigenous cultural practice that persists in certain regions of Indonesia, notably within the Sumba ethnic group in East Nusa Tenggara. This practice involves the forcible capture of a woman by a man, or a group of men on his behalf, with the intention of making her his wife. The ritualistic aspect of kawin tangkap, deeply embedded in the social fabric of these communities, is often justified as an expression of love and virility. However, from a contemporary legal perspective, the practice presents a myriad of ethical and legal dilemmas, particularly concerning the rights of women and the application of national laws that aim to protect individual freedoms and human rights.<sup>1</sup>

To understand the complexities of kawin tangkap, one must first appreciate its cultural roots. In the communities where it is practiced, kawin tangkap is not merely a marriage custom but a rite of passage for men, symbolizing their ability to protect and provide. It is a social event, often involving the entire community, and is sometimes followed by negotiations between the families of the man and the woman, where a bride price (belis) is discussed and agreed upon.<sup>2</sup>

Proponents of the tradition argue that kawin tangkap is a consensual act, citing cases where women are aware of the impending "capture" and have tacitly

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<sup>1</sup> Johanis Putratama Kamuri and Grace Mariany Toumeluk, "Tinjauan Teologis Terhadap Tradisi Kawin Tangkap di Pulau Sumba–Nusa Tenggara Timur," *Dunamis: Jurnal Teologi dan Pendidikan Kristiani* 6, no. 1 (2021), <https://doi.org/10.30648/dun.v6i1.493>.

<sup>2</sup> Muhdi Muhdi, "'Kawin Tangkap' Tradition in Maqasid Al-Syari'ah and Indonesian Law Perspective," *Shakhsyah Burhaniyah: Jurnal Penelitian Hukum Islam* 5, no. 2 (2020), <https://doi.org/10.33752/sbjphi.v5i2.1635>.

agreed to the arrangement. They claim that the practice is a form of cultural expression that should be preserved and respected. However, this view is contested by many who argue that the tradition, in practice, often bypasses the woman's consent, thus violating her personal autonomy and dignity.<sup>3</sup>

The kawin tangkap tradition raises significant legal and ethical concerns, particularly in its potential conflict with Indonesia's national laws and international human rights standards. Indonesia, as a signatory to various international human rights conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is obligated to protect the rights of women and ensure that cultural practices do not infringe upon these rights.<sup>4</sup>

Ethically, kawin tangkap is problematic because it often disregards the woman's agency. In many cases, women subjected to kawin tangkap experience significant psychological trauma and social stigmatization, especially if the marriage is not ultimately agreed upon by her family or if the woman is not "successfully" married off to her captor. This raises questions about the balance between preserving cultural traditions and upholding individual rights and dignity.<sup>5</sup>

Hukum adat (customary law) plays a central role in regulating marriage practices in many Indonesian communities, including those where kawin tangkap

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<sup>3</sup> Muhdi Muhdi, "'Kawin Tangkap' Tradition in Maqasid Al-Syari'ah and Indonesian Law Perspective," *Shakhsyah Burhaniyah: Jurnal Penelitian Hukum Islam* 7, no. 2 (2020), <https://doi.org/10.33752/sbjphi.v7i2.1635>.

<sup>4</sup> Astrid Budi Ati, "Tinjauan Kriminologis Budaya Nusa Tenggara Barat Tradisi Kawin Tangkap (Piti Rambang) Criminological Review of West Nusa Tenggara Culture Marriage Tradition (Piti Rambang)," *Fundamental: Jurnal Ilmiah Hukum* Vol. 10, no. 1 Januari-Juni (2021).

<sup>5</sup> Habibi Al Amin and Muhdi Muhdi, "Catch Marriage in Maqashid Al-Syari'ah and Indonesian Law Perspective," *Shakhsyah Burhaniyah: Jurnal Penelitian Hukum Islam* 6, no. 2 (2021), <https://doi.org/10.33752/sbjphi.v6i2.3948>.

is practiced. Hukum adat operates alongside the national legal system, and in some cases, it takes precedence in local communities. This dual legal system creates a complex legal landscape where the enforcement of national laws, particularly those protecting individual rights, can be inconsistent.<sup>6</sup>

In communities that practice kawin tangkap, hukum adat often legitimizes the act as a traditional marriage custom. Local customary leaders, who are the custodians of hukum adat, may see the practice as a legitimate form of marriage that should be respected and preserved. However, this creates a legal conflict when such practices are at odds with national laws and international human rights standards.

The tension between hukum adat and national law is a recurring theme in Indonesia's legal landscape, particularly in areas related to family law, land rights, and indigenous customs. The Indonesian government has recognized the importance of hukum adat in preserving the cultural heritage of its diverse ethnic groups. However, it also faces the challenge of ensuring that customary practices do not infringe upon the rights guaranteed by the national constitution and international treaties.

The Indonesian legal system has, to some extent, addressed the challenges posed by customary practices like kawin tangkap. However, the enforcement of laws prohibiting practices that violate individual rights remains inconsistent, particularly in remote regions where customary law holds sway. The Indonesian

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<sup>6</sup> Naomi Femilia and Et Al, "Analisis Pengaruh Tradisi Kawin Tangkap di Sumba Terhadap Hak Asasi Perempuan," *Unes Law Review* 6, no. 1 (2023).

government has an obligation to ensure that all citizens, regardless of their cultural background, are afforded the same legal protections.<sup>7</sup>

One of the key challenges in addressing the legal and ethical issues surrounding kawin tangkap is the lack of awareness and understanding of national laws in communities where the practice is prevalent. Many individuals in these communities may not be aware that kawin tangkap is considered illegal under national law or that it could result in criminal penalties.<sup>8</sup>

To address this, there is a need for comprehensive legal reform that includes both legal education and the harmonization of national laws with customary practices. Legal education programs that target local communities, particularly in areas where kawin tangkap is practiced, are essential in raising awareness about the rights of women and the legal implications of customary practices. Additionally, the government could work with local customary leaders to reform hukum adat in a way that aligns with national laws and international human rights standards, ensuring that cultural practices are preserved without compromising individual rights.

The challenge of balancing cultural preservation with the protection of human rights is not unique to Indonesia, but it is particularly pronounced in a country as culturally diverse as Indonesia. The kawin tangkap tradition exemplifies the complexities of this balancing act. While cultural practices are an integral part

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<sup>7</sup> Herman Et Al., "Adat Kawin Tangkap (Perkawinan Paksa) Sebagai Tindak Pidana Kekerasan Seksual," *Halu Oleo Legal Research* 5, no. 1 (2023).

<sup>8</sup> Widodo Dwi Putro, "Human Rights and Its Contested Legal Paradigm," *Journal of Southeast Asian Human Rights* 7, no. 2 (2023), <https://doi.org/10.19184/jseahr.v7i2.39308>.

of Indonesia's national identity, they must be practiced in a manner that respects the rights and dignity of all individuals.<sup>9</sup>

This requires a nuanced approach that recognizes the importance of cultural traditions while also ensuring that these traditions do not infringe upon the rights of others. The Indonesian government, in collaboration with local communities, legal scholars, and human rights organizations, must work towards a legal framework that accommodates cultural diversity while upholding the principles of justice and equality.<sup>10</sup>

The practice of kawin tangkap represents a complex intersection between customary law (hukum adat) and national law, highlighting the challenges of reconciling traditional practices with modern legal frameworks. In regions where kawin tangkap is practiced, hukum adat often legitimizes the tradition as a form of marriage, creating potential conflicts with national laws that prioritize individual rights and freedoms. This study seeks to explore whether existing legal frameworks adequately address the rights of women subjected to kawin tangkap, or if there is a need for new legal interpretations and frameworks to ensure their protection.<sup>11</sup>

Another critical aspect of this study is the investigation of potential errors in the application of both formal and material law in cases involving kawin tangkap.

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<sup>9</sup> Elanda Welhelmina Doko, I Made Suwitra, and Diah gayatry Sudibya, "Tradisi Kawin Tangkap (Piti Rambang) Suku Sumba di Nusa Tenggara Timur," *Jurnal Konstruksi Hukum* 2, no. 3 (2021), <https://doi.org/10.22225/jkh.2.3.3674.656-660>.

<sup>10</sup> Dedi Indrama, "Tradisi Kawin Tangkap di Tinjau Dari Perspektif Hukum Islam," *Al-Risalah: Jurnal Hukum Keluarga Islam (Ahwal Al-Syakhsiyah)* 3, no. 1 (2022), <https://doi.org/10.30863/al-risalah.v3i1.2150>.

<sup>11</sup> Marthen Malo, Daud Saleh Luji, and Yakobus Adi Saingo, "Praktik Kawin Tangkap di Sumba Barat Daya Dalam Perspektif Perkawinan Kristen," *Kamasean: Jurnal Teologi Kristen* 4, no. 2 (2023), <https://doi.org/10.34307/kamasean.v4i2.251>.

Given the cultural significance of kawin tangkap in certain communities, there may be instances where legal principles are misapplied or overlooked to accommodate customary practices. This research will examine whether such instances result in legal outcomes that align with the principles of justice, particularly in protecting the rights of individuals against coercive customs.

The study will analyze court decisions and legal proceedings related to kawin tangkap to identify any discrepancies in the application of law. By doing so, it aims to highlight the need for consistent and just legal practices that do not compromise individual rights in favor of cultural traditions. This analysis is crucial for understanding how the legal system can better protect vulnerable individuals, particularly women, from practices that may infringe upon their rights and freedoms.

The kawin tangkap tradition potentially conflicts with fundamental legal principles, such as the right to personal freedom and protection from forced marriage. These principles are enshrined in both national and international legal frameworks, including Indonesia's commitment to human rights conventions like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This study will critically analyze whether kawin tangkap aligns with or contradicts these core values upheld by Indonesian law, particularly in the context of human rights laws and gender equality norms.<sup>12</sup>

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<sup>12</sup> Septi Nur Wijayanti, "Hubungan Antara Pusat dan Daerah Dalam Negara Kesatuan Republik Indonesia Berdasarkan Undang-Undang Nomor 23 Tahun 2014," *Jurnal Media Hukum* 23, no. 2 (2017), <https://doi.org/10.18196/jmh.2016.0079.186-199>.

By examining the potential conflicts between kawin tangkap and established legal principles, the research will contribute to the ongoing discourse on balancing cultural preservation with the protection of individual rights. The findings of this study could inform policy recommendations and legal reforms that ensure cultural practices like kawin tangkap are practiced in a manner that respects the rights and dignity of all individuals, particularly women. This critical analysis is essential for advancing legal and social justice in Indonesia, ensuring that traditional practices do not perpetuate inequality or infringe upon fundamental human rights.

The study of the kawin tangkap tradition in Indonesia is deeply intertwined with several national laws, highlighting the legal challenges of balancing customary practices with modern legal standards. The Marriage Law (Undang-Undang Nomor 1 Tahun 1974) plays a crucial role in this context, as it explicitly requires the free consent of both parties to a marriage. This law directly contradicts the practice of kawin tangkap, where a woman's consent is often bypassed or coerced. The study aims to assess whether this law is effectively enforced in regions where kawin tangkap is prevalent and if there are gaps in its application that need to be addressed.<sup>13</sup>

Furthermore, the Human Rights Law (Undang-Undang Nomor 39 Tahun 1999) guarantees every citizen's right to personal freedom and protection from violence. This law is particularly relevant in the context of kawin tangkap, as the practice can be seen as a violation of a woman's right to freedom and bodily

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<sup>13</sup> Dian Herlambang and Kamal Fahmi Kurnia, "Analisis Perubahan Isu Desentralisasi Atas Digantinya Undang-Undang Nomor 32 Tahun 2004 Menjadi Undang-Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah," *Justicia Sains: Jurnal Ilmu Hukum* 7, no. 1 (2022), <https://doi.org/10.24967/jcs.v7i1.1636>.

autonomy. The study will examine how this law is used to protect women in areas where kawin tangkap is practiced and whether it provides adequate legal remedies for those who have been subjected to this tradition.

The Law on the Elimination of Domestic Violence (Undang-Undang Nomor 23 Tahun 2004) also plays a significant role in this research, as it provides protection for victims of domestic violence, which could include women forced into marriage through kawin tangkap. This law's relevance lies in its potential to offer legal recourse for women who suffer from coercion or violence within marriages that began with kawin tangkap. The study will investigate how effectively this law is implemented in protecting victims and whether there are challenges in applying it within the context of customary practices.<sup>14</sup>

Additionally, Article 28B Paragraph 1 of the Indonesian Constitution (UUD 1945) is a foundational legal principle that guarantees the right of every citizen to form a family and have children through a legal marriage.<sup>15</sup> This article emphasizes the importance of mutual consent and agreement in marriage as a prerequisite for forming a family.<sup>16</sup> In the context of kawin tangkap, this constitutional provision raises critical questions about the legality of forced marriage based on customs. The

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<sup>14</sup> Nur Wijayanti, "Hubungan Antara Pusat dan Daerah Dalam Negara Kesatuan Republik Indonesia Berdasarkan Undang-Undang Nomor 23 Tahun 2014."

<sup>15</sup> Chandra Halim and Vicentius Patria Setyawan, "Analysis of Forced Marriage as an Offense of Sexual Violence", *Jurnal Kewarganegaraan* Vol.7 No.2 (2023), [https://journal.upy.ac.id/index.php/pkn/article/download/5514/3263/15345?utm\\_source=chatgpt.com](https://journal.upy.ac.id/index.php/pkn/article/download/5514/3263/15345?utm_source=chatgpt.com)

<sup>16</sup> The Constitutional Court of the Republic of Indonesia, "The 1945 Constitution of the Republic of Indonesia", The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia (2015), <https://www.mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf>



study will explore how this constitutional right is upheld or potentially violated in regions where kawin tangkap is practiced.<sup>17</sup>

Lastly, regional regulations, such as the Peraturan Daerah (Perda) of East Nusa Tenggara, which may recognize and regulate customary law, including marriage practices, are also critical to this study. These local laws can either reinforce or contradict national legal standards, creating a complex legal environment. The study will explore how these local regulations interact with national laws and whether they contribute to upholding or undermining the rights of individuals, particularly women, in communities where kawin tangkap is practiced. By analyzing these regional laws, the research aims to provide a comprehensive understanding of the legal landscape surrounding kawin tangkap.<sup>18</sup> And offer recommendations for legal reforms that better protect individual rights while respecting cultural traditions.

Given the background discussed above, this study titled "Adat Kawin Tangkap In Indonesian Law Perspective" has been chosen to critically examine the intersection of customary practices and national legal frameworks in Indonesia. The research aims to explore the legal ambiguities, potential misapplications of law, and conflicts with fundamental legal principles associated with the kawin tangkap tradition. Through this analysis, the study seeks to contribute to a deeper

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<sup>17</sup> Ratna Batara Munti, Ema Mukarramah, Elisabeth Anita Dhewy, "Qualitative Study Report: Stakeholder Perceptions and Support toward the Anti-Sexual Violence Bill and Law No.16/2019 on Amendments to the Marriage Law", International Ngo Forum on Indonesian Development (2020), <https://infid.org/wp-content/uploads/2023/12/Gender-Equality-Qualitative-Study-Report.pdf>

<sup>18</sup> Mujiburrahman Mujiburrahman, "Eksploitasi Seksual Anak Perspektif Undang Undang Perlindungan Anak Sebagaimana Telah Diubah Dengan Undang Undang Nomor 35 Tahun 2014 dan Perubahan Kedua Undang Undang Nomor 17 Tahun 2016," *Jurnal Hukum Tri Pantang* 6, no. 2 (2020), <https://doi.org/10.51517/jhtp.v6i2.263>.

understanding of how such cultural practices are navigated within the modern Indonesian legal system and to propose recommendations for legal reforms that ensure the protection of individual rights.

## **B. Problem Formulation**

The research problem in this study is:

1. How does the kawin tangkap tradition align with or contradict the existing national laws in Indonesia, particularly in terms of consent and individual rights?
2. What legal challenges and inconsistencies arise in the application of both customary and national laws in cases involving the kawin tangkap tradition, and how can these be addressed to protect the rights of those involved?

## **C. Research Objectives**

The research objectives based on the problem statements provided could be formulated as follows:

1. To analyze the alignment or contradiction between the kawin tangkap tradition and existing national laws in Indonesia, focusing on issues of consent and the protection of individual rights.
2. To identify and evaluate the legal challenges and inconsistencies in the application of customary and national laws in cases involving the kawin tangkap tradition, and to propose legal reforms or strategies to better protect the rights of affected individuals.

#### D. Research Originality

Here is the Originality of The Research table that shows a comparison between previous studies and your research titled "Adat Kawin Tangkap In Indonesian Law Perspective":

No.	Sources	Discussion
1.	Kaimuddin Haris O.Hidayat S.Nurrohmah Muntalib D., "Adat Kawin Tangkap (Perkawinan Paksa) sebagai Tindak Pidana Kekerasan Seksual," <i>Halu Oleo Legal Research</i> (2023). <sup>19</sup>	Previous research examines kawin tangkap as a form of abduction and a violation of marriage laws in Indonesia. It focuses on the legal implications of forced marriages and the psychological impact on women. This study differs by exploring the broader legal ambiguities and potential reforms needed to align customary practices with national law.
2.	Femilia N.et Al, "Analisis Pengaruh Tradisi Kawin Tangkap di Sumba Terhadap Hak Asasi Perempuan," <i>Unes Law Review</i> (2023). <sup>20</sup>	This study discusses the violation of human rights in the context of kawin tangkap and how it undermines the personal freedoms of women. The research highlights how this tradition has evolved over time. In contrast, the current study will explore not only the human rights aspects but also the legal inconsistencies in the application of both customary and national laws.
3.	Doko E. W., Suwitra I. M., Sudibya D. G., "Tradisi Kawin Tangkap (Piti Rambang) Suku Sumba di Nusa Tenggara Timur," <i>Jurnal Konstruksi Hukum</i> (2021). <sup>21</sup>	Previous work examines the socio-cultural factors that sustain the tradition and its legal implications. It focuses on how local customs and patriarchal structures support kawin tangkap. The current study will compare these findings with Indonesian national law to evaluate the legal standing of the practice and propose necessary legal reforms.
4.	Amin H. A., Muhdi M., "Catch Marriage In Maqashid Al-	This research evaluates the kawin tangkap tradition from an Islamic law

<sup>19</sup> Herman et al., "Adat Kawin Tangkap (Perkawinan Paksa) Sebagai Tindak Pidana Kekerasan Seksual," *Halu Oleo Legal Research* 5, no. 1 (2023).

<sup>20</sup> Femilia and et al, "Analisis Pengaruh Tradisi Kawin Tangkap di Sumba Terhadap Hak Asasi Perempuan."

<sup>21</sup> Elanda Welhelmina Doko, I Made Suwitra, and Diah gayatry Sudibya, "Tradisi Kawin Tangkap (Piti Rambang) Suku Sumba di Nusa Tenggara Timur," *Jurnal Konstruksi Hukum* 2, no. 3 (2021), <https://doi.org/10.22225/jkh.2.3.3674.656-660>.

	<p>Syari'ah And Indonesian Law Perspective," Shakhshiyah Burhaniyah (2021).<sup>22</sup></p>	<p>perspective, using the maqasid al-shariah framework. It concludes that the practice can be considered legitimate under certain religious interpretations. In contrast, the current study will focus on the legal conflict between such interpretations and Indonesian national law, particularly in protecting human rights and gender equality.</p>
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## E. Definition of Terms

In the context of this study, several key terms are used that require clear definitions to ensure a comprehensive understanding of the topic. These definitions help establish a common framework for discussing the legal, cultural, and social aspects of the kawin tangkap tradition within the Indonesian legal perspective.

### 1. *Kawin Tangkap*

Kawin tangkap refers to a traditional practice found in certain regions of Indonesia, particularly in Sumba, where a man "captures" a woman with the intent to marry her. This practice often occurs without the woman's prior consent, and in some cases, without the knowledge or approval of her family. The term is derived from the Indonesian words "kawin," meaning marriage, and "tangkap," meaning to capture. While it is considered a cultural tradition by some, kawin tangkap has been increasingly scrutinized due to its potential violation of individual rights,

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<sup>22</sup> Muhdi Muhdi, "Kawin Tangkap' Tradition in Maqasid Al-Syari'ah and Indonesian Law Perspective," Shakhshiyah Burhaniyah: Jurnal Penelitian Hukum Islam 5, no. 2 (2020), <https://doi.org/10.33752/sbjphi.v5i2.1635>.

particularly those of women, and its conflict with modern legal frameworks that prioritize consent in marriage.<sup>23</sup>

## **2. Hukum Adat (Customary Law)**

Hukum adat refers to the body of traditional law that governs the social and cultural practices of indigenous communities in Indonesia. It is a set of unwritten laws and norms that have been passed down through generations and are often specific to particular regions or ethnic groups. Hukum adat plays a significant role in the practice of kawin tangkap, as it provides the cultural justification for the tradition. However, hukum adat can sometimes be at odds with national laws, particularly in cases where it infringes upon human rights or contradicts the principles of justice established in the Indonesian legal system.<sup>24</sup>

## **3. National Law**

National law in this context refers to the formal legal framework established by the Indonesian government, including statutes, regulations, and judicial decisions that apply uniformly across the country. Key national laws relevant to this study include the Marriage Law (Undang-Undang Nomor 1 Tahun 1974), which criminalizes abduction for marriage purposes under Article 332. National law also includes human rights legislation, such as the Human Rights Law (Undang-Undang Nomor 39 Tahun 1999), which protects individual freedoms and rights, and the Law on the Elimination of

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<sup>23</sup> Femilia and Et Al, "Analisis Pengaruh Tradisi Kawin Tangkap di Sumba Terhadap Hak Asasi Perempuan."

<sup>24</sup> Amin and Muhdi, "Catch Marriage in Maqashid Al-Syari'ah and Indonesian Law Perspective."

Domestic Violence (Undang-Undang Nomor 23 Tahun 2004), which provides protection against domestic violence.<sup>25</sup>

#### **4. Consent**

Consent is a key legal and ethical principle in marriage, referring to the voluntary and informed agreement of both parties to enter into a marital union. Under Indonesian law, consent is a fundamental requirement for the validity of a marriage, as stipulated in the Marriage Law (Undang-Undang Nomor 1 Tahun 1974). In the context of kawin tangkap, the issue of consent is central to the debate, as the practice often involves coercion or the absence of genuine consent from the woman involved. The study examines how the concept of consent is interpreted and applied in cases of kawin tangkap and its implications for the legality of such marriages.<sup>26</sup>

#### **5. Human Rights**

Human rights are the basic rights and freedoms that are guaranteed to every individual, regardless of nationality, sex, ethnicity, religion, or any other status. These rights are enshrined in international law and protected by national laws, such as Indonesia's Human Rights Law (Undang-Undang Nomor 39 Tahun 1999). In the context of kawin tangkap, human rights issues arise primarily around the rights to personal freedom, protection from violence, and gender equality. The study explores how kawin tangkap

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<sup>25</sup> Putro, "Human Rights and Its Contested Legal Paradigm: A Case Study of Bride Kidnapping in Sumba."

<sup>26</sup> Ati, "Tinjauan Kriminologis Budaya Nusa Tenggara Barat Tradisi Kawin Tangkap (Piti Rambang) Criminological Review of West Nusa Tenggara Culture Marriage Tradition (Piti Rambang)."

practices may infringe upon these rights and what legal mechanisms are in place to protect individuals, particularly women, from such violations.<sup>27</sup>

## **6. Legal Pluralism**

Legal pluralism refers to the coexistence of multiple legal systems within a single country, such as the parallel existence of hukum adat (customary law) and national law in Indonesia. This concept is crucial in understanding the legal complexities surrounding kawin tangkap, as it involves navigating the tensions between traditional practices sanctioned by hukum adat and the statutory laws enforced by the state. The study examines how legal pluralism affects the enforcement of rights and the resolution of conflicts between customary and national laws.<sup>28</sup>

By defining these key terms, the study aims to provide a clear and consistent framework for analyzing the complex interplay between culture, law, and individual rights in the context of kawin tangkap within Indonesian society.

### **F. Theoretical Review**

In examining the kawin tangkap tradition within the Indonesian legal context, several theoretical frameworks are essential to provide a comprehensive understanding of the cultural, legal, and social dynamics at play. This section explores key theories, including legal pluralism, human rights theory, feminism,

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<sup>27</sup> Putro, "Human Rights and Its Contested Legal Paradigm."

<sup>28</sup> Herman Et Al., "Adat Kawin Tangkap (Perkawinan Paksa) Sebagai Tindak Pidana Kekerasan Seksual."

sociological jurisprudence, and legal anthropology, which together offer a nuanced perspective on the intersection between traditional practices and modern law.<sup>29</sup>

### **1. The Existence of Adat Law In Indonesia**

Adat law, or customary law, is a fundamental component of Indonesia's legal and cultural framework, reflecting the rich diversity of the archipelago's ethnic groups. Adat law encompasses a wide range of traditional practices, norms, and regulations that govern various aspects of life, including marriage, property rights, and conflict resolution. This system operates alongside the national legal framework, creating a dual legal structure that accommodates both local customs and state laws. The integration of adat law into the national legal system demonstrates Indonesia's commitment to preserving cultural heritage while promoting legal uniformity.<sup>30</sup>

Adat law is characterized by its flexibility and adaptability, allowing it to address the unique needs and values of different communities. This system is particularly important in rural and indigenous areas, where traditional practices play a significant role in daily life. The recognition of adat law within the national legal framework ensures that local customs are not only preserved but also respected by the formal legal system. This respect is crucial for maintaining social cohesion and cultural identity, as it

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<sup>29</sup> Mujiburrahman Mujiburrahman, "Eksplorasi Seksual Anak Perspektif Undang Undang Perlindungan Anak Sebagaimana Telah Diubah Dengan Undang Undang Nomor 35 Tahun 2014 dan Perubahan Kedua Undang Undang Nomor 17 Tahun 2016," *Jurnal Hukum Tri Pantang* 6, no. 2 (2020), <https://doi.org/10.51517/jhtp.v6i2.263>.

<sup>30</sup> Geoffrey Swenson, "Legal Pluralism in Theory and Practice," *International Studies Review* 20, no. 3 (2018), <https://doi.org/10.1093/ISR/VIX060>.



acknowledges the legitimacy of traditional practices and their role in shaping community norms.

However, the coexistence of adat law and national law also presents challenges. The primary issue arises when customary practices conflict with national legal standards, particularly those related to human rights and individual freedoms. In such cases, the legal system must navigate the tension between respecting cultural traditions and upholding constitutional principles. The dual legal system thus requires a delicate balance, ensuring that adat law is applied in a manner that does not undermine fundamental rights or violate national laws. This balancing act is essential for maintaining both cultural integrity and legal coherence within Indonesia's diverse legal landscape.<sup>31</sup>

## **2. Adat Law Kawin Tangkap In Law Indonesia**

The tradition of kawin tangkap, where a man captures a woman to marry her, is a notable example of adat law in practice. This tradition is particularly prevalent in certain regions of Indonesia, such as Sumba in East Nusa Tenggara. Kawin tangkap reflects the cultural practices and social norms of these communities, where it has historically been considered a legitimate method of arranging marriages. The practice, however, poses

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<sup>31</sup> Keebet Von Benda-Beckmann and Bertram Turner, "Legal Pluralism, Social Theory, and the State," *Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018), <https://doi.org/10.1080/07329113.2018.1532674>.

significant legal and ethical questions, especially when viewed through the lens of national laws that prioritize individual rights and consent.<sup>32</sup>

In the context of Indonesian law, kawin tangkap is recognized as part of the cultural heritage but is subject to scrutiny under national legal standards. The primary challenge is reconciling the practice with laws that emphasize the importance of free and informed consent in marriage. Indonesian law, including the Marriage Law (Undang-Undang Nomor 1 Tahun 1974), sets clear requirements for marriage that conflict with the principles underlying kawin tangkap. Specifically, these laws mandate that marriage must be entered into voluntarily by both parties, without coercion or duress.<sup>33</sup>

The integration of kawin tangkap into the legal framework requires a careful examination of how traditional practices can be adapted to comply with national legal standards. This involves assessing whether adat law practices, like kawin tangkap, align with or contradict the principles of individual autonomy and consent as enshrined in Indonesian law. The challenge is to ensure that cultural practices do not infringe upon fundamental rights, while still allowing for the preservation of traditional customs. Addressing this issue is crucial for achieving a legal balance that

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<sup>32</sup> Luis Romano Damiani Pellegrini, "Theoretical and Conceptual Foundations of the United Nations Convention on the Rights of Persons With Disabilities: Human Rights Theory and the Social Model of Disability," *Anuario Mexicano de Derecho Internacional* 23 (2023), <https://doi.org/10.22201/ijj.24487872e.2023.23.17903>.

<sup>33</sup> Frédéric Mégret, "International Human Rights Law Theory," in *Research Handbook on the Theory and History of International Law, Second Edition*, 2020, <https://doi.org/10.4337/9781788116718.00015>.

respects cultural diversity while upholding universal legal and human rights standards.

### **3. Marriage Law In Indonesia**

Marriage law in Indonesia is primarily governed by Undang-Undang Nomor 1 Tahun 1974 (Law No. 1 of 1974) on Marriage, which establishes the legal requirements for marriage and emphasizes the necessity of free and informed consent from both parties. This law is a cornerstone of Indonesia's legal framework for family matters, outlining the conditions under which a marriage is considered valid. It provides a comprehensive legal structure that governs various aspects of marriage, including registration, consent, and the rights and obligations of spouses.<sup>34</sup>

The Marriage Law stipulates that both parties must willingly consent to the marriage, and any form of coercion or forced marriage is explicitly prohibited. This requirement is fundamental to ensuring that marriages are entered into voluntarily and with mutual agreement, reflecting the principles of personal autonomy and equality. The law also addresses issues such as the minimum age for marriage, registration procedures, and the legal consequences of non-compliance. By setting clear standards for marriage, the Marriage Law aims to protect individuals from coerced or non-consensual unions and to uphold the integrity of marital agreements.<sup>35</sup>

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<sup>34</sup> Linda Sudiono, "The Vulnerability of Women in Dealing with Covid-19 Pandemic: Feminist Legal Theory Approach," *Hasanuddin Law Review* 7, no. 3 (2021), <https://doi.org/10.20956/halrev.v7i3.2350>.

<sup>35</sup> Margaret Thornton, "Postscript: Feminist Legal Theory in the 21st Century," *Laws*, 2020, <https://doi.org/10.3390/laws9030016>.

The application of the Marriage Law is crucial for evaluating practices like kawin tangkap, which may conflict with the principles of free consent and equality outlined in the law. The law provides a legal framework for assessing whether such practices meet the standards of voluntary and consensual marriage. Additionally, the Marriage Law serves as a basis for legal reforms and interventions aimed at addressing issues related to forced marriage and ensuring that traditional practices align with modern legal standards. By providing a clear and enforceable set of rules, the Marriage Law plays a vital role in safeguarding individual rights and promoting fair and equitable marriage practices in Indonesia.

#### **4. Sociological Jurisprudence**

Sociological jurisprudence focuses on the relationship between law and society, emphasizing the importance of understanding legal phenomena within their social context. This theoretical framework is particularly useful for examining kawin tangkap as it provides insights into how legal norms interact with cultural practices and social structures.<sup>36</sup>

Roscoe Pound (1911), a key proponent of sociological jurisprudence, argued that the law should be understood as a social institution that reflects and shapes societal values. In the context of kawin tangkap, this approach involves analyzing how the practice is embedded within the social fabric of certain communities, how it is justified and

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<sup>36</sup> Koko Roby Yahya, "Aliran Hukum Sociological Jurisprudence Dalam Perseptif Filsafat Hukum," *Jurnal Insan Pendidikan dan Sosial Humaniora* 1, no. 1 (2023), <https://doi.org/10.59581/jipsoshum-widyakarya.v1i1.76>.

perpetuated, and how it is perceived by both practitioners and external observers, including legal authorities.<sup>37</sup>

Sociological jurisprudence also considers the impact of law on social change. In the case of kawin tangkap, the introduction of national laws that emphasize individual rights and consent in marriage may lead to shifts in social attitudes toward the practice. This theory encourages an examination of how legal interventions can be used to challenge and potentially transform cultural practices that are deemed harmful or unjust.

## **5. Legal Anthropology**

Legal anthropology is the study of law within its cultural context, focusing on how legal systems are shaped by and interact with cultural practices. This theoretical approach is particularly relevant for analyzing kawin tangkap, as it involves understanding the practice not just as a legal issue but as a deeply rooted cultural tradition.<sup>38</sup>

Sally Engle Merry (2006) discusses how legal anthropologists examine the ways in which local customs and traditions intersect with formal legal systems. In the case of kawin tangkap, legal anthropology provides a framework for understanding how the practice is culturally

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<sup>37</sup> Nabilah Apriani and Nur Shofa Hanafiah, "Telaah Eksistensi Hukum Adat Pada Hukum Positif Indonesia Dalam Perspektif Aliran Sociological Jurisprudence Review The Existence of Customary Law on Indonesian," *Jurnal Hukum Lex Generalis* 3, no. 3 (2022).

<sup>38</sup> Márton Matyasovszky-Németh and Balázs Fekete, "Traces of Legal Anthropology in Hungary in the 20th Century. An Attempt to Define the Folk Concept of Law," *Acta Ethnographica Hungarica* 67, no. 1 (2023), <https://doi.org/10.1556/022.2022.00005>.

legitimized, how it is regulated by hukum adat, and how it is contested or negotiated within the broader legal system.<sup>39</sup>

Legal anthropology also emphasizes the importance of cultural relativism—the idea that cultural practices should be understood within their own context rather than judged solely by external standards. However, this approach must be balanced with a critical assessment of how certain cultural practices may conflict with universal human rights norms, particularly when they involve coercion or violence.<sup>40</sup>

In this study, legal anthropology offers a lens through which to explore the cultural significance of kawin tangkap and its role within the social structure of the communities that practice it. This perspective is crucial for understanding the challenges of applying national law to a practice that is deeply intertwined with local identity and tradition.

## **6. The Interplay of Theories**

The theoretical frameworks discussed above—legal pluralism, human rights theory, feminist legal theory, sociological jurisprudence, and legal anthropology—are not mutually exclusive but rather complementary. Together, they provide a comprehensive understanding of the kawin tangkap tradition and its place within the Indonesian legal system.<sup>41</sup>

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<sup>39</sup> Syaikh, “The Dispute Settlements of Inheritance in Palangka Raya: A Legal Anthropology Approach,” *Mazahib Jurnal Pemikiran Hukum Islam* 18, no. 1 (2019), <https://doi.org/10.21093/mj.v18i1.1441>.

<sup>40</sup> João Francisco Kleba Lisboa, “Indigenous Peoples and the Judiciary in Brazil: An Appeal for a Legal Anthropology Approach,” *Vibrant Virtual Brazilian Anthropology* 19 (2022), <https://doi.org/10.1590/1809-43412022v19a803>.

<sup>41</sup> Bishnu Kumar Khadka, “Interplay of Learning Theories in the Development of Reading Skills,” *Journal of Tikapur Multiple Campus* 7, no. 1–2 (2024), <https://doi.org/10.3126/jotmc.v7i1-2.63185>.

Legal pluralism allows for an examination of the coexistence and conflict between hukum adat and national law, highlighting the legal complexities involved in regulating kawin tangkap. Human rights theory and feminist legal theory provide critical tools for evaluating the practice from the perspective of individual rights and gender equality, questioning whether the tradition can be justified in light of contemporary legal and ethical standards.<sup>42</sup>

Sociological jurisprudence and legal anthropology offer insights into the social and cultural dimensions of kawin tangkap, emphasizing the importance of understanding the practice within its broader societal context. These theories also underscore the potential for law to act as an agent of social change, challenging harmful practices while respecting cultural diversity.<sup>43</sup>

By integrating these theoretical perspectives, the study aims to provide a nuanced analysis of the kawin tangkap tradition, addressing its cultural significance, its legal implications, and its impact on individual rights. This approach allows for a balanced examination of the practice, considering both the need to protect human rights and the importance of cultural traditions within Indonesia's diverse legal landscape.

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<sup>42</sup> John Van Maanen, Jesper B. Sørensen, and Terence R. Mitchell, "The Interplay between Theory and Method," *Academy of Management Review* 32, no. 4 (2007), <https://doi.org/10.5465/AMR.2007.26586080>.

<sup>43</sup> R. Hartley, "The Evolution and Redefining of 'Cal': A Reflection on the Interplay of Theory and Practice," *Journal of Computer Assisted Learning* 26, no. 1 (2010), <https://doi.org/10.1111/j.1365-2729.2009.00340.x>.

## **G. Research Method**

### **1. Type of Research**

This research adopts a qualitative research design aimed at exploring and understanding the complex interplay between traditional practices and contemporary legal standards within Indonesian society, specifically focusing on the kawin tangkap tradition. Qualitative research is chosen because it allows for an in-depth examination of the cultural, legal, and social dynamics of kawin tangkap. It emphasizes understanding participants' perspectives and the contextual meanings of their actions and beliefs, which is essential for exploring practices deeply rooted in cultural traditions.

The exploratory nature of this research is crucial for investigating the nuances of how kawin tangkap is practiced, perceived, and regulated. Unlike quantitative research, which might focus on statistical data and generalizability, qualitative research in this context aims to uncover underlying themes and patterns related to the practice of kawin tangkap and its interactions with legal frameworks.

Case study methodology is employed within this qualitative framework to provide a detailed examination of specific instances where kawin tangkap is practiced. This approach allows for an intensive investigation of the tradition within its cultural context, providing rich, detailed insights into how kawin tangkap operates and is perceived by



different stakeholders, including practitioners, legal professionals, and affected individuals.<sup>44</sup>

## 2. Method of Approach

This research employs a dual methodological approach, combining the statute approach and the case approach to analyze the civil law aspects of the kawin tangkap tradition in Indonesia.<sup>45</sup>

**Statute Approach** focuses on analyzing the relevant laws and regulations related to the kawin tangkap tradition. This approach involves examining civil law statutes that govern marriage, consent, and individual rights. Through this approach, the research aims to understand how civil law addresses issues related to kawin tangkap and the extent to which this tradition aligns with the prevailing legal provisions.

**Case Approach** involves analyzing court decisions, legal precedents, and judicial interpretations of laws related to kawin tangkap. This approach provides insight into how the judiciary has applied the law in real-world cases involving kawin tangkap and similar practices. By studying relevant case law, the research seeks to uncover how the courts have balanced the principles of adat law with national legal standards, particularly regarding issues of consent and human rights. The case

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<sup>44</sup> Mujiburrahman Mujiburrahman, "Eksploitasi Seksual Anak Perspektif Undang Undang Perlindungan Anak Sebagaimana Telah Diubah Dengan Undang Undang Nomor 35 Tahun 2014 dan Perubahan Kedua Undang Undang Nomor 17 Tahun 2016," *Jurnal Hukum Tri Pantang* 6, no. 2 (2020), <https://doi.org/10.51517/jhtp.v6i2.263>.

<sup>45</sup> Márton Matyasovszky-Németh and Balázs Fekete, "Traces of Legal Anthropology in Hungary in the 20th Century. An Attempt to Define the Folk Concept of Law," *Acta Ethnographica Hungarica* 67, no. 1 (2023), <https://doi.org/10.1556/022.2022.00005>.

approach allows for a deeper understanding of the practical application of civil law and how legal principles are interpreted and enforced in specific instances.

Together, these approaches offer a comprehensive legal analysis that integrates theoretical examination with practical insights, providing a well-rounded understanding of how kawin tangkap is treated within the Indonesian civil legal system.

### **3. Object of Research**

The research employs a mixed-methods approach to gain a comprehensive understanding of kawin tangkap by integrating both qualitative and legal analyses. The qualitative component of the study involves conducting in-depth interviews, focus groups, and participant observations. These methods are employed to gather detailed, nuanced information about the practice of kawin tangkap, including the perspectives of those directly involved or affected by the tradition. This includes engaging with local community members, legal professionals, and women who have experienced kawin tangkap. Such qualitative data is crucial for understanding the cultural and personal dimensions of the practice, as well as its impact on individuals and communities.<sup>46</sup>

In addition to qualitative analysis, the research incorporates legal analysis to examine how kawin tangkap is addressed within the existing

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<sup>46</sup> Márton Matyasovszky-Németh and Balázs Fekete, "Traces of Legal Anthropology in Hungary in the 20th Century. An Attempt to Define the Folk Concept of Law," *Acta Ethnographica Hungarica* 67, no. 1 (2023), <https://doi.org/10.1556/022.2022.00005>.

legal framework. This involves reviewing relevant legal texts, court decisions, and legislative documents, including national laws such as the Marriage Law and the Criminal Code. The study assesses how these laws interact with customary law and their application in practice. By analyzing legal texts and judicial interpretations, the research aims to determine whether current legal frameworks effectively address issues related to kawin tangkap or if there are gaps that need to be addressed.<sup>47</sup>

The comparative analysis aspect of the research involves comparing the findings from Indonesia with similar practices in other cultural and legal contexts. This comparison helps draw broader conclusions about the relationship between traditional practices and modern legal standards. By examining how kawin tangkap is handled in different cultural and legal environments, the study aims to identify best practices and potential areas for reform. The mixed-methods approach, therefore, provides a richer, multi-dimensional understanding of kawin tangkap, offering insights into its cultural significance, legal implications, and the potential for legal and social reforms.

#### **4. Sources of Research Data**

In conducting a comprehensive analysis of the "Adat Kawin Tangkap In Indonesian Law Perspective," it is essential to identify and examine key legal documents that form the basis for understanding the intersection of

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<sup>47</sup> Johanis Putratama Kamuri and Grace Mariany Toumeluk, "Tinjauan Teologis Terhadap Tradisi Kawin Tangkap di Pulau Sumba–Nusa Tenggara Timur," *Dunamis: Jurnal Teologi dan Pendidikan Kristiani* 6, no. 1 (2021), <https://doi.org/10.30648/dun.v6i1.493>.

customary law and national legislation, particularly concerning the tradition of forced marriage.

### **The Constitution**

The 1945 Constitution of Indonesia stands as the foundational legal document of the nation, outlining the fundamental principles of governance and the rights of citizens. Although the Constitution does not delve into the specifics of customary law, it acknowledges the diversity of Indonesia's society and the significance of preserving local customs. Article 18B of the Constitution explicitly recognizes and respects traditional communities along with their traditional rights, as long as they remain in accordance with societal developments and principles of the unitary state. This constitutional recognition forms the backdrop against which customary practices like kawin tangkap are considered within the broader legal framework.<sup>48</sup>

### **Laws on Customary Law**

The recognition of customary law in Indonesia is further supported by various national laws. The Law on Regional Government (Undang-Undang Nomor 22 Tahun 1999), for instance, provides a legal framework that allows for the recognition and implementation of local regulations, including customary laws, at the regional level. However, the application and enforcement of these laws can vary widely across regions, depending on local governance and the specific customary practices in question. The dynamic

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<sup>48</sup> Johanis Putratama Kamuri and Grace Mariany Toumeluk, "Tinjauan Teologis Terhadap Tradisi Kawin Tangkap di Pulau Sumba–Nusa Tenggara Timur," *Dunamis: Jurnal Teologi dan Pendidikan Kristiani* 6, no. 1 (2021), <https://doi.org/10.30648/dun.v6i1.493>.

interplay between customary law and national legislation often leads to varied interpretations and applications of practices like kawin tangkap.<sup>49</sup>

### **Laws on Marriage**

The Marriage Law (Undang-Undang Nomor 1 Tahun 1974) serves as the primary legislation governing marriage in Indonesia. It sets forth the legal requirements and procedures for marriage, emphasizing the necessity of free consent from both parties. While the law acknowledges the existence of customary marriages, it stipulates that these practices must not contradict the legal provisions outlined in the statute. Article 2 of the Marriage Law, which mandates that marriages must be conducted according to the respective religious laws and validated by state law, provides a crucial point of reference when assessing the legality of customary practices like kawin tangkap.

### **Laws on Indigenous Peoples**

Indonesia has ratified several international conventions and enacted national laws to protect the rights of indigenous peoples, including their cultural practices. The Law on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women (Undang-Undang Nomor 7 Tahun 1984) is particularly relevant in this context, as it underscores the need to protect women from practices that could infringe upon their rights, such as forced marriage. These legal instruments provide a broader framework for examining how the rights of individuals, particularly women,

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<sup>49</sup> João Francisco Kleba Lisboa, "Indigenous Peoples and the Judiciary in Brazil: An Appeal for a Legal Anthropology Approach," *Vibrant Virtual Brazilian Anthropology* 19 (2022), <https://doi.org/10.1590/1809-43412022v19a803>.

are upheld or challenged within the context of customary practices like kawin tangkap.<sup>50</sup>

### **Customary Law and Forced Marriage**

The practice of kawin tangkap, often rooted in customary law, raises significant legal and ethical questions. To fully understand the implications of this tradition, it is necessary to examine specific regional regulations, village bylaws, and case law that pertain to such practices. These documents can offer insights into the legal status of kawin tangkap, including any efforts at the local or national level to regulate, reform, or abolish the practice. Analyzing these sources can reveal the complexities involved in balancing respect for cultural traditions with the protection of individual rights under Indonesian law.

### **H. Data analysis**

Data analysis for this research involves a multi-stage approach to thoroughly examine the practice of kawin tangkap. The first stage is thematic analysis of qualitative data collected from interviews, focus groups, and participant observations. This process involves coding the data to identify recurring patterns and themes. By categorizing the data into distinct themes, the analysis aims to uncover insights related to the cultural significance of kawin tangkap and its impact on individuals. Thematic analysis helps in understanding how the practice is

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<sup>50</sup> João Francisco Kleba Lisboa, "Indigenous Peoples and the Judiciary in Brazil: An Appeal for a Legal Anthropology Approach," *Vibrant Virtual Brazilian Anthropology* 19 (2022), <https://doi.org/10.1590/1809-43412022v19a803>.

perceived within the community and the personal experiences of those involved, offering a nuanced view of its effects and implications.

The second stage is legal analysis, where the focus shifts to examining the relevant statutes, case law, and legal interpretations related to kawin tangkap. This analysis involves assessing how national laws address issues of forced marriage, consent, and human rights, and how these laws interact with hukum adat (customary law). By identifying gaps, inconsistencies, and areas where legal reforms may be needed, this analysis provides a critical evaluation of the effectiveness of current legal frameworks in addressing the challenges posed by kawin tangkap. The goal is to highlight where the law may fall short in protecting individual rights and ensuring justice.<sup>51</sup>

In the third stage, comparative analysis is conducted by comparing the findings from Indonesia with similar practices in other countries. This comparison helps to contextualize kawin tangkap within a broader legal and cultural framework. By examining how similar traditions are regulated elsewhere, the research aims to identify potential best practices and alternative approaches that could inform legal and policy reforms in Indonesia. This comparative perspective provides valuable insights into how kawin tangkap might be addressed more effectively, considering international standards and practices.

The final stage involves the integration of findings from the thematic, legal, and comparative analyses. This step synthesizes insights from different data sources

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<sup>51</sup> João Francisco Kleba Lisboa, "Indigenous Peoples and the Judiciary in Brazil: An Appeal for a Legal Anthropology Approach," *Vibrant Virtual Brazilian Anthropology* 19 (2022), <https://doi.org/10.1590/1809-43412022v19a803>.

and perspectives to draw comprehensive conclusions about kawin tangkap. The integrated findings aim to offer actionable recommendations for addressing the practice's challenges, including potential legal reforms, human rights considerations, and cultural preservation. The results are then presented in a structured format, with detailed explanations of key themes, legal issues, and practical recommendations for policymakers, legal professionals, and community leaders. This thorough approach ensures that the research provides a well-rounded understanding of kawin tangkap and its implications for Indonesian society.<sup>52</sup>

### **I. Systematica Writing**

Chapter I is an introduction that tries to explain a general description of the problem to be studied. Chapter I covers the background of the problem, which discusses the background of the research, followed by the formulation of the problem, the purpose of the problem, as well as the research method. The end of this chapter will describe the systematics of writing.

Chapter II discusses the discussion of the literature review which contains the theoretical basis and conceptual basis of business competition and approaches taken by kawin tangkap law

Chapter III discusses the conceptual analysis of the formulation of the problem to be examined, namely the legal analysis in the implementation of per se illegal and rule of reason approaches in adat kawin tangkap

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<sup>52</sup> Johanis Putratama Kamuri and Grace Mariany Toumeluk, "Tinjauan Teologis Terhadap Tradisi Kawin Tangkap di Pulau Sumba–Nusa Tenggara Timur," *Dunamis: Jurnal Teologi dan Pendidikan Kristiani* 6, no. 1 (2021), <https://doi.org/10.30648/dun.v6i1.493>.



Chapter IV is the concluding part which will outline the conclusions from what was stated in the previous chapters and provides suggestions based on research results that are expected to be useful for interested parties.