Customary Law and Constitutionalism in the Process of Recognizing Indigenous Communities in the Indonesian Legal State

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ABSTRACT

This study analyzes the position of customary law and the status of indigenous peoples in the national legal system through a constitutional perspective. The purpose of this study is to construct the principle of constitutionalism applied to the status of indigenous peoples, and to analyze the structural and legal obstacles that result in this recognition not being optimal. This study uses a normative legal research method with a limited statutory, conceptual, and historical approach through an analysis of constitutional provisions, sectoral laws and regulations, legal doctrine, and relevant court decisions. The results of the study indicate that although indigenous peoples and customary law have obtained constitutional legitimacy through Article 18B paragraph (2) and Article 28I of the 1945 Constitution of the Republic of Indonesia, the practice of recognition is still dominated by a conditional administrative approach and is oriented towards legal centralism. The fragmentation of sectoral regulations, the weak integration of collective rights within the human rights framework, and dependence on regional government policies give rise to legal uncertainty and unequal protection. This study concludes that the recognition of indigenous peoples needs to be reconstructed as an inclusive, pluralistic, and participatory constitutional process to strengthen substantive justice and legal certainty in the Indonesian legal system.

Penelitian ini menganalisis posisi hukum adat dan status masyarakat adat dalam sistem hukum nasional melalui perspektif konstitusionalisme. Tujuan penelitian ini yaitu mengkonstruksi prinsip konstitusionalisme diterapkan dalam status masyarakat adat, dan menganalisa hambatan struktural dan yuridis yang mengakibatkan belum optimalnya pengakuan tersebut. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan historis terbatas melalui analisis terhadap ketentuan konstitusi, peraturan perundang-undangan sektoral, doktrin hukum, serta putusan pengadilan yang relevan. Hasil penelitian menunjukkan bahwa meskipun masyarakat adat dan hukum adat telah memperoleh legitimasi konstitusional melalui Pasal 18B ayat (2) dan Pasal 28I Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, praktik pengakuannya masih didominasi oleh pendekatan administratif yang bersyarat dan berorientasi pada legal sentralisme. Terpecahnya regulasi sektoral, lemahnya integrasi hak kolektif dalam kerangka hak asasi manusia, serta ketergantungan pada kebijakan pemerintah daerah menimbulkan ketidakpastian hukum dan ketimpangan perlindungan. Penelitian ini menyimpulkan bahwa

pengakuan masyarakat adat perlu direkonstruksi sebagai proses konstitusional yang inklusif, pluralistik, dan partisipatif guna memperkuat keadilan substantif dan kepastian hukum dalam sistem hukum Indonesia.

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1. Introduction

Discussions on customary law and indigenous communities in the Indonesian constitutional state cannot be separated from the constitutional framework that positions the constitution as an instrument limiting power and guaranteeing recognition of social and legal diversity. In the Indonesian context, recognition of indigenous communities has a strong constitutional basis through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which emphasizes that the state recognizes and respects customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. This formulation shows that the recognition of indigenous communities is an integral part of the design of the Indonesian constitutional state, even though it is conditional and open to legal interpretation.[1]

Customary law, as *living law*, represents a system of norms that has grown, thrived, and been practiced for generations within indigenous communities. The contextual, unwritten, and communally based nature of customary law often clashes with the positivistic and centralistic nature of the national legal system. This tension places customary law in a vulnerable position, particularly when the state applies rigid and administrative standards of recognition. In many cases, customary law is only recognized to the extent that it is not deemed to interfere with state interests or development, thus diminishing the substance of customary justice values through the legal-formal approach.[2]

From the perspective of modern constitutionalism, the recognition of indigenous peoples cannot be understood as merely symbolic recognition, but rather must be interpreted as a recognition of indigenous peoples as legal subjects and subjects of human rights. Article 28I paragraph (3) of the 1945 Constitution explicitly states that the cultural identity and rights of traditional communities are respected in accordance with the development of the times and civilization. This provision emphasizes that the rights of indigenous peoples are fundamental and inherent, and places the state in the position of guarantor, not grantor of rights. Thus, customary law and the rights of indigenous peoples should be positioned as part of a collective human rights regime.[3]

However, in state practice, the process of recognizing indigenous peoples still faces various structural and normative obstacles. The fragmentation of sectoral regulations, such as in forestry, mining, and agrarian affairs, often places indigenous peoples in a subordinate

[1] Jimly Asshiddiqie, *Konstitusi dan konstitusionalisme Indonesia* (Sinar Grafika, 2018), 235.
[2] John Griffiths, "What Is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55, 1–5.
[3] Maria Farida Indrati, "Hak masyarakat adat dalam perspektif hak asasi manusia," *Jurnal HAM* 11, no. 2 (2020): 191.

position to state and corporate interests. Furthermore, the mechanism for determining indigenous peoples, which requires administrative recognition from local governments, results in many indigenous communities losing access to legal protection, even though sociologically they still live and practice their customary laws. This situation demonstrates the gap between constitutional norms and the reality of implementation.[4]

The recognition of indigenous peoples within the Indonesian rule of law has a relatively strong constitutional basis, but conceptually, fundamental issues remain regarding the meaning of such recognition within the framework of constitutionalism. While the Constitution acknowledges the existence of indigenous peoples, it does not explicitly define the operational mechanisms for such recognition. As a result, the recognition of indigenous peoples is often understood as a mere administrative policy, rather than a direct consequence of the principle of the rule of law, which guarantees the protection of the rights of citizens and traditional legal communities.[5]

The next issue relates to the lack of a consistent constitutional paradigm for positioning customary law. In legislative practice and policy, customary law is often positioned as subordinate and residual, applicable only to the extent it does not conflict with state law. This approach demonstrates the still-dominant tendency toward legal centralism, resulting in customary law not being fully understood as an integral part of the pluralistic national legal system. This situation has the potential to undermine the principle of constitutionalism, which should accommodate legal diversity as a social reality.[6]

Furthermore, there is a serious issue related to the tension between constitutional recognition and the protection of collective rights. The Indonesian legal system has historically emphasized the protection of individual rights, while the rights of indigenous peoples are communal and embedded in collective identity. The national legal framework's inability to accommodate these collective rights has resulted in many indigenous peoples' rights, particularly those related to customary territories and resource management, not receiving adequate protection, despite constitutional recognition.[7]

Another emerging issue is the dependence of indigenous peoples' recognition on regional government policies, which are often influenced by local political and economic interests. Recognition mechanisms through regional regulations or regional head decrees create legal uncertainty, as the status of indigenous peoples can vary across regions. This situation contradicts the principle of legal certainty, a pillar of the rule of law, and demonstrates the state's weak role in guaranteeing equal constitutional protection for all indigenous peoples in Indonesia.[8]

Furthermore, from the perspective of modern constitutionalism, the judiciary's role as guardian of the constitution has not been fully optimized in promoting the transformation of

[4] R. Bayo, A. U. Wijaya, and F. Hadi, "Pengakuan masyarakat adat dalam peraturan perundang-undangan di Indonesia," *Jurnal Ilmu Hukum Wijaya Putra* 1, no. 1 (2023): 1–11.

[5] Ni'matul Huda, "Pengakuan konstitusional masyarakat hukum adat dan implikasinya terhadap pembentukan hukum nasional," *Jurnal Hukum & Pembangunan* 49, no. 3 (2019): 389–92.

[6] Werner Menski, "Legal Pluralism Revisited: The Implications for Legal Practice," *Asian Journal of Law and Society* 1, no. 2 (2014): 296.

[7] Tania Murray Li, "Indigeneity, Capitalism, and the Management of Dispossession," *Current Anthropology* 51, no. 3 (2010): 385–414, 388–91.

[8] Herlambang P. Wiratraman, "Politik pengakuan dan perlindungan masyarakat adat di Indonesia," *Jurnal RechtsVinding* 8, no. 2 (2019): 223.

protection for indigenous communities. Despite progressive court decisions, customary law is still often viewed as a mere social fact, rather than a legal norm with constitutional force. This demonstrates a gap between the development of constitutional thought and the practice of law enforcement at the judicial level.[9]

Research on indigenous peoples in the Indonesian legal system has so far been dominated by a normative approach that emphasizes the existence of a constitutional basis for the recognition of indigenous peoples in the 1945 Constitution. Most studies assert that Article 18B paragraph (2) and Article 28I have provided sufficient constitutional legitimacy for the existence of indigenous peoples. However, these studies tend to stop at a textual reading of the constitution and have not critically examined how the principle of constitutionalism works in the process of recognition in state practice.

On the other hand, studies that examine customary law from a legal pluralism perspective tend to position customary law as a social phenomenon that exists outside the state legal system. This approach is important for understanding the legal reality in society, but it has not systematically linked customary law to constitutionalism as a fundamental principle of the rule of law. As a result, customary law is often understood as non-state law requiring administrative recognition, rather than as part of the constitutional structure itself.

Furthermore, there are still limited studies that consider the process of recognizing indigenous peoples as an indicator of the functioning of the rule of law and constitutionalism. Recognition is often understood as a mere legal product, rather than as a constitutional process reflecting the relationship between the state, customary law, and the constitutional rights of citizens. Therefore, there is a gap in research regarding how customary law should be constitutionally integrated into the process of recognizing indigenous peoples to strengthen the principles of Indonesia's rule of law.

This research has significant academic and practical significance for the development of customary law and constitutionalism studies in Indonesia. Academically, this research contributes to the enrichment of constitutional law discourse by positioning customary law not merely as a social phenomenon or non-state law, but as an integral part of the practice of constitutionalism in a state governed by the rule of law. By focusing its analysis on the process of recognizing indigenous peoples, this research broadens understanding of how the principles of constitutionalism operate in the context of a legally and culturally pluralistic society.

This research has theoretical significance because it systematically links the concepts of constitutionalism and legal pluralism. Until now, these two concepts have often been discussed separately, resulting in customary law being marginalized from the state's constitutional framework. This research seeks to bridge this gap by offering the perspective that the recognition of indigenous peoples is part of a concrete test of the rule of law's commitment to justice, diversity, and the protection of collective rights. Thus, this study makes a conceptual contribution to the development of a more inclusive and contextual constitutionalism.

[9] Yance Arizona, "Peradilan dan pengakuan hak masyarakat adat," *Jurnal Sociae Polites* 18, no. 1 (2017): 67.

From a practical perspective, this research has direct relevance for policymakers, law enforcement officials, and judicial institutions. The analysis of the process of recognizing indigenous peoples is expected to provide critical reflection in formulating legal policies that are more consistent with constitutional mandates. This research can also serve as a reference for judicial institutions in interpreting constitutional norms related to indigenous peoples in a more progressive and substantive justice-oriented manner, particularly in resolving disputes involving customary law and indigenous peoples' rights.

Furthermore, this research has social significance because it contributes to strengthening the position of indigenous peoples as legal subjects in Indonesia's rule of law. By emphasizing that the recognition of indigenous peoples is a constitutional process, not simply an administrative procedure, this research encourages a paradigm shift in viewing the relationship between the state and indigenous peoples. This approach is expected to strengthen the protection of indigenous identities, values, and legal systems that exist within communities, while ensuring that development and public policies do not neglect the principles of justice and respect for indigenous peoples' rights.

Thus, the significance of this research lies in its ability to integrate academic, policy, and social justice interests within a coherent analytical framework. This research not only seeks to explain the issue of indigenous peoples' recognition but also offers a more substantive and humane constitutional perspective for building an inclusive and just Indonesian state based on the rule of law.

2. Method

2.1. Types of Research

This research uses a normative legal research approach, focusing on analyzing law as a norm and system governing the recognition of indigenous peoples within the framework of the Indonesian rule of law. This normative approach was chosen because the primary objective of this research is to examine how customary law is positioned and integrated within the construction of constitutionalism, particularly through constitutional norms and evolving state practices. In this context, law is understood not only as written regulations but also as a construct of values and principles that shape the relationship between the state and indigenous peoples.[10]

2.2. Research Approach

The research approaches used are a statutory approach and a conceptual approach. The statutory approach is used to analyze constitutional provisions, particularly Article 18B paragraph (2) and Article 28I of the 1945 Constitution, as well as laws and regulations related to the recognition of indigenous peoples. Meanwhile, the conceptual approach is used to examine key concepts such as constitutionalism, the rule of law, legal pluralism, and customary law as *living law*. This approach is important for building an analytical framework that is not merely textual, but also reflective and theoretical.[11]

[10] Soerjono Soekanto and Sri Mamudji, *Penelitian hukum normatif: Suatu tinjauan singkat* (RajaGrafindo Persada, 2014), 13–15.

[11] Peter Mahmud Marzuki, *Penelitian hukum* (Kencana Prenada Media Group, 2017), 133.

Furthermore, this study utilizes a limited historical approach to understand the dynamics of customary law recognition in the course of Indonesian constitutional rule. This approach is used proportionally to explore how the state's paradigm shift toward indigenous communities has influenced the construction of laws and policies for recognition. Thus, customary law is not understood statically, but rather as part of a constitutional process that continues to evolve in line with social and political changes.[12]

2.3. Data Collection Technique

The legal materials used in this research consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia and related laws and regulations. Secondary legal materials consist of scholarly books discussing customary law, constitutionalism, the rule of law, and legal pluralism. Meanwhile, tertiary legal materials are used to a limited extent to assist in the exploration of legal concepts and terms. The legal material collection technique is carried out through a systematic and critical literature study.[13]

2.4. Data Analysis Techniques

The analysis of legal materials was conducted using qualitative methods that are both prescriptive and argumentative. The collected legal materials were analyzed by linking constitutional norms with theoretical concepts and practices of indigenous peoples' recognition. Through this analysis, the research aimed not only to explain the existing legal conditions (*das sein*) but also to formulate arguments regarding how customary law should be positioned within a constitutional framework that upholds the principles of the rule of law and substantive justice (*das sollen*).[14]

3. Results and Discussion

3.1. The Legal Status of Customary Communities and the Process of Recognizing Indigenous Communities as Constitutional Practice

The results of the study show that customary law has normatively obtained constitutional legitimacy in the Indonesian legal system, especially through Article 18B paragraph (2) and Article 28I of the 1945 Constitution of the Republic of Indonesia. This recognition marks an important shift from the paradigm of a homogeneous legal state to a legal state that recognizes the diversity of legal systems. From a constitutional perspective, this recognition reflects the constitution's efforts to limit state power while guaranteeing the continuity of the identity and normative system of indigenous communities as part of the nation's citizens.[15]

However, research results indicate that constitutional recognition of customary law has not been fully internalized in the practice of state administration. Customary law is still often positioned as a subordinate law, whose validity depends heavily on formal recognition by the

[12] Asshiddiqie, *Konstitusi dan konstitusionalisme Indonesia*, 45.
[13] Bambang Sunggono, *Metodologi penelitian hukum* (RajaGrafindo Persada, 2016), 67–70.
[14] Sudikno Mertokusumo, *Penemuan hukum: Sebuah pengantar* (Liberty, 2009), 37–39.
[15] Jimly Asshiddiqie, "Negara hukum dan konstitusionalisme," *Jurnal Konstitusi* 14, no. 3 (2017): 485.

state. This condition indicates that Indonesian constitutionalism is still dominated by a legal centralism approach, in which state law is viewed as the sole source of legal legitimacy. As a result, customary law has not been fully treated as a constitutionally equal part of the national legal system.[16]

Further discussion shows that the recognition of indigenous peoples in Indonesia is largely understood as a product of administrative law, rather than a constitutional process. The mechanism of recognition through regional regulations or regional head decrees demonstrates that the existence of indigenous peoples still depends on the political will and administrative capacity of local governments. From the perspective of a state based on the rule of law, this situation is problematic because it creates legal uncertainty and unequal treatment among indigenous communities in various regions.[17]

From a constitutional perspective, the recognition of indigenous peoples should be understood as a process reflecting the reciprocal relationship between the state and its citizens. Recognition should not be reduced to a mere administrative procedure, but rather should be understood as the state's constitutional obligation to respect and protect the legal communities that existed before the state was formed. Thus, the process of recognizing indigenous peoples serves as an important indicator for assessing the extent to which the principles of the rule of law are substantively implemented.[18]

3.2. Regulatory Fragmentation and Its Impact on the Recognition of Customary Law

The research also shows that the integration of customary law and human rights regimes still faces conceptual challenges. The Indonesian legal system has traditionally focused on protecting individual rights, while the rights of indigenous peoples are collective and communal. As a result, indigenous peoples' rights are often reduced to cultural rights, without full recognition of the rights to land, territories, and natural resources as part of human rights.[19]

From a modern human rights perspective, indigenous peoples are viewed as subjects of rights with collective rights to their own identity, territory, and legal system. Therefore, customary law serves not only as a cultural heritage but also as an instrument for protecting the dignity and survival of indigenous peoples. When the state fails to integrate this perspective into legal policy, constitutional recognition loses its substantive meaning and has the potential to perpetuate structural injustice.[20]

The following discussion shows that fragmentation of sectoral regulations is a major obstacle to the recognition of indigenous communities. Laws in the forestry, mining, and agrarian sectors are still dominated by the paradigm of state control over natural resources.

[16] Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 199.

[17] Ni'matul Huda, "Problematika pengakuan masyarakat hukum adat," *Jurnal Hukum & Pembangunan* 50, no. 2 (2020): 267.

[18] Tom Ginsburg, "Constitutional Courts in New Democracies," *International Journal of Constitutional Law* 2, no. 1 (2004): 84–86.

[19] M. Nowak, "Collective Rights in Indigenous Contexts," *Human Rights Quarterly* 21, no. 1 (1999): 44.

[20] S. James Anaya, "Indigenous Peoples' Rights and Human Rights," *Arizona Journal of International and Comparative Law* 24, no. 1 (2007): 13.

In practice, this paradigm often conflicts with the existence of indigenous territories and resource management systems based on customary law.[21]

This situation demonstrates an inconsistency between constitutional norms that recognize indigenous peoples and sectoral policies that actually limit their living space. From a constitutional perspective, this fragmentation reflects weak coordination between legal norms and the state's failure to position the constitution as the supreme norm guiding all legal policies. As a result, recognition of indigenous peoples is partial and unsustainable.[22]

Conceptually, the failure to integrate customary law and human rights regimes—particularly in Indonesia—stems from the individualistic bias that dominates contemporary law enforcement, a legacy of Western traditions. National law tends to treat subjects and property as separate instruments of individual rights, whereas customary law communities operate on the basis of collective, communal values that are inseparable from their spiritual, ecological, and social ties to their ancestral lands. As a result of this epistemological mismatch, the fulfillment of human rights—particularly customary law—is reduced to merely the formal protection of property assets, without providing substantive or essential recognition of a community's rights to its living territory and the management of natural resources. Such a reduction leads to structural weaknesses, as the cultural existence of indigenous communities is recognized in an abstract manner, severed from the material foundation that sustains the continuity of their identity, dignity, and honor.

At the level of legislation and policy implementation, these conceptual issues are exacerbated by the fragmentation of sectoral regulations that effectively undermine the constitutional mandate for protection. Laws and regulations governing the agrarian, mining, plantation, and forestry sectors still operate under the shadow of the doctrine of state sovereignty, which is interpreted in an exclusive and centralized manner. Each ministry technically develops its own licensing and mapping frameworks, which often overlap and reinforce one another. In practice, the extractive licensing regime and investment concessions—based on sectoral legislation—move much more swiftly and possess far stronger legal binding power than the system for demarcating customary territories, which is constrained by layers of bureaucratic procedures. This situation creates a normative contradiction in which the state simultaneously recognizes the existence of indigenous communities in the Constitution but systematically narrows their living space through a technical regulatory framework based on legislation.

From a constitutional law perspective, this regulatory fragmentation reveals a dysfunction in the legal framework and the state's failure to establish the Constitution as the Supreme Law of the Land, which is binding on all sectoral policymaking. The principle of the unity of the legal system requires that all organic laws and their implementing regulations be subject to and aligned with the values of constitutional rights protection as set forth in Article 18b, paragraph 2, and Article 28I of the 1945 Constitution. When sectoral laws actually serve as a framework for the deprivation of living space or constitute criminal acts against customary-based natural resource management practices, a covert violation of the

[21] Yance Arizona, "Konstitusionalisme agraria dan hak masyarakat adat," *Jurnal RechtsVinding* 9, no. 1 (2020): 33.

[22] Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law," *Yale Journal of International Law* 28, no. 1 (2003): 178.

Constitution occurs at the operational level. Without cross-sectoral legislative harmonization through a holistic rule of law and the strengthening of constitutional supremacy in natural resource management—including recognition of customary law—the legal framework will remain fragmented and fail to realize a sense of ecological and social justice that communities can experience sustainably.

3.3. The Role of the Courts and Constitutional Implications for Strengthening an Inclusive Rule of Law

The study's findings confirm that the judiciary plays a strategic role in strengthening the recognition of customary law and indigenous communities. Several court decisions, particularly the Constitutional Court, have provided progressive interpretations of the existence of indigenous communities and their rights. These decisions demonstrate that the judiciary can function as a guardian of the constitution, encouraging legal transformation toward substantive justice.[23]

Specifically, this progressive role is clearly evident in Constitutional Court Decision No. 35/PUU-X/2012, which marked a shift from the historical view and ruled that customary forests are no longer state forests, thereby restoring the ownership rights of indigenous communities over their ancestral lands as stipulated in Article 18B, paragraph (2) of the 1945 Constitution. The Constitutional Court subsequently reinforced the constitutional rights of indigenous peoples to strengthen this jurisprudence through Constitutional Court Decision No. 97/PUU-XIV/2016. In its main ruling, the Court stated that the provision requiring adherents of indigenous belief systems—which are closely tied to the traditions of many indigenous communities—to leave the religion column blank or not fill it out on their Identity Cards (KTP) and Family Cards (KK) is contrary to the 1945 Constitution, and ordered the state to include the registration of adherents of indigenous beliefs in civil registration documents. These landmark rulings demonstrate how an active judiciary can bridge the gap between state legal formalism and substantive justice, ensuring that constitutionalism actively protects indigenous identities, land rights, and equal citizenship rights within the framework of an inclusive rule of law.

However, the implementation of these judicial decisions still faces obstacles at the policy and administrative levels. Without strong regulatory support and political commitment, court decisions have the potential to become merely symbolic. Therefore, strengthening the role of the judiciary must be accompanied by policy reforms that place customary law as an integral part of the national legal system.[24] This discussion demonstrates that the recognition of indigenous communities is a real test of Indonesian constitutionalism. A state governed by the rule of law that only recognizes diversity normatively, without substantive protection, risks violating the principle of social justice that underpins the constitution. Therefore, customary law needs to be positioned as part of an inclusive constitutional design that respects legal diversity as a social and constitutional reality.[25]

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[23] Bisariyadi, "Mahkamah Konstitusi dan perlindungan masyarakat adat," *Jurnal Konstitusi* 15, no. 4 (2018): 742.

[24] Mark Tushnet, "Judicial Review and Social Transformation," *Harvard Law Review* 113, no. 7 (2000): 1503–29, 1513.

[25] Ran Hirschl, "The Rise of Constitutionalism," *Annual Review of Political Science* 11 (2008): 93–118, 105.

Recognition of customary rights at the administrative and policy levels requires a specific and clear separation of judicial functions among judicial institutions. First, the Constitutional Court plays a role at the abstract-normative level as the guardian of the constitution by reviewing the constitutionality of laws—such as by invalidating provisions that alienate customary forests and indigenous communities. Second, the Administrative Court (PTUN) functions at the administrative-operational level to review the legality of decisions made by public officials, including the annulment of concession permits, land certificates, or decrees issued arbitrarily by regional heads within customary territories. Third, the General Courts—in this case, the District Courts—play a role in civil and criminal contexts to resolve disputes over actual ownership, claims for compensation regarding the control of customary lands, and to provide legal protection for indigenous communities against criminalization. Without a structured and systematic configuration across these three judicial spheres—where the Constitutional Court safeguards statutory norms, the Administrative Court oversees bureaucratic administrative actions, and the General Courts adjudicate disputes arising within communities—progressive rulings will remain mere legal symbolism lacking substantive enforcement power.

3.4. Multicultural Constitutionalism and the Challenge of Recognizing Indigenous Peoples

The research findings demonstrate that the recognition of indigenous peoples in the Indonesian legal system cannot be separated from the debate on multicultural constitutionalism. The Indonesian Constitution normatively allows for diversity, but state practice still exhibits a tendency toward legal homogenization. In this context, indigenous peoples are often positioned as a special group requiring exceptions, rather than as an inherent part of the country's constitutional design. This approach has implications for the limited space for affirmative action in customary law as a system of equal norms.[26]

Multicultural constitutionalism demands that the state not only recognize differences symbolically but also accommodate the value systems and laws that exist within society. Therefore, the recognition of indigenous peoples should not be understood as a threat to national integration, but rather as strengthening the legitimacy of the constitution through recognition of social realities. When customary law is placed within this framework, the Indonesian rule of law actually gains a more solid moral and social foundation.[27] Further discussion reveals a conceptual tension between state sovereignty and the social sovereignty of indigenous peoples. The state, through the doctrine of state control, often positions itself as the holder of supreme authority over land and natural resources. On the other hand, indigenous peoples possess a system of social sovereignty that has long regulated human relations within their territories based on customary law. This tension has become a major source of legal and social conflict in various regions of Indonesia.[28]

[26] Will Kymlicka, "Multicultural Citizenship within Constitutional States," *Ethics* 108, no. 2 (1998): 239–66, 301.

[27] Sujit Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law," *Constitutional Design* 18, no. 3 (2009): 829.

[28] Li, "Indigeneity, Capitalism," 386.

From a modern constitutional perspective, sovereignty is no longer understood in absolute terms, but rather is limited by the principles of human rights and social justice. Therefore, state sovereignty should be exercised with respect for the social sovereignty of indigenous communities. When the state ignores this dimension, the rule of law loses its humanistic character and becomes an instrument of formal legal domination.[29]

3.5. Conditional Recognition and the Risk of Delegitimizing the Constitution

One of the important findings of this research is the problematic nature of conditional recognition of indigenous communities. The phrase "as long as they are still alive and in accordance with societal developments and the principles of the Unitary State of the Republic of Indonesia" is often used to justify delaying or even refusing recognition. In practice, these conditions are often interpreted unilaterally by the state without meaningful participation from indigenous communities themselves.[30]

From a constitutional law perspective, the constitutional qualification “as long as it remains relevant and in line with societal developments and the principles of the Unitary State of the Republic of Indonesia,” as elaborated in Article 18B, paragraph (2), and Article 28I of the 1945 Constitution, substantively places indigenous communities in a position that is constantly threatened by state delegitimization. Critically, these criteria have proven to be extremely difficult to meet in practice due to the absence of measurable, objective, and standardized indicators at the level of technical regulations. Provisions regarding “as long as they remain in existence” and “community development” are sometimes interpreted in a static and anachronistic manner by government officials, who require indigenous communities to prove the authenticity of traditions that have not been influenced by modernization—a standard that is unrealistic in the contemporary era. On the other hand, the phrase “in accordance with the principles of the Unitary State of the Republic of Indonesia and development” is often manipulated as a political constraint to prioritize corporate investment projects or concessions over customary territories under the guise of development. The lack of clarity regarding these criteria for proof grants local governments an extremely broad scope of discretion, so that the determination of the existence of indigenous communities is no longer based on sociocultural facts, but rather on the political will and pragmatic administrative decisions of local leaders.

Conditional and non-transparent recognition has the potential to delegitimize the constitution in the eyes of indigenous communities. The constitution, which should be an instrument of protection, is instead perceived as a tool of restriction. This situation is dangerous for the sustainability of the rule of law, as the constitution loses its social binding power. Therefore, the conditions for recognition need to be interpreted progressively and participatory to remain in line with the spirit of constitutionalism. The process of recognizing indigenous communities still lacks substantive participation. Indigenous communities are often the objects of policy, not the subjects, in the decision-making process. In a constitutional democracy, participation is a key element that guarantees the legitimacy of law and policy.

[29] Boaventura de Sousa Santos, “Law and Globalization from Below,” *International Journal of Sociology of Law* 29, no. 1 (2001): 15.

[30] Marcus Colchester, “Indigenous Rights and the Rule of Law,” *Forest Peoples Programme Journal* 5, no. 2 (2004): 22.

Without participation, the recognition of customary law risks becoming a meaningless administrative formality.[31]

A participatory approach to recognizing indigenous peoples is not only relevant from a democratic perspective but also strengthens the rule of law. When indigenous peoples are actively involved, the law is no longer perceived as a coercive instrument, but rather as the result of a just social agreement. Thus, participation serves as a bridge between customary law and constitutionalism.[32]

3.6. Conceptual Reconstruction of the Recognition of Indigenous Peoples in the Indonesian Legal State

In the global context, a discourse on indigenous constitutionalism has emerged that positions indigenous peoples as constitutional actors, not simply recipients of policies. This discourse emphasizes that indigenous peoples have the normative capacity to contribute to the formation of the country's constitutional values. This discourse is relevant for Indonesia, which has a sociological and historical diversity of indigenous communities.[33] Lessons from this global discourse demonstrate that the recognition of indigenous peoples is not merely a domestic issue but part of the development of contemporary constitutionalism. By adopting this approach, Indonesia can strengthen its position as a state based on the rule of law that is responsive to social justice and human rights.[34]

Based on the overall discussion, this study emphasizes the need for a conceptual reconstruction of the recognition of indigenous peoples. Recognition should no longer be understood as a gift from the state, but rather as an acknowledgment of existing social and legal realities. This reconstruction demands a paradigm shift from a centralized rule of law to a pluralistic and inclusive rule of law.[35] With this reconstruction, customary law can serve as a source of values and norms that enrich Indonesian constitutionalism. A rule of law is no longer based on the logic of uniformity, but on the principle of justice that respects diversity. This is the essence of a rule of law that is not only normatively legitimate but also socially just.

In modern constitutional discourse, the shift toward a constitutionalist paradigm for customary law communities calls for a fundamental change in how the status of subjects of customary law is viewed in relation to the state. Thus far, the perspective of Indonesia's contemporary rule of law has tended to position indigenous communities passively as objects of regulation or merely as beneficiaries of the state's administrative policies. In contrast, the global perspective on constitutionalism holds that indigenous communities are an integral part of the constitutional framework itself, possessing their own value systems, strong normative structures, and historical social legitimacy. Long before the formation of the Indonesian state—which was built upon the foundation of the social diversity and history of

[31] Archon Fung, "Participation, Deliberation, and Representation," *Annual Review of Political Science* 11 (2008): 241–62, 169.
[32] Mark E. Warren, "Democracy and the State," *Political Theory* 33, no. 2 (2005): 239.
[33] G. Christie, "Indigenous Legal Orders and Constitutionalism," *McGill Law Journal* 58, no. 4 (2013): 685.
[34] Kirsty Gover, "Indigenous Peoples and Constitutional Recognition," *Modern Law Review* 77, no. 2 (2014): 173.
[35] Jeremy Webber, "The Grammar of Customary Law," *McGill Law Journal* 54, no. 4 (2009): 583.

the archipelago—the implementation of this perspective held great significance in positioning indigenous communities not merely as a marginal group to be standardized, but as active subjects who help shape and enrich national values based on their own customs.

Therefore, conceptual reconstruction is crucial for the recognition of indigenous communities, which must begin by shifting the fundamental nature of the state's legal actions from a model of constitutive grant toward a form of recognition that, through a constitutive method of grant, acknowledges the existence and rights of these communities as if they were newly established and valid only after formal designation through administrative legal instruments issued by local governments, so that the absence of technical regulations does not result in or lead to the loss of indigenous communities' constitutional rights; conversely, the declaratory model of recognition holds that the state's role is merely to record, facilitate, and respect the fulfillment of social and legal realities that have existed for generations. This shift in conceptual meaning demands a transformation in perspective—from a centralized and hegemonic rule of law toward a pluralistic and inclusive rule of law—because the diversity of normative frameworks is recognized as a force that underpins social stability and justice in the fulfillment of human rights.

In terms of the implementation and formulation of legislative policies, this conceptual reconstruction necessitates the integration of customary law as an equal source of law in the development of the national legal system. A state governed by the rule of law and founded on Pancasila must not be trapped in a logic of normative equivalence, which risks marginalizing local wisdom in agrarian governance, dispute resolution, or environmental conservation. By making the essential principle of justice—which values diversity—the primary benchmark of Indonesia's legal foundation, this approach will bridge the gap between the state's formal recognition and the reality of justice as experienced by society. Thus, this framework ensures that the state's aspirations do not stop at mere substantive or procedural validity, but are tangibly realized as instruments for the protection of human dignity and social justice for all the people of Indonesia as members of the nation, without exception.

4. Conclusion

Based on the results and discussion, this study confirms that the recognition of indigenous peoples within the Indonesian rule of law is a fundamental constitutional issue, not merely a sectoral or administrative one. Normatively, the constitution provides a strong basis for recognizing the existence of indigenous peoples and customary law. However, in state practice, this recognition tends to be formal and conditional, thus not fully reflecting the principles of constitutionalism that uphold limitations on state power, protection of human rights, and substantive justice.

Furthermore, this research also confirms that the recognition of indigenous peoples cannot be separated from the human rights dimension, particularly collective rights. The inability of the Indonesian legal system to integrate the collective rights of indigenous peoples into the human rights framework has resulted in partial and fragmented protection. In this context, customary law should be understood not merely as a cultural identity, but as a normative instrument for safeguarding the dignity, sustainability of life, and the relationship between indigenous peoples and their territories.

The discussion also shows that fragmented sectoral regulations and weak coordination between legal norms exacerbate the problem of recognizing indigenous peoples. Although the judiciary, particularly the Constitutional Court, has played a significant role through progressive interpretations, the implementation of these decisions still faces structural obstacles. This indicates that strengthening the judiciary's role needs to be accompanied by a reconstruction of legal policies and paradigms that place the constitution as the supreme norm guiding all legal and governmental practices.

This study concludes that the recognition of indigenous peoples must be reconstructed as an inclusive, participatory, and sustainable constitutional process. Indonesia's rule of law needs to move from a recognition-based approach to one that acknowledges existing social and legal realities. This reconstruction will not only strengthen the position of indigenous peoples but also enrich Indonesian constitutionalism with the values of legal pluralism and social justice. Ultimately, the successful recognition of indigenous peoples is an important indicator for the realization of an Indonesian rule of law that is not only normatively legitimate but also substantively just and humane.

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