Enholding The Relevance Of The Traditional Constitution In Indonesia: A Path To An Integrated National Law

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**Abstract**  
Customary constitutions in Indonesia are scattered in various regions at the village, sub-district, district, city, province, and even archipelago levels. The codification and unification of laws are increasingly undermining the existence of customary constitutions in Indonesia. The existence and position of the customary constitution are increasingly unclear in the regulatory framework in Indonesia. Maintaining the customary constitution is crucial as it can serve as a spirit and guide in the formation of national law. To remind the nation again about the spirit of being cultured and to give the nation confidence in the nation’s civilization, it is necessary that the customary law be placed in an equal position with the existing and recognized statutory order in Indonesia. For this reason, it is necessary to provide a separate place for the growth and development of customary law as part of the nation’s wealth and as a reference in the formation of national law so that in every formation of statutory regulations, it always reflects values contained in the nation’s customs, especially those related to basic law, namely the customary constitution in Indonesia. This paper uses a sociological normative writing method, which will provide an overview of the position and status of the customary constitution in the Indonesian legal system. So it is hoped that through writing this journal, it can provide an understanding of how important the position of the customary constitution is in the development of law in the modern era.

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Accepted: 2024-03-15 | Customary constitutions in Indonesia are scattered in various regions at the village, sub-district, district, city, province, and even archipelago levels. The codification and unification of laws are increasingly undermining the existence of customary constitutions in Indonesia. The existence and position of the customary constitution are increasingly unclear in the regulatory framework in Indonesia. Maintaining the customary constitution is crucial as it can serve as a spirit and guide in the formation of national law. To remind the nation again about the spirit of being cultured and to give the nation confidence in the nation’s civilization, it is necessary that the customary law be placed in an equal position with the existing and recognized statutory order in Indonesia. For this reason, it is necessary to provide a separate place for the growth and development of customary law as part of the nation’s wealth and as a reference in the formation of national law so that in every formation of statutory regulations, it always reflects values contained in the nation’s customs, especially those related to basic law, namely the customary constitution in Indonesia. This paper uses a sociological normative writing method, which will provide an overview of the position and status of the customary constitution in the Indonesian legal system. So it is hoped that through writing this journal, it can provide an understanding of how important the position of the customary constitution is in the development of law in the modern era. |
I. Introduction

Customary constitutions exist and develop along with the times. Even though its existence continues to be eroded, it needs to receive recognition from both the central government and the regional governments. This recognition is very necessary to have a positive effect on the existence of customary law in the midst of the onslaught of foreign laws that are starting to enter and develop in Indonesia. It is with these various challenges that the customary constitution needs to receive the main attention of all Indonesian people, not only the officials in power and authority, but also serious attention from all components of Indonesian society so that the customary constitution remains sustainable, exists, develops, and remains a guideline in people’s everyday lives.¹

In state practice, customary constitutions are not much mentioned; even their position and existence are not clear. In some research and literature, it is also not explicitly mentioned and used, as further research on the existence of customary laws that we know in Indonesia are very diverse and recognize various kinds of customary laws, so for that, it requires in-depth thinking regarding the urgency of placing a clear and precise customary constitution. In the Indonesian legal and constitutional system.²

By laying down and placing the proper customary constitution, its existence will be maintained, so that the nation’s children in the future can still develop, not only knowing their existence but also being able to contribute towards the development of national law through references originating from the customary constitution itself.³

Through this paper, the author tries to explain the position and status of customary constitutions in the national legal structure, whether they have been accommodated or have not obtained their place and position so that they will contribute ideas to the sustainability of national development. Law based on the Indonesian spirit, which is beginning to erode along with the unstoppable progress and development of technology and information.⁴ It is on the basis of this initial objective that the author tries to provide an overview of the constitutional order of the existence of a customary constitution in Indonesia, so that it becomes a reference in the formation, enforcement, and implementation of law in the field. It is in this position that the spirit to build and socialize the existence and existence of customary constitutions must also be encouraged, so that the existence and existence of customary laws and constitutions are not eroded by various kinds of obstacles, threats, challenges, and disturbances of an increasingly advanced and developing era.

Observing the problems faced, there seems to be a disconnect between the existence of the customary law and its recognition by the central and regional governments. This acknowledgement is very important because it validates the existence of the customary law and ensures its sustainability in the midst of the entry of foreign law into Indonesia.⁵

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² I. S. Widodo et al., Constitution Law (Banten: Sada Kurnia Pustaka, 2023).
The current legal structure does not seem to pay enough attention to these customary laws, which are an important component of the national heritage and have an important role to play in guiding people’s behavior.6

Customary constitutions in Indonesia are diverse, reflecting the country’s rich cultural heritage. They have evolved with time and, even in an eroded state, have significant potential to contribute to national legal structures. The problem lies in their explicit recognition and clear position in the legal and constitutional systems.7 The lack of clear placement of these laws undermines their significance, which, if addressed, could lead to the development of more effective national laws.8

In line with these problems, the author takes the first step to provide an overview of the constitutional order of the Customary Constitution, which aims to strengthen its position in the formation, enforcement, and implementation of law in the field.9 However, it is a complex task that faces many challenges, including the rapidly evolving era of technology and information and the various interpretations and applications of these laws in different regions of the country.10 Therefore, a thorough and nuanced analysis of the existing customary laws, their role, and their current position in the legal system is essential for their preservation and utilization in Indonesian society.

Based on the above analysis, it becomes clear that customary constitutions, although ingrained in the fabric of Indonesian culture, are currently grappling with challenges of recognition and effective integration within the country’s legal framework and constitution. These customary laws, as varied as the nation itself, carry a wealth of wisdom capable of significantly influencing national legal structures. However, they continue to erode due to the influx of foreign laws, rapid advances in technology, and a lack of clear placement within the current legal system.

This background illustrates the urgent need for a comprehensive understanding and explicit recognition of customary constitutions. Such acknowledgement, both from the central government and the regional government, is necessary for the continuity of the law. Their proper placement in the legal system can not only ensure its preservation but also guide law enforcement and implementation, thus contributing to the nation’s legal development. Despite the complexities involved, these efforts are essential to maintaining Indonesia’s cultural heritage and cultivating a spirit of national law that is in harmony with the country’s unique traditions and customs. As Indonesian society moves forward in an increasingly globalized world, the preservation and lawful application of these customary constitutions can serve as an anchor, binding society to its roots while guiding it towards an inclusive and culturally aware future.

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2. Problem

According to background of the study, the problems will be analyzed are how can the Indonesian legal system effectively recognize and integrate customary law while ensuring that it maintains a dynamic, flexible nature and continues to reflect the socio-cultural values of various regions? And then what efforts can be made to strengthen the legal protection and constitutional rights of indigenous peoples in Indonesia, bearing in mind that their rights, particularly those relating to customary land, are often violated by the government and non-governmental parties?

3. Literature Review

The relevance of customary constitutions in Indonesia, as well as their role in the country's legal system, has been a topic of academic interest. Various studies have explored the intersectionality of custom law, referred to as "custom" law in Indonesia, and the national legal framework.

Rudnyckyj discusses the importance of Indonesian customary law in relation to regional autonomy, as well as the potential for this customary law to influence national legislation. This is in line with the idea of reaffirming the relevance of customary constitutions to facilitate a more integrated national law. Rudnyckyj’s work provides a foundation for understanding the existence and undermining of the customary constitution in the face of national law codification.

Furthermore, Butt critically analyzes the legislative recognition of customary law in Indonesia, arguing that there has been a tendency to codify it, a process that paradoxically undermines its organic and dynamic nature. Butt argues that this approach ignores the cultural richness embodied in customary law and its potential to shape legal reforms in ways that reflect national customs and values. This perspective further underscores the need for an integrative approach to customary constitutions and national laws.

McGlynn explores the tension between formal legal structures and customary law in Indonesia. He shows how these tensions can undermine the legitimacy and effectiveness of the legal system, leading to conflict and social disruption. This study emphasizes the need to address the unclear position of customary constitutions in the legal and regulatory framework in Indonesia.

On a different note, F. and K. von Benda-Beckmann argue that Indonesia’s pluralistic legal system recognizes the complexities of customary law, suggesting that it is context-dependent and subject to multiple interpretations. They believe that this approach can facilitate a healthier integration of customary constitutions into national law, thereby strengthening the country’s legal resilience.

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Finally, Tamanaha states that the discourse of legal pluralism, particularly the existence of customary law, provides a fundamental basis for understanding the complexity of the law-making process in a society as diverse as Indonesia. It is this complex dialogue between customary law and the national legal system that underscores the need for harmonious integration, as stated in your proposed study.

Analyzing the body of literature on customary constitutions in Indonesia, several key themes and perspectives emerge. First, the work of Rudnyckyj and Butt explains the tension between the dynamic nature of customary law and the codification process. When included in the national codification system, this law risks undermining local autonomy and traditional values. Measures must be taken to prevent the loss of cultural property enshrined in the law.

Second, the work of McGlynn highlights the conflict that exists between customary law and formal legal structures, suggesting that the marginalized position of customary constitutions can create social disruption and undermine the legal system. This points to the need for a more harmonious integration of customary constitutions into the national legal framework.

Third, the perspectives of F. and K. von Benda-Beckmann and Tamanaha advocate legal pluralism, highlighting the complexity and multiple interpretations of customary law. They argue for the recognition of context-dependent customary law and the need for a pluralistic system that can overcome this complexity and assist in the formation of robust national laws.

The literature widely indicates that a careful, sensitive, and well-integrated approach to customary constitutions is essential. The proposed study is in line with this perspective by advocating for the reaffirmation of customary constitutions to form integrated national laws. In addition, this research can contribute to the discourse by exploring practical strategies for elevating the position of customary constitutions in the legal order in Indonesia, filling perceived gaps in the existing literature. In conclusion, the literature widely acknowledges the importance of customary constitutions in the context of the Indonesian legal landscape. This insight will be a valuable effort to reaffirm the relevance of the constitution to integrated national law.

4. Research Method

In writing this journal, the author uses the methods of normative law and sociological law. The way of writing normative law is by conducting research on laws and regulations related to the formation of laws and regulations in Indonesia as well as the position of the customary constitution in the Indonesian constitutional system. While the method of writing sociological law is used by looking at legal phenomena that often occur in society, in addition, the author also uses various references in this journal related to the actualization of customary constitutions in Indonesia, focusing on their formation and implementation.

In writing, this journal also uses primary legal materials, namely laws and regulations.

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16 Soerjono Soekanto, Introduction to Legal Research (Jakarta: UI-Press, 2006).
related to the formation of laws and regulations; besides that, it also uses secondary legal materials, namely books related to the topic of discussion. In addition, it is also supported by tertiary legal materials, namely legal dictionaries, which can provide enlightenment to writers, especially with regard to meanings that are difficult and are not understood by writers, so that a tool is needed in the form of a legal dictionary.

In addition, this journal writing method uses the inductive method, namely the mechanism and procedure for writing that try to analyze general matters to get specific conclusions. This method aims to provide easily understandable reading material for audiences interested in exploring how customary law can be used as a reference in the formation of laws and regulations in Indonesia.

2. Results and Discussion

Not many people know that our customary laws are scattered and tend to be neglected due to legal codification that wants uniformity between countries, including Indonesia. The need for seriousness in studying and implementing customary law, especially in the form of a constitution that has long grown and developed in Indonesia, the existence of customary law is increasingly eroded by the development of the times, which increasingly demands legal interaction between countries as part of the international community, which must obey and comply with the rules made to fulfill economic liberalism in various parts of the world.

With these increasingly liberal laws, it is necessary to revive the spirit of local legal wisdom, which is based on the spirit of developing and implementing local laws, whose existence is increasingly being eroded by the times, especially in relation to basic laws. Laws (UUD) that apply in various regions based on ethnicity and customs that exist in Indonesia. In this regard, the spirit to develop and socialize the existence of customary law and constitution in the midst of modern society must be continuously fostered so that the existence of law and constitution continues to exist, is recognized, and can be implemented under certain conditions. and at a certain time in the present and in the future.

Customary Constitution as Existing Law

Every society around the world has a legal system within the territory of the state. There is no nation that does not have its own national legal system. The national law of the nation is a reflection of the culture of the nation concerned. Because law is in the nation’s mind and grows from the nation's legal awareness, law will emerge as a reflection of the nation’s culture. In Indonesia, one of the laws that is a reflection of the nation's personality is customary law, which is the embodiment of the nation’s soul from century to century. The local customs and traditions are different, even though the basis and characteristics are the same, namely Indonesianness. Therefore, the tradition of the Indonesian people is said to be Bhinneka Tunggal Ika, which means different things but is still one. These

18 Soepomo, Chapters on Customary Law (Jakarta: Pradnya Paramita, 1989).
customs are always developing, always follow the development of society, and are closely related to folk traditions. Thus, custom is a precipitate of decency in society whose truth has received general recognition in that society. Customs existed in ancient times, namely before Hinduism arrived in Indonesia. At that time, the prevailing custom was the Malay-Polynesian custom. Gradually, Islamic and Christian cultures also influenced the original culture. The influence of the immigrant culture mentioned above was so great that in the end, the original culture, which had long dominated the way of life of the Indonesian people, was shifted, and the prevailing custom was an acculturation between the original custom and the custom brought by Hinduism, Islam, and Christianity. Thus, the development of customary law in society is greatly influenced by the three religions mentioned above.\(^{21}\)

Customary law is a law that grows out of people's awareness and is a reflection of the tastes and senses of the nation's culture.\(^{22}\) In developments and developments in the field of law, statements often arise as to whether, in its formation, it will use customary law materials, which are its own law, or instead use law from outside (foreign).\(^{23}\) There are several experts who doubt the ability of customary law to be used as the basis for national law. This opinion is based on the opinion and argument that customary law is ancient law and is often called primitive law, which is only suitable for use in underdeveloped societies. This opinion has the consequence that customary law is no longer appropriate when used as law in a modern civilized society. Especially if applied in the current era of globalization, where public relations between countries no longer have boundaries.

In tertiary institutions, both in law faculties and in sharia departments, customary law is still one of the subjects that must be taken. More than that, the author also often hears, both from lecturers and students, that customary law cannot be categorized as law but only as "custom." This reality is also supported by the fact that nowadays, customary law is also not much in demand. Customary law is only considered obsolete, which makes it no longer worth studying. Very few people and universities are interested in pursuing customary law; it seems that the results of research on customary law in Indonesia are very minimal. And books on customary law literature are also old books that were only updated in the year they were published. This situation indicates that the development of customary law will be increasingly dismal and will most likely not be of interest to the academic community in the future. For this reason, it needs to be reaffirmed so that customary law can gain a better understanding.\(^{24}\)

Indonesia is a country that adheres to plurality in the field of law, where there are three laws whose existence is recognized and valid, namely western law, religious law, and customary law. In practice, there are still many people who use customary law to regulate daily activities and solve existing problems. Each region in Indonesia has its own customary law system to regulate the lives of various people, most of which are not in the


form of written rules.
Customary law develops following the development of society and existing folk traditions. Customary law is a precipitate of decency in society whose truth is recognized in that society. In its development, the practices that occur in customary law communities often raise the question of whether these customary law rules can still be used to regulate people's daily activities and resolve problems that arise in customary law communities. Meanwhile, our country also has legal rules made by bodies or institutions that make laws and other statutory regulations. Customary law and state law have different binding powers; constitutionally, both are the same, but there are differences in form and aspect. The existence of customary law stands firmly on a strong foundation, namely the existence of a theoretical foundation and a judicial foundation. This basis legitimizes the application of customary law. Long before modern law penetrated the body of the Indonesian nation, there had been an order that had long governed the life of Indonesian society, which consisted of tribes spread almost all over Indonesia, namely customary law. The theoretical foundation that up to now legitimizes the implementation of customary law from a conception point of view, namely from the thoughts of Carl Von Savigny, who is a pioneer of legal thought, more specifically about the history of law, For him, law is "the spirit of a nation," according to the pioneer of the historical law school, namely Carl Von Savigny. For him, law was born from customary law. Customary law is a manifestation of positive law. Savigny further explained that law exists as an expression of the soul of a nation (volgkeist) regarding what is considered right and fair. The soul of a nation is different for each nation. The soul of the nation is also different over time. The reflection of the existence of different souls can be seen in the culture of each nation, which is also different. It is this spirit of the nation that then becomes the determining factor for people's compliance with the law itself. The soul form of this concept is the values adopted in society, which will metamorphose into written norms.

Position of Customary Law in the Constitution

After the second amendment to the 1945 Constitution, there were arrangements and recognition regarding customary law, as seen in Article 18 B paragraphs (1) and (2) and Article 28 I paragraph (3) of the 1945 Constitution. Article 18B 1945 Constitution:

"The state respects and recognizes special or special regional government units regulated by law. The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.

Article 28 I paragraph (3) of the 1945 Constitution:

"The cultural identity and rights of indigenous peoples are respected in line with their times
Indonesia is a country that adheres to pluralism in the field of law, where there are three laws whose existence is recognized and valid, namely western law, religious law, and customary law. In practice, there are still many people who use customary law to regulate daily activities and solve existing problems. Each region in Indonesia has its own customary law system to regulate the lives of various people, most of which are not in the form of written rules.

The substance of Article 18B (2) of the 1945 Constitution, in the phrase "as long as it is still alive," as written above, mandates that our country has a pluralist constitution. The constitution includes customary law as a source of guidance for social life in modern times. Because customary law can be used as a source for drafting national legislation.

Customary law develops as society and existing folk traditions evolve. Society recognizes the truth of customary law as a reflection of decency in society. In its development, the practices that occur in customary law communities often raise the question of whether these customary law rules can still be used to regulate people's daily activities and resolve problems that arise in customary law communities.

Meanwhile, our country also has legal rules established by bodies or institutions that make laws and other statutory regulations. Customary law and state law have different binding powers; constitutionally, both are the same, but there are differences in form and aspects. The state has officially recognized the existence of this customary law, albeit with limited use. Referring to Article 18B paragraph (2) of the 1945 Constitution which states:

"The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law."

This means that the state recognizes the existence of customary law and constitutional rights in the Indonesian legal system. Then, understand the article's formulation:

[1] The constitution guarantees the unity of customary law communities and their traditional rights;
[2] Constitutional guarantee as long as customary law is still alive;
[3] In accordance with the development of society;
[4] In accordance with the principles of the Unitary State of the Republic of Indonesia;

Thus the constitution guarantees recognition and respect for customary law if it fulfills the following conditions:

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30 Indonesia, 1945 Constitution of Indonesia and Amendment.
31 Ibid.
[1] The reality requirement is that customary law is still alive and in accordance with community developments; 

[2] The idealistic requirements are in accordance with the principles of the Unitary State of the Republic of Indonesia, and their applicability is regulated in law

So that the recognition and respect for the existence of customary law in the constitution is still relevant and has provided a clear picture that the Indonesian nation has a distinctive legal culture,.

Because customary law itself was born from the customary needs of the Indonesian people, so by itself, customary law can answer all legal problems faced by the community in daily life in a certain area. Customary law must be studied in the context of developing national law because, of course, the situation and conditions of the people in each region are different. These differences also lead to variations in their socio-cultural values, including the value of law as a cultural product.

Thus, although, on the one hand, customary law retains its traditional values, on the other hand, customary law can accept changes that affect it. Therefore, it can be seen where the flexibility of customary law lies. The constitution, as an organic law, guarantees legal certainty for customary law and its legal community by including recognition and respect for the laws that live in society. Judges (judges and constitutional judges) ensure legal certainty by exploring, following, and understanding legal values and a sense of justice that exist in society. Every society has autonomy over its legal values because it is society that needs these values.

The existence of the constitution as the highest normative rule in the hierarchy of laws and regulations, which has provided a separate place for recognition and respect for customary law, must be interpreted as the spirit and ideals of the Indonesian nation in the context of realizing a legal state capable of providing justice and prosperity for its people.

Even though the existence and rights of customary law communities are formally recognized in the 1945 Constitution, particularly in relation to customary land rights, in reality these rights are continuously being violated by both the government and non-government parties. These violations include violations of economic, social, and cultural rights that result in violations of civil and political rights. Violations of rights that continue to occur are one of the factors in the occurrence of horizontal and/or vertical conflicts, which often result in the loss of life and property. Therefore, in order for customary law community units to defend their constitutional rights, Law Number 24 of 2003 concerning the Constitutional Court (UUMK) specifically provides legal protection to customary law community units to become applicants at the Constitutional Court in terms of reviewing laws when there is a constitutional right that is impaired by the enactment of a law.

However, according to Article 18B paragraph (2) of the 1945 Constitution, recognition and respect for customary law community units and their traditional rights must be based on

the following conditions: As long as they are still alive, in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, they are regulated by law. In line with the constitution, the Constitutional Court Law also stipulates the same conditions for customary law community units to become applicants at the Constitutional Court. Both the 1945 Constitution and the Constitutional Court Law stipulate certain conditions for customary law community units to be able to proceed at the Constitutional Court. Even though constitutional requirements must be met, the state guarantees legal recognition and protection for customary law community units.

Based on this description, in fact, the position of the customary constitution is very fundamental both in the formation of law and in the administration and implementation of law in the field. The position of the customary constitution in relation to the formation of laws can contribute input to the draft laws and regulations, from the initial draft to their discussion and promulgation. In addition, in legal practice in the field, customary law must have a place and not only be known and studied but can also be practiced in everyday life so that the position of the customary constitution is not only as a living law but can also be practiced in the lives of the nation and state. In Indonesia, there are many customary laws that are still alive and developing in society that tend to be out of place due to the codification of law in the modern era.

6. Conclusion

Based on the discussion above, it can be concluded that the Customary Constitution is the law that applies in various regions and to certain groups of people in Indonesia. Codification and the spirit of forming laws and regulations in Indonesia continue to threaten the existence of customary constitutions. The existence of customary constitutions is not followed by the spirit of caring for, protecting, and even preserving and implementing them in the field. In the formation of law, customary constitutions are often not used as guidelines, so their existence continues to be eroded by the times that require the legalization of law and the spirit of legal takeover stemming from developments in international law. On the other hand, Article 18 B paragraph (1), paragraph (2), and Article 28 I paragraph (3) of the 1945 Constitution acknowledge the existence of the Customary Constitution and the laws that develop in society. In fact, through its various decisions, the Constitutional Court recognizes indigenous peoples as legal subjects who have legal standing to submit applications for reviewing laws against the 1945 Constitution. With the recognition of customary constitutions both in the 1945 Constitution and in legal practice in the field, it is hoped that customary law will continue to be strong and can even be used as a guide in the formation and practice of customary laws on the ground.

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