

Research Article

Customary Criminal Law and Progressive Legal Theory for Trademark Rights Protection: Indonesia, Poland, and South Africa

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ABSTRACT

Trademark protection under the contemporary intellectual property regime remains predominantly grounded in a positivistic and registration based approach, providing limited recognition of customary criminal law in safeguarding communal economic interests. This study examines the legal relationship between customary criminal law and positive criminal law in trademark protection in Indonesia, Poland, and South Africa, while proposing a progressive legal reconstruction. Employing normative legal research with comparative and conceptual approaches, this study analyzes legislation, international instruments, legal doctrines, and scholarly literature. The findings demonstrate three distinct legal models, namely complementary conditional, constitutionally fragmented, and exclusionary monistic. Based on Progressive Legal Theory, this study proposes integrating customary criminal law into trademark protection through restorative mechanisms, recognition of communal ownership, and institutional legal reform to achieve substantive justice while maintaining legal certainty.

Keywords: Customary Criminal Law; Progressive Legal Theory; Trademark Rights Protection.

A. INTRODUCTION

Trademark protection in global trade has undergone significant normative harmonization following the enactment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Madrid Protocol (Purwaningsih, 2020). The TRIPS Agreement, through Part II Articles 15 to 21, mandates WTO member states to provide minimum standards for trademark protection, including provisions regarding protectable subject matter. Article 15(1) of the TRIPS Agreement states that ‘any sign, or any combination of signs, capable of distinguishing the goods or services of

one undertaking from those of other undertakings, shall be capable of constituting a trademark’. Meanwhile, the Madrid Protocol, through Article 2, regulates the international registration mechanism that enables trademark protection in various countries through a single centralized application. This international legal harmonization essentially aims to create legal certainty and procedural uniformity at the global level.

Nonetheless, the system produced by this harmonization retains a strongly positivistic and formalistic character, especially through the implementation of the first-to-file principle, which treats formal registration as the only basis for

obtaining trademark rights (Oscar & Soesatyo, 2025). This positivistic orientation disregards the complex socio-economic conditions operating at the national level, where trademark infringements, by contrast, have demonstrated a marked upward trend. Drawing on the recapitulation data from the Indonesian Directorate of Law Enforcement under the DJKI, 163 of the 296 intellectual property infringement cases recorded during the 2019–2025 period were classified as trademark violations (Rahmaidha et al., 2025). This framing places trademark disputes as the top category of intellectual property offenses, substantially exceeding copyright infringements (87 cases) and patent infringements (21 cases), with 2023 and 2024 each reaching reporting peaks of 53 cases (Hutauruk et al., 2026). The continued prevalence of these trademark infringement figures is further intensified by the large scale of transactions conducted on post-pandemic e-commerce platforms (Kennedy & Wartoyo, 2024). This empirical picture therefore supports the contention that a formal-legalistic, monolithic criminal strategy cannot effectively restrain trademark infringements that occur in informal and community-based market settings.

The state law's inability to curb the rate of trademark infringements highlights a core conflict between legal centralism and legal pluralism. Legal centralism treats the state as the single source of legitimate law (Widjajanto et al., 2025). By contrast, legal pluralism acknowledges the presence of non-state normative orders that take

root in society and continue to grow and change within it (Hariri & Babussalam, 2024). Meanwhile, legal pluralism further recognizes that these non-state normative orders live in society and evolve there (McKerracher, 2023). Lawrence M. Friedman, using the Legal System Theory framework, argues that the effectiveness of law enforcement depends on the legal structure, legal substance, and legal culture (Rachmarani et al., 2024), with legal culture emerging as the most decisive factor in determining whether law enforcement succeeds or fails in a given society (Hanifah & Adil, 2025). In developing countries, a wide gap often separates the state's formal law from the communal legal culture operating within society. The Progressive Law Theory introduced by Satjipto Rahardjo maintains that law is made for human beings; accordingly, intellectual property legal regulations must be responsive, flexible, and oriented toward the future to achieve substantive justice for people's economy (Pitasari, 2025). Progressive law is grounded in the view that human beings are the primary subjects of law and that law must serve humanity (Andriawan, 2022), not the reverse so the legal approach should not be confined to a rigid formalism rooted in statutory texts. As a result, a paradigmatic breakthrough is needed to connect formal law with the socio-cultural reality of society.

Through substantive criminal law reform, Indonesia has created pathways for recognizing living law within society. Article 2 Paragraph (1) of Law Number 1 of 2023 on the Criminal Code

(National Criminal Code) explicitly acknowledges the applicability of living law within society as a source of substantive criminal law. This acknowledgment represents a major paradigm shift in the Indonesian criminal law system, moving away from a rigid principle of formal legality toward a more flexible principle of material legality (Setiyowati et al., 2026).

In the domain of trademark protection, this provision can strongly interact with the criminal regime set out in Articles 100 to 103 of Law Number 20 of 2016 on Trademarks and Geographical Indications. The connection is further strengthened by the fact that trademark offenses in Indonesia are complaint offenses, whose enforcement relies heavily on the initiative of the trademark owner (Masrur et al., 2025). At a philosophical level, the features of this complaint offense closely align with customary criminal law, which emphasizes community-based resolution, mediation, and the restoration of social balance (restorative justice) (Akhter et al., 2023). Accordingly, Article 2 Paragraph (1) of the National Criminal Code enables customary institutions to resolve local trademark disputes more promptly, in ways consistent with local legal culture, provided that they satisfy the cumulative requirements and are verified through a Government Regulation. Up to 68.2% of businesses involved in formal trademark cancellations and formal proceedings experience serious financial losses due to complex litigation (Davinia & Kansil, 2025). As a result, customary

communities across different regions, such as the Safeguard System models in Bali, Flores, Batak Karo, and Dayak, have actively revitalized local customary courts to address social-economic violations through community-based restorative justice (Ismawati et al., 2026).

A comparative study involving two countries from distinct legal traditions shows differences in how customary law is recognized within intellectual property. In South Africa, Section 211 Paragraph (3) of its 1996 Constitution constitutionally requires courts to apply customary law, as long as it does not conflict with the basic principles of the state and the constitution. However, trademark enforcement in South Africa, governed by the Trade Marks Act 194 of 1993 and the Counterfeit Goods Act 37 of 1997, continues to be fragmented and dominated by the state's formal judiciary (Sharma & Dube, 2025). This situation produces a mixed legal system pattern that undermines the integration of customary law into the intellectual property sphere, meaning that the constitutional recognition of customary law has not yet been realized at the operational level in trademark enforcement. This institutional gap is reflected in empirical evaluations from the International Property Rights Index, which rate South Africa's trademark protection framework at a moderate 5.29, indicating procedural rigidities that entirely disregard indigenous governance (Property Right Alliance, 2025).

Conversely, Poland, through Article 305 of

the Prawo własności przemysłowej (Industrial Property Law of 2000), applies a pure codification model characteristic of Civil Law traditions, and this model is entirely centralistic, formal, and monolithic (Czapliński, 2024). Article 305 Paragraph (1) of the statute governs criminal liability for anyone who, with the intent to place goods into circulation, affixes them with a counterfeit trademark. The Polish legal system, which conforms to the EU Enforcement Directive, effectively shuts out customary law instruments in the penal sphere, illustrating an approach that depends solely on state-law mechanisms and does not recognize communal norms. The macro-level effectiveness of this centralized arrangement is reflected in the European Commission and EUIPO Joint Report, which shows that the authorities of member states intercepted more than 112 million counterfeit items with an estimated value of €3.8 billion (European Commission, 2025). Within this unified framework, Poland's rigid enforcement infrastructure plays a central role, helping it stand out as one of the seven leading EU countries responsible for producing 90% of the total volume of these seized counterfeit goods (EUIPO, 2025).

These three countries exemplify three variations of relationships across the range of progressive law theory within global legal systems, namely: explicit post-new codification recognition (Indonesian civil law), fragmented constitutional recognition (South African mixed system), and the rejection or lack of any formal

space (Polish EU-civil law). The differing socio-anthropological settings of these three nations—ranging from the indigenous communities of the Indonesian Archipelago and traditional African leadership structures to the ethnic-regional communities of Central Europe—demonstrate that the effectiveness of trademark protection cannot be separated from the socio-cultural foundations in which law operates. Accordingly, the urgency of this research stems from the need to shift the paradigm of trademark rights protection away from a purely formal-legalistic approach toward one that responds to the realities of legal pluralism, especially in countries with large populations of informal entrepreneurs and indigenous communities. The lack of a conceptual framework connecting customary criminal law with contemporary intellectual property protection regimes can generate a legal vacuum (*rechtsvacuum*) as well as a risk of legal uncertainty, particularly in regions where economic practices grounded in communal norms are highly intensive. This cross-jurisdictional study is important because it offers a theoretical contribution toward developing a trademark protection model that reflects substantive justice, consistent with the concept of progressive law, which treats law as a tool for serving humanity rather than as a merely rigid and closed text.

I Putu Diarsa Putra et al. analyze, in the Asian Journal of Social and Humanities, law enforcement against trademark offenses conducted by the Directorate of Special Criminal

Investigation of the Bali Regional Police, and conclude that enforcement effectiveness continues to encounter obstacles related to evidence, inter-institutional coordination, and public legal awareness (Putra et al., 2025). Unlike Putra et al., who restrict their analysis to institutional and evidentiary barriers within a single police jurisdiction under Indonesia's positive law framework, this article goes beyond a domestic enforcement audit to explore how customary criminal law may be harmonized with the formal trademark regime, doing so across three distinct legal systems. Rai Widiatmika et al. in the *Jurnal Dinamika Hukum* emphasize the possibility of trademark rights infringements involving unregistered trademarks through an inclusive legal approach (Widiatmika et al., 2023). While Widiatmika's inclusive approach aims to extend protection to unregistered marks within Indonesia's existing statutory framework, this article does not seek to broaden statutory coverage; instead, it asks whether an entirely non-statutory order customary law can provide an alternative or complementary basis of legitimacy for trademark protection, a question not addressed by Widiatmika's framework. Meanwhile, Devica Rully Masrur et al. in the *Jurnal Pembangunan Hukum Indonesia* argue that the nature of the complaint offense in trademark crimes affects the protection of trademark owners and consumer interests (Masrur et al., 2025). Masrur et al. confine their study to the procedural classification of trademark

crimes as complaint offenses (*delik aduan*) and the implications of that classification for victims and consumers; in contrast, this article probes the deeper doctrinal assumption underlying that classification whether a purely state-centered, complaint-based penal logic is sufficient at all, or whether communal/customary legal orders point to a different, more progressive understanding of criminal liability in trademark matters.

Gilang Kresnanda Annas and colleagues, writing in the *Jambe Law Journal*, develop the idea of rebuilding communal intellectual property law through a human-rights approach and criminal law enforcement (Annas et al., 2026). Although Annas et al. also engage with communal intellectual property law, their reconstruction is grounded in a human-rights framework limited to enforcement policy within Indonesia. This article diverges by placing communal/customary norms specifically within the progressive law paradigm, and by testing that framework comparatively against two other jurisdictions, South Africa and Poland, rather than presenting it as a single-country conceptual proposal. In parallel, Nadiia Verbova and Valentyna Kryzhna, in the *Law Journal of the National Academy of Internal Affairs*, provide a comparative analysis of international best practices for combating intellectual property crimes (Verbova & Kryzhna, 2024). Verbova and Kryzhna's comparison is geared toward identifying transferable "best practices" in conventional criminal-policy terms and does not engage customary law at all; by

contrast, this article's comparative design is constructed specifically around the tension between state codification (civil law/common law) and customary normative orders, using South Africa's ubuntu-influenced legal pluralism and Poland's fully centralistic civil law model as deliberately contrasting reference points against Indonesia. Nevertheless, prior research continues to focus on the effectiveness of positive-law enforcement, the protection of trademark holders' rights, or criminal policy in general, and has therefore not comprehensively examined the relationship between customary criminal law and the trademark criminal law regime through the lens of progressive law in a comparative study of Indonesia, South Africa, and Poland.

Drawing on Satjipto Rahardjo's Progressive Law Theory, this study provides a fresh viewpoint by framing customary criminal law as a necessary element that can be integrated into the trademark rights protection system in order to realize substantive justice through an approach that remains consistent with the national legal system. This research aims to redesign a trademark rights protection model that incorporates customary criminal law on the basis of the Progressive Law Theory, using a comparative analysis of Indonesia, Poland, and South Africa. The rationale for including these two jurisdictions is to examine differences in how customary law and state law interact within trademark protection frameworks operating under civil law and mixed legal system traditions, thereby enabling the

development of a regulatory model suited to Indonesia. To meet this objective, the study addresses two legal issues: (i) the position and relational patterns between customary criminal law and the positive criminal law framework in safeguarding trademark rights in Indonesia, Poland, and South Africa; and (ii) how the Progressive Law Theory is applied to reconstruct a trademark rights protection model that integrates customary criminal law into a sentencing system that reflects substantive justice.

B. RESEARCH METHODS

This research, which aims to reconstruct a trademark rights protection model by integrating customary criminal law grounded in the Progressive Law Theory, uses a comparative study across Indonesia, Poland, and South Africa. It is a normative legal research. The study applies a comparative approach to identify the similarities, differences, and regulatory features of trademark rights protection in the three countries, and it also uses a conceptual approach to analyze the concepts of customary criminal law, the Progressive Law Theory, legal system theory, living law, and the principles of intellectual property rights protection as the basis for developing legal arguments. The primary legal materials include Law Number 20 of 2016 concerning Trademarks and Geographical Indications, Law Number 1 of 2023 concerning the Criminal Code, the Agreement on Trade-

Related Aspects of Intellectual Property Rights, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, South Africa's Trade Marks Act 194 of 1993 and Counterfeit Goods Act 37 of 1997, Poland's Industrial Property Law, together with other statutory regulations related to trademark rights protection. Secondary legal materials comprise books, scientific articles, research findings, and expert doctrines addressing criminal law, customary law, intellectual property law, progressive law, and comparative law, whereas non-legal materials include legal dictionaries, language dictionaries, reports from government agencies, and relevant statistical data on trademark rights infringements. All legal materials were gathered through library research, processed by means of inventory, classification, and systematization techniques, and then analyzed qualitatively by using a prescriptive method through legal interpretation, legal argumentation, and comparative law, in order to develop a trademark rights protection model that integrates customary criminal law into a sentencing system that reflects substantive justice.

C. RESULTS AND DISCUSSION

1. The Standing and Relational Patterns between the Customary Criminal Law Regime and Positive Criminal Law in Trademark Protection within Indonesia, Poland, and South Africa

The position of customary criminal law within the trademark protection regime calls for a strong theoretical basis for understanding the relationship between state and non-state normative orders. John Griffiths, in his work *What is Legal Pluralism?* (1986), proposed a typology that differentiates between weak legal pluralism and strong legal pluralism (Al-Astewani, 2025). As an analytical tool for charting how the state recognizes non-state law, weak legal pluralism describes a context in which recognition is purely delegative (Pirie, 2023). This means that customary law continues to operate within the framework of state legal centralism, with its legitimacy derived from the state (Sukirno & Wibawa, 2024). By contrast, strong legal pluralism treats non-state normative orders as autonomous and equal sources of law, deriving legitimacy not from state authority but from communal legal consciousness itself (Kozak-Isik, 2026). This typology provides the primary framework for evaluating the degree to which customary criminal law in Indonesia, Poland, and South Africa is granted an autonomous status, or instead is adopted instrumentally to serve the state's formal market certainty. Griffiths argues that genuine legal pluralism involves recognizing the reality that, within a social field, more than one legal order regulates community behavior (Humphress, 2024).

The living law theory developed by Eugen Ehrlich in *Fundamental Principles of the Sociology of Law* (1913) strengthens the

conceptual basis for recognizing law that actually operates within society. Ehrlich maintains that the law that truly binds society is not always identical to the state's written codification; rather, it emerges from communal legal consciousness and social associations within the community (Fillafer, 2022). This notion of living law asserts that the primary source of law lies in society's social practices, not solely in statutory texts (Sagal et al., 2025). In the context of trademark rights, the concept of living law is used to determine whether there is decoupling or separation between modern positive law, which is capitalistic-individualistic in character, and the sociological realities of societies that continue to practice trademark marking according to communal values. Ehrlich concludes that the development of law occurs much more through the development of society itself than through legislation or jurisprudence (Fillafer, 2022).

Indonesia, through reforms to its substantive criminal law, has made a progressive move by acknowledging the law that exists within society as an alternative foundation for sentencing (Rozah & Yudistira, 2025). Article 2 Paragraph (1) of Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code) provides that the provisions of the principle of legality in Article 1 Paragraph (1) do not prevent the operation of the law that lives within society, which holds that a person merits punishment even when the act is not set out in statutory law. This provision signals a shift in

paradigm from formal legality to substantive legality, such that law is no longer understood narrowly as merely a product of legislation (Hardinanto et al., 2024). However, Article 2 Paragraph (2) of the National Criminal Code explicitly sets limits on the applicability of living law by requiring four cumulative indicators to be satisfied. The living law within society will then be compiled and given effect through Regional Regulations, serving as a means of legal certainty without reducing its original nature (Junaidi & Susanto, 2025). At present, the position of customary criminal law with respect to the criminal sanction regime in Articles 100 to 103 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications remains complementary-conditional rather than substitutive; in other words, customary criminal law operates only to fill legal gaps within the sphere of traditional communal trademark marking that has not been addressed by the state system.

The features of offenses within Indonesian customary criminal law differ fundamentally from the positive criminal system, which is fundamentally retributive and punitive in character (Rochaeti et al., 2023). Ter Haar, in *Beginnelsen en Stelsel van het Adatrecht*, explains that a customary offense arises when an act causes a disturbance to the equilibrium of society (disturbing of social balance) (Utama et al., 2024). This idea forms the basis for the emergence of customary reactions (*adatreactie*), which generate

sanctions that are restitutive and cosmological rather than retributive in nature (Anggraeni & Saleh, 2024). Such sanctions include customary fines (brayan or denda pati), cleansing rites (prayascita), and social ostracism, all of which are intended to restore socio-spiritual order rather than punish the offender retributively (Praditha, 2024). The Baduy indigenous community, whose Baduy woven cloth (Tenun Baduy) has both economic value and cultural significance transmitted across generations (Jiniputri et al., 2025), provides an example of this dual character. Imitation of Baduy woven cloth motifs by outsiders is considered a breach of pikukuh (customary tenets) that disrupts the community's social and spiritual equilibrium (Kusmayani & Elfrida, 2025). Nevertheless, because the Baduy customary institution's penal jurisdiction is territorially limited to the customary land (customary domain) of Kanekes Village (Supendi et al., 2026), customary penal institutions do not have the operational capacity to seize goods or impose commercial fines on offenders outside the customary territory.

On the other hand, the Inner Baduy (Baduy Dalam) community strictly complies with customary prohibitions on participating in state bureaucracy and on formal registration (Muhyidin & Setyawan, 2025). By contrast, Law Number 20 of 2016, through the framework of Collective Trademarks and Geographical Indications, provides protection that is premised on formal registration, which is constitutive in nature; as a result, indigenous communities that opt to isolate

themselves from state administration encounter substantial bureaucratic obstacles. To register a Geographical Indication, the indigenous community must establish a Geographical Indication Protection Society that is recognized by the regional government (Gultom & Wartini, 2023). Consequently, state law enforcement agencies are unable to prosecute the counterfeiting of Baduy woven cloth because it has not been officially registered as intellectual property in the system of the Directorate General of Intellectual Property. The character of trademark offenses under Law Number 20 of 2016 as complaint-based offenses (delik aduan) progressively enables customary restitutive sanction institutions to function as pre-litigation mediation forums before any formal complaint is filed with the state police. However, the operational implementation of Article 2 of the National Criminal Code remains stalled due to the non-issuance of the Government Regulation intended as the implementing regulation, which is supposed to govern the concrete mechanism for applying the law that exists within society; thus, any prospective integration between customary criminal law and the state system remains only prospective.

Poland's distinctive criminal law framework presents a marked contrast to the Indonesian approach by relying on an absolute, strictly centralised form of legal monism. Article 305 of the Industrial Property Law establishes punishments in the form of a fine, restriction of

liberty, or imprisonment of up to two years for anyone who counterfeits trademarks for commercial purposes, and up to five years where the conduct amounts to a regular source of income. This punitive rule functions in conjunction with Article 120, which sets out the graphic limits of a trademark, Article 153, which concerns the exclusive right of commercial use, and Article 296, which governs the right to seek damages. There is no legislative gap in Polish criminal law that allows customary norms or local practices to serve as an alternative foundation for sentencing; accordingly, the system embodies pure legal centralism, in which the state is treated as the only legitimate authority for determining penal sanctions. Poland also consistently rejects the use of analogy in criminal law to broaden protection. The pattern observed in Poland corresponds to full legal monism (exclusionary monism), under which the customary laws of ethno-regional communities such as the Kashubians and Silesians are barred from operating within the penal sphere.

Historically, Poland recognized communal product marking through *Znak Cechowy*, or guild marks, during the medieval town law period, a tradition shaped by Magdeburg law (Mikuła, 2025). In the Podhale mountainous region, the Goral (Górale) community produces a traditional sheep's milk cheese known as *Oscypek*. *Oscypek* is made with wooden molds bearing distinctive motifs that function as a collective sign or guild mark (Najgebauer-Lejko et al., 2022). These

motifs distinguish authentic products and provide the basis for imposing sanctions on artisans who copy the shape or motifs of the *Oscypek* wooden molds without authorization. Nevertheless, alongside modern legal codification and compliance with Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, which strengthens enforcement mechanisms for intellectual property rights through civil, administrative, and criminal measures (Stamatoudi & Vrins, 2021), and Directive (EU) 2015/2436, which approximates the trademark laws of European Union member states (Brancusi, 2022), this community-based practice has been fully absorbed and replaced by the rigid trademark registration system under the *Urząd Patentowy Rzeczypospolitej Polskiej* (Patent Office of the Republic of Poland) (Ogurek, 2023). If *Oscypek* counterfeiting occurs in Warsaw, the Goral community is barred from carrying out customary proceedings or independently seizing goods. They must report the violation to the state trade inspectorate as an administrative economic offense under Article 305 of national law. If the local community seeks to protect traditional product markings, it must use the European Union's administrative-economic instruments in the form of *sui generis* Geographical Indications supervised by the EUIPO, as provided in Regulation (EU) No. 1151/2012 on Quality Schemes for Agricultural Products and Foodstuffs. Accordingly, the Polish model operates as a negative benchmark showing how

a monistic-positivistic system erases the communal-historical dimension of a trademark, and how straightforward corporatization and codification remove the autonomous penal rights of local communities in favor of European Union standardization.

South Africa offers a qualitatively distinct model by constitutionally recognizing customary law and placing it in a textually strong position. Section 211 Paragraph (3) of the Constitution of the Republic of South Africa 1996 requires courts to apply customary law whenever it is applicable, subject to any legislation or agreement that specifically addresses it, and provided that it is consistent with the Bill of Rights. In this way, the provision sets out at the level of prescription the scope of courts' duties concerning the application of customary law, with the aim of creating a constitutionalized customary law system that is on an equal footing with other laws in force across the republic. Even so, trademark protection in South Africa is governed separately by the Trade Marks Act 194 of 1993 and the Counterfeit Goods Act 37 of 1997, both of which were adopted from Western standards without including reference clauses to communal customary law. Section 34(1) of the Trade Marks Act regulates three forms of trademark infringement, including the use of an identical or confusingly similar mark in relation to a registered trademark; however, the statute does not provide any recognition for traditional communal marking systems (Saputra et al., 2026). This mismatch gives rise to

fragmented legal pluralism, in which the extensive recognition of strong legal pluralism at the constitutional level is reduced to weak legal pluralism when it intersects with sectoral national intellectual property statutes.

Although the Government of South Africa passed the Intellectual Property Laws Amendment Act (IPLAA) of 2013 to incorporate aspects of Traditional Knowledge into the domestic trademark system, the statute has, in practice, stalled functionally. The national provision requires the creation of a highly centralised "National Council for Traditional Knowledge," which must evaluate and certify which communal marks qualify for protection (Tong, 2017). Criminal prosecution for trademark infringement under the Counterfeit Goods Act 1997 depends entirely on the coercive measures of state institutions (State Inspectors) and on actions taken by well-funded trademark proprietors. This arrangement is exclusionary and capital-driven, and it is driven by corporate interests (corporate-driven enforcement). In doing so, this national legal framework effectively overlooks the features of communal ownership that are inherent in traditional products, thereby casting the trademark statute as a protective tool for large-scale contemporary businesses and diminishing the economic rights of clan-based micro-entrepreneurs.

Ubuntu's philosophy, which underpins South African customary law, promotes a stance that differs from the individualistic and punitive

approach characteristic of the positive criminal justice system. The Ubuntu principle—expressed as the idea that a person becomes a person through other persons—places greater emphasis on social cohesion and communal duties than on individual interests (Onyango Ouma, 2025). In 2018, the multinational retail corporation Zara unlawfully copied the traditional knit motifs of the Xhosa tribe for its sock products (Gumede, 2023). These motifs are sacred traditional cultural expressions for the Xhosa community; they were later brought to contemporary attention by the local designer Laduma Ngxokolo through the Maxhosa brand (Africanews, 2024). Once this widespread imitation took place, the Xhosa traditional leadership institutions could not impose customary sanctions grounded in the Ubuntu philosophy through customary courts. This limitation followed from jurisdictional constraints under the Traditional Courts Act of 2022, which expressly restricts the authority of customary courts to minor internal clan disputes and bars them from determining commercial intellectual property disputes.

To stop this kind of cultural exploitation, action had to be taken through formal Western legal avenues: hiring corporate law firms to sue Zara under the threat of litigation in the High Court and submitting reports to the Companies and Intellectual Property Commission (CIPC) (Eytan, 2019). The matter ended with Zara withdrawing the products in response to international public pressure; nevertheless, it

theoretically supports the existence of parallel, non-overlapping systems between customary law and state law. Indigenous communities of lower socioeconomic status, unlike the Maxhosa brand, will remain marginalized and dispossessed of rights in their communal marks because they lack the financial capital to retain formal legal counsel in the High Court. The failure to integrate customary criminal law into the national intellectual property penal framework shows that constitutional recognition under Section 211(3) of the 1996 Constitution does not automatically ensure meaningful protection for indigenous communities. Sociologically, enforcement of criminal trade mark provisions under the Counterfeit Goods Act 1997 is carried out through an exclusive, capitalistic, corporate-led model, which leaves indigenous communities trapped in structural inequality beyond the scope of formal legal protection.

Table 1. The Position and Relational Patterns of Customary Criminal Law in Relation to Trademark Protection in Indonesia, Poland, and South Africa

Dimension	Indonesia	Poland	South Africa
Basis of Customary Law Recognition	Article 2 Paragraph (1) of Law No. 1/2023 (National Criminal Code)	No statutory -level basis for penal customary law	Section 211(3) of the Constitution of the Republic of South Africa
Nature of Recognition	Legally active but functionally stalled due to the	Absolutely unrecognized (Exclusi	Constitutionally strong and supreme; binding

	uncomplete d Regional Regulations (Perda) on customary compilation	onary Legal Monism)	upon all judicial institutions
National Trademark Criminal Regulation	Articles 100–103 of Law No. 20/2016 (Utilizing a Complaint- Based Offense Mechanism)	Articles 120, 153, 296, & 305 of the Prawo własność ci przemys łowej (Subject to EU Directiv e 2015/24 36)	<i>Trade Marks Act 194/1993 (Sections 2 & 34); Counterfeit Goods Act 37/1997 (Corporate- driven)</i>
Typology of Legal Pluralism (Griffiths)	Transitionin g toward strong pluralism (yet held hostage by administrati ve procedures)	<i>Absolut e legal centralis m</i>	<i>Strong pluralism at the constitution al level coexisting with sectoral weak pluralism</i>
Relational Pattern with the Trademark Criminal Regime	Conditional- Complemen tary	Monolith ic Exclusio n	Fragmente d-Parallel (Strictly limited by the Traditional Courts Act

			2022)
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(Source: Author's Analysis)

Indonesia is in a transitional phase toward strong pluralism following the enactment of the 2023 Criminal Code, yet its operationalization remains held hostage by yet-to-be-issued administrative regulations. South Africa suffers from a systemic ambivalence in the form of strong pluralism at the constitutional level, which subsequently degrades into weak pluralism within the sectoral realm of intellectual property. Poland consistently enforces an absolute legal monism (legal centralism), providing not the slightest room for customary norms within its penal system. This gradation validates Roscoe Pound's thesis regarding the chasm between law in the books and law in action, wherein the textual recognition of customary law does not automatically guarantee its functionality in protecting communal economic rights from the threat of trademark counterfeiting. In other words, mere normative recognition is insufficient without being followed by operational mechanisms that enable customary law to truly function within law enforcement practices.

The legal maxim *ubi societas ibi ius*, meaning that where there is society there is law (Ciravegna, 2023), supports the claim that the presence of living norms in traditional communities is a social fact that cannot be eliminated by the rigidity of formal state law (Abdullah et al., 2026). The complete exclusion of

customary law, as illustrated by the Polish model, or symbolic acknowledgment without operational clarity, as seen in the Indonesian and South African models, risks provoking sociological resistance in the form of large-scale decoupling. This occurs because state law does not adequately reflect the sense of substantive justice that persists within society. This principle highlights the urgency for international trademark penal law to start relaxing its formal boundaries so that it can incorporate customary laws that are genuinely followed by grassroots economic actors. Not accommodating this sociological reality, in turn, will weaken the legitimacy of state law in the eyes of the public, who are both the subjects and objects of that law enforcement.

The relationship between customary criminal law and the positive penal framework in trademark protection can be expressed through three new typological models. The first is the conditional-complementary model, exemplified by Indonesia: customary law is allowed to complement the formal statutory texts, but its scope is limited by cumulative conditions that the state sets out in Article 2 Paragraph (2) of the 2023 Criminal Code. The second is the constitutional-fragmented model, represented by South Africa, in which customary law is treated as supreme as a constitutional foundation under Section 211(3) of the 1996 Constitution, yet its applicability is divided along sectoral lines with respect to modern economic goods through separate, unintegrated intellectual property

statutes. The third is the closed-monistic model, exemplified by Poland, under which customary law is entirely excluded from the penal system, and all trademark disputes are fully taken up by coercive state administrative mechanisms under Article 305 of the Industrial Property Law. Together, these three models outline a spectrum ranging from the most inclusive to the most exclusive recognition of customary law within trademark protection.

2. Progressive Legal Theory: Reconstructing a Trademark Protection Model Based on Substantive Justice

The philosophical basis for reconstructing a trademark protection model that integrates customary criminal law is grounded in the Progressive Legal Theory pioneered by Satjipto Rahardjo. This theory promotes the view that law exists for human beings (Setyawan, 2025), not human beings for the law, so that trademark protection should no longer be confined to individualistic-capitalistic registration schemes. This philosophical reconstruction calls for a paradigm shift from a positivistic-formal approach toward one that can accommodate the collective economic rights and communal ownership features inherent in products grounded in local wisdom. The rigid character of the global trademark regime, which is built on the first-to-file principle, must be dismantled so that it no longer marginalizes indigenous communities that have historically lacked familiarity with Western registration administration. Progressive Legal

Theory functions as a means to overcome legal formalism that obstructs the achievement of substantive justice for communal economic actors across all three jurisdictions.

Restoring the balance of values within the modern trademark law system requires an anchor in the Idea of Law formulated by Gustav Radbruch. Radbruch explains that every legal system must balance three fundamental values: legal certainty, justice, and expediency (Ashari & Jamilah, 2024). The trademark law regimes in Indonesia, Poland, and South Africa currently suffer from a philosophical deficiency because they prioritize substantive legal formal certainty by means of constitutive registration systems, thereby sacrificing substantive justice. The proposed reconstruction of the protection model seeks to reestablish equilibrium among these three values, in which the legal certainty offered by formal registration is preserved to maintain modern market stability. The relaxation of formal boundaries must be carried out to create space for justice for traditional communities that have historically had no familiarity with Western administration, as reflected in the cases of the Baduy community in Indonesia and the Xhosa tribe in South Africa.

Mochtar Kusumaatmadja's theory of law as an instrument of active social engineering provides the operational basis for incorporating customary criminal law into the penal framework governing trademark infringement. Mochtar Kusumaatmadja built on Roscoe Pound's ideas

about law as a tool of social engineering by reframing law as something more than a mere reflection of existing values, presenting it instead as a means for directing deliberate social change (Ikhsan et al., 2025). On this foundation, the argument holds that the incorporation of customary criminal law is not simply a passive, symbolic acknowledgment of social reality, but rather an active legislative measure intended to require the national intellectual property law system to adjust to sociological conditions. This social engineering seeks to guide the protection regime toward substantive justice, ensuring that state law does not become separated from the local legal culture of grassroots communal entrepreneurs. Accordingly, law operates as a vehicle for social renewal, channeling planned change toward a more inclusive and equitable protection system.

The first-level reconstruction is conducted by reinforcing the normative foundation for the applicability of the living law in society. Article 2 Paragraph (1) of Law Number 1 of 2023 on the National Criminal Code provides that the legality principle does not rule out the application of the living law within society, which holds that a person is liable to punishment if the relevant requirements specified by law are satisfied. The Stufenbau theory developed by Hans Nawiasky concerning the hierarchy of legal norms clarifies that lower norms serve to elaborate and implement higher norms without contradicting the provisions above them (Maarif, 2024).

Accordingly, a tiered technical regulation is needed, through a Government Regulation on the Procedures for Determining the Living Law within Society, to include an exception clause to the formal legality principle specifically for communal marks. The inventorying of Tenun Baduy or Sarung Donggala motifs into Regional Regulations as legal objects protected by local customary penal sanctions must be undertaken without the risk of being regarded as vigilantism.

The second-level reconstruction model proposes a two-track penal framework grounded in the restorative justice paradigm. In *Changing Lenses*, Howard Zehr presents an approach that redirects attention away from questions about which rule was violated and what punishment is warranted, and toward questions about who was harmed and how that harm can be repaired (Malazoniia, 2025). The proposed two-track model combines formal state penal sanctions with customary criminal law by drawing on the character of complaint-based offenses found in Articles 100 to 103 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications. Under this design, formal penal sanctions such as fines or pure imprisonment are reserved as an ultimum remedium for infringers operating at a corporate scale, as illustrated by the *Zara versus Maxhosa* brand case. At the customary-institution level, the customary response, or relational compensation, is positioned as the primary restoration track; once it is carried out, the right to formal criminal

prosecution is automatically extinguished.

The third-level reconstruction aims to create a new legal category, namely the Customary Collective Trademark, as part of the national trademark protection system. Conventional intellectual property paradigms rely on the idea of individual ownership (Yulia et al., 2026), which is reflected in the trademark registration systems across all three countries; by contrast, customary trademarks are fundamentally derived from the collective ownership of communities and are administered under traditional authority. Reconstruction at this level involves establishing a new legal category within the DGIP (DJKI) registration system in Indonesia and the CIPC in South Africa in the form of a Customary Collective Trademark. The exclusive rights and enforcement authority associated with this new category are not held by individuals, but are vested entirely in the Archipelago Customary Institutions (*Lembaga Adat Nusantara*) or, in South Africa, the Traditional Council. The penal protection accompanying this category must treat its infringement as an economic crime against the community's cultural identity, rather than as merely an individual civil right that can be negotiated on a personal basis.

A workable reconstruction of the gap in South Africa is secured by dismantling the sectoral legal isolation produced by the Traditional Courts Act of 2022. To date, this statute has curtailed the role of traditional courts

in national commercial intellectual property disputes, as shown in the case of *Zara v the Xhosa tribe's Maxhosa brand*. The proposed practical remedy is to create a Cross-Judicial Dispute Referral Mechanism within the trademark enforcement framework, enabling the Traditional Court to be vested with constitutional power to issue recommendation documents for restitutive sanctions. The Traditional Court may also function as an *amicus curiae*, with its submissions required to be adopted and taken into account by both the High Court and the CIPC when determining formal penal sanctions. As a result, the decisions of customary courts will no longer remain isolated from the state judicial system; instead, they will become an integral part of the intellectual property law enforcement process in South Africa.

A different approach is necessary for Poland because its full compliance with Continental European legal unification excludes the use of supranational penal institutions. In Poland, progressive reconstruction is implemented by incorporating community-based enforcement powers into contemporary market regulations. A targeted amendment is required for Regulation (EU) No. 1151/2012 on Geographical Indications systems, together with the enforcement provisions set out in Directive 2004/48/EC. During the monitoring of traditional products such as *Oscypek* cheese in the Podhale mountain region the local Goral artisans' association must be granted formal authority as

Joint Cultural Inspectors, with an independent veto right to stop the distribution of counterfeit products in the open market. This veto right operates as an early prevention measure before any infringement is formally handled under criminal law by the state trade inspectorate under Article 305 of the Industrial Property Law. By using this method, conflicts are avoided with the formal legality principle of Continental Europe, while still allowing local communities to protect their traditional cultural expressions from unauthorized commercial exploitation.

The Ubuntu philosophy, which has been incorporated into South African constitutional jurisprudence (Lansink, 2023), functions as a catalyst for relational reconciliation within the penal system addressing trademark infringement. The principle of Ubuntu, captured in the idea that a person is a person through other persons, affirms that genuine justice arises from the restoration of human relationships (van Norren, 2022), rather than from the mere punishment of individual infringers. This commitment aligns directly with the principle of restoring cosmological balance in Indonesian customary law and provides the main basis for reshaping the character of trademark-related penal sanctions, which have so far been rigid, individualistic, and retributive. Under the proposed reconstruction model, sanctions for infringements of traditional trademarks must include elements aimed at rebuilding the relationship between the offender and the victim community (Sinaga et al., 2026).

The effective implementation of these socio-relational sanctions on the ground should be treated by state law as an important mitigating consideration within national sentencing policies.

The proposed reconstruction as a whole shows that incorporating customary criminal law into trademark protection is not meant to supplant the positive legal system; rather, it aims to enhance its effectiveness through an approach that is more attuned to social realities. Gustav Radbruch's concept of statutory injustice and supra-statutory law supplies the philosophical basis for the idea that unjust positive law loses its legal character in the view of society (Trivisonno & De Oliveira, 2018). A trademark infringement penal system that overlooks the community-customary dimension risks forfeiting substantive legitimacy by failing to reflect the living sense of justice within society. Progressive legal theory maintains that rebuilding the trademark protection model is not only a static-technical legislative undertaking, but also a dynamic, sustainable endeavor (Perwitasari et al., 2025). The adaptive-gradual model that integrates customary criminal law in Indonesia, Poland, and South Africa provides the solution for achieving intellectual property criminal enforcement that is not merely valid on formal paper, but also ensures substantive justice for indigenous communities as the proprietors of the living and continually developing knowledge and cultural identity within their communities.

D. CONCLUSION

The placement and relational patterns between customary criminal law and the positive penal regime in trademark protection show distinct features across countries. Indonesia situates customary criminal law within a conditional-complementary model by recognizing living law within society under the National Criminal Code, even though implementation still requires operational regulations. South Africa follows a constitutional-fragmented model because customary law is strongly recognized, yet the scope of its application is constrained by sector-specific intellectual property regulations. By contrast, Poland adheres to a closed-monistic model in which trademark protection is entirely confined to the framework of positive law, leaving no space for customary law to serve as a basis for criminal law enforcement. Satjipto Rahardjo's Progressive Legal Theory can provide a basis to reconstruct a trademark protection model that incorporates customary criminal law by strengthening recognition of living law, developing a restorative-justice-based two-track penal mechanism, and establishing a protective category for customary collective trademarks, so that trademark protection not only ensures legal certainty but also delivers substantive justice for communal societies.

This study argues that Indonesian lawmakers should immediately draft implementing regulations for Article 2 of the National Criminal Code to regulate the operational mechanisms for

applying living law in society, including the recognition of communal mark protection under customary criminal law. In addition, amendments to Law Number 20 of 2016 on Trademarks and Geographical Indications are necessary to accommodate the category of customary collective trademarks and to strengthen dispute resolution mechanisms grounded in restorative justice for indigenous communities. For South Africa and Poland, the findings of this study may be used as a basis for developing a more participatory trademark protection model without weakening the legal certainty already established within their respective legal systems. Future research is encouraged to conduct empirical studies on the effectiveness of trademark dispute resolution through customary institutions across different local communities and to assess the implementation of communal protection models for traditional products in law enforcement practices. Follow-up studies are likewise important, using an interdisciplinary approach that integrates legal, anthropological, and economic perspectives to produce a trademark protection model that is more responsive to developments in digital trade and to the needs of indigenous communities at both national and international levels.

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