

## Harmonization of the Application of Customary Law and Positive Law in Village Communities of Malang Regency

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### ABSTRACT

Ngadas Village is a village with an interesting order of life and customs like many other villages. The people have lived long with the customs and norms of local wisdom. Our study aims to investigate the harmonization of both customary law and national law in Ngadas Village. The customary law includes the local wisdom value as a philosophy and obeys positive law. To understand the harmonization, we use an empirical juridical approach in understanding the role of government officials in preserving customs and positive law. Subsequently, we discuss the harmonization through the role of government officials covering aspects of community life. Our findings indicate that the positive law serves as a reference to the customary law. The customary law is in line with national interests and laws and national law. Likewise, the customary law is in harmony with religious elements. This denotes the importance of the village's official roles for the local community's interests.

**Keywords:** Harmonization, Implementation, Law, Positive Law, Traditional Law

**JEL Classification Codes:** K00, K15, K19

### INTRODUCTION

Ngadas Village is located on the slope between Mount Bromo and Mount Semeru, Malang Regency, 2375 m above sea level. It is not too densely populated and has a different life order from most other surrounding villages. The people's habits exist in the community (Yanis, 2010), and the local wisdom norms have been respected since the village was founded. Its natural conditions have made the village more developed, especially in the agricultural sector. Along with the increasing population, the existing customary habits are applied to all of its residents, primarily regulating their social life. The community has carried out its local wisdom from generation to generation. It comprises agricultural crafts, harmony, and friendship among community groups shown when engaging in collaborative activities.

The local wisdom is reflected in their daily life and has close ties with the geographical conditions where they live so that it is only applied in the geographical area of the village. (Solekhan, 2014). It is a description of wisdom related to human relationality with the

nature in which they grow and develop. Relativity is a series of everyday human relationships that continue to spark deep awareness, often associated with legends, and myths. However, as it is located within the territory of the State of Indonesia, national law also applies to it and all of its residents. Thus, the local customary law and the applicable positive law should keep pace with one another.

The village rulers or those responsible for the continuity of the common life order must continuously explore the wisdom of the daily life of the community to ensure that the local wisdom manifested in unwritten customary law is preserved and obeyed. (Armada, Azcón, López-Castillo, Calvo-Polanco, & Ruiz-Lozano, 2015). The local wisdom is based on the concept of justice of humanity and environmental sustainability.

This concept of justice has a dominant scope of philosophical-ethical-cosmological dimensions. It is not superficially observed as a matter of sharing benefits in the form of money; it however deeply lives as a matter of 'beautiful relations' between humans and nature. The village is graced with the busyness of farmers and traders passing, warmly greeting each other, and going in and out of the alleys peacefully. These habits are preserved in Ngadas Village. Even to foreigners, they show their hospitality, by introducing their customs and customary behavior for them to obey while in the village.

The diversity of beliefs is not an obstacle in the daily life of the people; there is a very significant mixture based on their awareness of the customary law. (Ferus et al., 2020). When problems occur, the local authorities interfere (village heads, traditional heads, or *dukun*).

*Dukun* is a community figure highly respected regardless of their respective beliefs. His/her consideration and advice are asked before conducting village activities and when problems occur. The customary rules are unnegotiable laws to maintain human relations with nature. The local wisdom pays attention to the philosophy of universal life that supports and grows unitedly.

This local wisdom is part of the Indonesian philosophy deeply lives in the people's daily lives and hearts. We observed the life of Ngadas Village people customs and customary rules, as a pearl of local wisdom strived to be harmonized with the applicable positive laws in Indonesia.

## RESEARCH METHOD

To understand how the harmonization takes place within the application of both customary and positive laws, we conducted a qualitative and empirical analysis. First, we collected data from legal sources and various online searches. We linked them to focus on question formulation. Comprehending the research questions, we analyzed the data by a phenomenological approach. The analysis ends in an in-depth evaluation to get findings we believe answering the questions with the principles of validity and reliability. We adhere to the study model of positive law and customary law initiated by national law experts (Marzuki, 2017). We harmonized the customary and positive laws



in Ngadas Village community through the role of village officials and social, legal community leaders. Due to the pandemic, we were forced to use the empirical juridical method by examining the village apparatus efforts. We also take note of local customs and follow applicable positive laws (Gamas, 2019).

## RESULTS AND DISCUSSION

### Indonesian Philosophy

Indonesian philosophy has a broad meaning since it contains the local wisdom of the indigenous peoples (Slamet, Dargusch, Aziz, & Wadley, 2020). The local wisdom is related to the values of Pancasila and it comprises its noble values manifested in their daily behavior. They are:

1. **Godhead.** The first precept of Pancasila is a deity with a non-institutional religious culture, which has an openness and acceptance to a plural religious image
2. **Humanity.** With this concept, the forms of acceptance of others are reflected in hospitality and respect. This underlines that humanity belongs to the experience of human struggles, including in preserving customs and customary rules.
3. **Unity.** It deals with nationalism comprising national values as an estuary in people's lives since it brings a meaning of beauty, especially the relationship between humans and nature.
4. **Democracy.** It reflects that the people are not rulers, yet subjects of life who are wise, responsible for the continuity of the common life order, as wisdom is obtained from the experience of living together in a state of peace.
5. **Justice.** It reflects social justice for all Indonesian people which includes an understanding of the relationship between the human life order and the universe, enabling the achievement of human welfare.

### Pancasila as Source of law

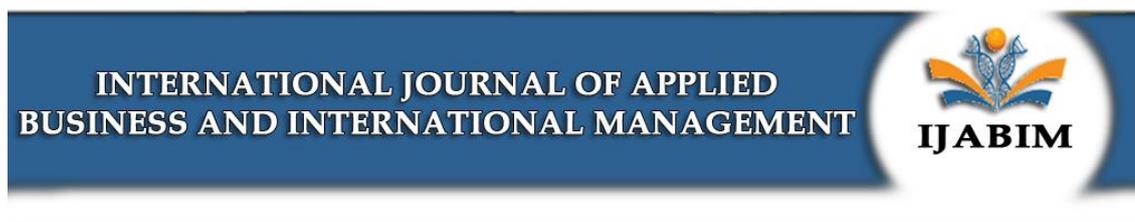
Pancasila is the everlasting and undistorted national guide, the values of which create harmony not only with the universe but also with the current state law. (Prabowo et al., 2017). This ensures the continuity of harmonious relationships in everyday life. The application of customs or customary rules in the customary community in Ngadas Village harmonizes their life together.

### Customary Law Section

The definition of customary law can be understood from its parts and application as in presented Table 1.

**Table 1.** Customary Law Section

Customary Law Section	Description	National Law
Customary Law and Administration	Rules regarding the structure of customary community, forms of community (fellowship), customary law (village),	Law No. 6/2014 concerning Villages

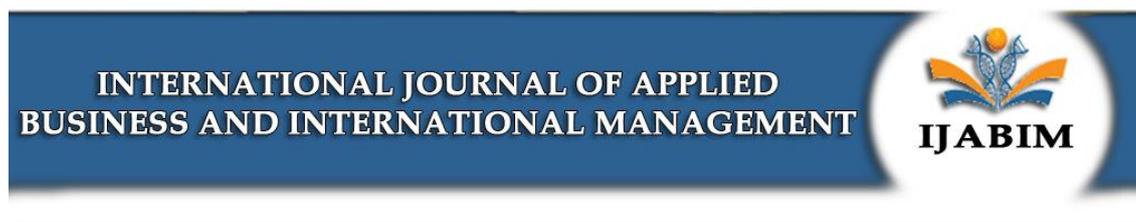


	apparatus (village), the structure of positions and duties of apparatus, village customary density assembly, and village assets	
Traditional Marriage Law	Rules regarding the forms of marriage, methods of proposals, marriage ceremonies, divorces	Law No. 1/1974 jo Law No. 16/2019 concerning Marriage
Kinship Customary Law	Rules regarding a person's position as a member of a relative, the position of the child towards parents and vice versa, the position of the child towards relatives and vice versa, and child guardianship issues	Book II of the Civil Code on People, Law No. 39/1999 concerning Human Rights
Inheritance Customary Law	The rules on how the inheritance/assets are passed on/divided from heir to heirs and from generation to generation	Book II of the Civil Code on People
Customary Economic Laws	The rules regarding how the legal relationships that apply in village communities in their efforts to meet their daily needs, land transactions	Article 33 of the 1945 Constitution of the Republic of Indonesia. Law No. 5/1960 concerning Agrarian Principles
Customary Law of Offense (Adatdelicten Recht)	Rules regarding events, wrongdoing which results in disruption of the balance of indigenous peoples (customary offenses)	Criminal Code (KUHP)
Customary Justice Law	Rules regarding how to settle a case and/or how to determine a legal decision on a case according to the customary law of offenses	Criminal Code (KUHP)

Source: UUD NRI 1945; Law No.5 / 1960 concerning Agrarian Principles.

#### Alignment of Customary Law with National Law

Based on the different characteristics of each traditional village, in Law No. 6/2014 on Villages - Article 1 point 1 concerning General Provisions, it is said that "village" is a village and traditional village or what is referred to by other names, hereinafter referred to as village. (Elwi, 2012). It is a legal community unit with territorial borders and is authorized to regulate and administer government affairs, the interests of local communities based on community initiatives, rights of origin, and/or traditional rights recognized and respected in the government system of the Unitary State of the Republic of Indonesia. It is clear that normatively Law No. 6/2014 does not differentiate the terminology of 'village' from 'traditional village'.



The determination of traditional villages is guided by Law No.6 / 2014, and also submits to the Decision of the Indonesian Constitutional Court as in Table 2.

**Table 2.** The Decision of the Indonesian Constitutional Court

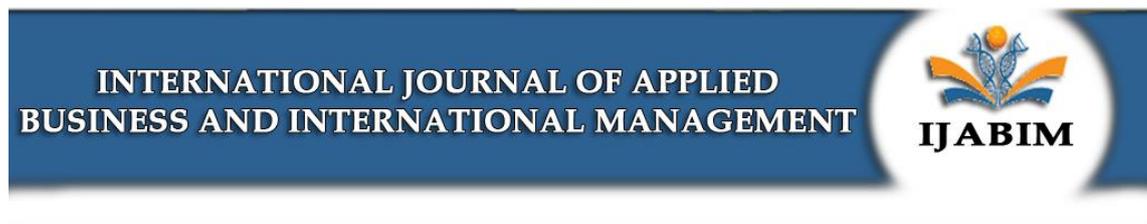
Decision	Concerning	Subject
NO.010/PUU-I/2003	Review of Law No. 11/2003 concerning Amendments to Law No. 53/1999 concerning the Establishment of Pelalawan Regency, Rokan Hulu Regency, Rokan Hilir Regency, Siak Regency, Karimun Regency, Natuna Regency, Kuantan Singingi Regency, and Batam City	Designation as a Traditional Village
No.31/PUU-V/2007	Review of Law No.31 / 2007 on the Establishment of the City of Tual in Maluku Province	Determination as a City
No. 6/PUU-VI/2008	Review of Law No. 51/1999 concerning the Establishment of Buol District, Morowali Regency, and Banggai Islands Regency	District Determination
No.35/PUU-X/2012	Review of Law No.41/1999 concerning Forestry	Forestry areas and customary land areas

*Source: Constitutional Court of the Republic of Indonesia*

Article 96 of Law No. 6 of 2014 emphasizes that the government, provincial government, and regency/city government carry out the arrangement of customary law community units designated as traditional villages (Aslan, Nugraha, Karyanto, & Zakaria, 2020; Aslan, Suhari, Antoni, Mauludin, & Mr, 2020; Aslan & Putra, 2020; Wulansari & Gunarsa, 2016). In Article 97 paragraph (1), it is stated that the determination of a traditional village must meet the following requirements:

1. Indigenous peoples and their traditional rights are alive, territorial, genealogical, and functional in nature;
2. Customary law community units and their traditional rights are deemed in accordance with community development; and
3. Customary law community units and their traditional rights are in accordance with the principles of the Unitary State of the Republic of Indonesia.

Customary law community units and their living traditional rights must have a territory and at least fulfill one of the elements or a combination of elements, namely (1) a society whose members have a feeling together in a group; (b) customary governmental institutions; (c) customary assets and/or objects; and/or (d) customary law norms. Therefore, this set of customary law norms can be used as the basis for the enforcement of customary law in traditional villages. (Palguna, 2019).



Customary law can serve as a basis for the principles of national law and must meet the following requirements:

- a. Customary law must not conflict with national and state interests based on national unity;
- b. Customary law must not conflict with the Indonesian State which has the philosophy of Pancasila;
- c. Customary law must not conflict with the *ius constitutum*;
- d. Customary law that is clean from the characteristics of feudalism, capitalism, and human exploitation of humans;
- e. Customary law does not conflict with religious elements.

The National Law that applies in the territory of the Republic of Indonesia, which covers all areas of indigenous peoples in Indonesia, allows the existing customary law rules to be enforced in all aspects of the lives of local indigenous peoples. However, the village apparatuses as part of the government apparatus are also obliged to carry out their duties and functions to implement the rules stipulated by the Indonesian State, because the State of Indonesia is a rule of law.

Therefore, a customary law community unit and its traditional rights are based on Article 97 paragraph (1) letter c Law No. 6 of 2014. (Hasjimzoem, 2014). Following the principles of the Unitary State of the Republic of Indonesia, a customary law community unit does not interfere with the existence of the Unitary State of the Republic of Indonesia as a political and legal entity which a) does not threaten the sovereignty and integrity of the Unitary State of the Republic of Indonesia; and b) the substance of the customary law norms is in accordance with and does not contradict the provisions of the statutory regulations.

Regarding customary forest, which was decided by the Constitutional Court of the Republic of Indonesia, it is an affirmation of the status of customary law which has been regulated in Law no. 41/1999 concerning Forestry Article 67b, namely carrying out forest management activities based on applicable customary law and not contradictory to the law. Therefore, placing customary forest as part of state forest is a disregard for the rights of customary law communities, since the existence of customary forest in the customary land area of a customary law community is recognized and protected in Article 18B paragraph (2) and Article 28I paragraph (3) UUD NRI 1945 (Solekhan, 2014). The settlement of customary disputes based on customary law in force in traditional villages is in line with human rights principles by prioritizing deliberative settlement. Meanwhile, the authority of the traditional village, based on the rights of origin, includes:

- a. Government regulation and implementation based on the original arrangement;
- b. The arrangement and management of *ulayat* or customary territories;
- c. The preservation of the socio-cultural values of traditional village;
- d. The settlement of customary disputes based on customary law applicable in traditional villages in areas that are in line with human rights principles by prioritizing deliberative settlement;
- e. Conducting a customary village court peace trial in accordance with the provisions of statutory regulations;

- f. Maintenance of peace and order of the Indigenous people based on the customary law that applies to traditional villages, and
- g. Development of customary law life in accordance with the socio-cultural conditions of traditional village communities.

The clarity of village status in Law No. 6/2014 has significantly changed the dynamics of the Indonesian state administration (Slamet et al., 2020). The objectives of the village regulation are to:

- a. give recognition and respect to the existing villages with their diversity, before and after the formation of the Unitary State of the Republic of Indonesia;
- b. provide clarity on the status and certainty of village customary law in the constitutional system of the Republic of Indonesia to realize justice for all Indonesian people;
- c. preserve and advance the customs, traditions, and culture of rural communities;
- d. encourage initiatives, movements, and participation of village communities for the development of village potential and assets for mutual welfare;
- e. form a professional, efficient and effective, open and accountable village government;
- f. improve public services for villagers to accelerate the realization of public welfare;
- g. increase the socio-cultural resilience of village communities to create village communities capable of maintaining social unity as part of national resilience;
- h. advance the economy of rural communities and overcome gaps in national development, and
- i. strengthen village communities as development subjects.

### **Today's Customary Law Development**

Traditional villages are a community that highly upholds their ancestors and their customs. (Wulansari & Gunarsa, 2016). They have the view carrying out the inheritance of their ancestors of life values, norms, hopes, and ideals, as an obligation, need, and pride. This obligation means that maintaining community harmony, and violation of customs/traditions is the destruction of community harmony.

Observing the application of positive law as a reference in applying customary law rules, we pay attention to the relationship between humans and nature to make it possible for an event not to occur harming fellow humans and nature, between the customary law community with the force of law and the progress of the times. It seems that customary law can accept, follow, and make concessions to the principles and philosophy of life of the forces of the era. As for granting of this concession, there are several established principles:

- a. Mutualism must make concessions to individualism;
- b. Indigenous universalism must make concessions to the principle of secularism;
- c. Indigenous idealism must make concessions to the principle of materialism;
- d. The principle of decent and tolerant must give concessions to human principles to fight for material benefits and prosperity for themselves.

Any concessions made by *adat* for its acceptance, use, and participation in the progress brought about by this global power will provide a primary *adat* concession (Mann et al., 2011). From time to time, the demands for deepening concessions to human rights and



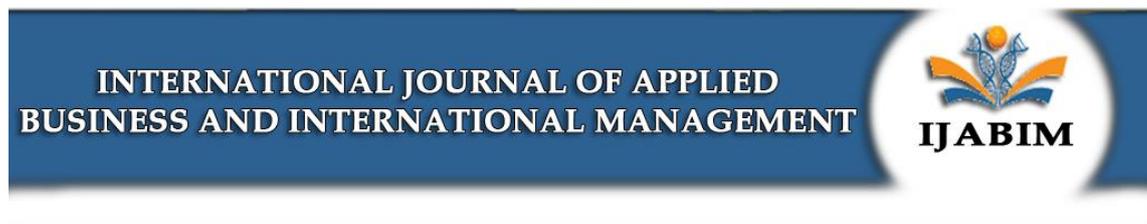
customs seem to be getting further away due to the influence of these global powers. In addition, the stronger the value of competing for the win-lose competition is controlled by the spirit of individualism, so that collectivism is getting weaker.

In general, customary law is a law that develops and lives in society, based on the values in the community, therefore, the development of changes in society that live in this era of globalization and modernization is a logical consequence of advances in technology, information, and transportation, which tends to leave the values that have become a sublime reference in the culture of the indigenous peoples. The shift from the kinship system, especially in resolving disputes in a family manner, has been fractured because it is more glorifying material than kinship, so that family breakdowns occur as a result of property issues, and customary law is no longer a guide in dispute resolution.

All local communities have local wisdom with a very strong influence in regulating the balance between humans and nature and among humans. The application of customary law during this globalization period requires a wider space, from the institutions/government and indigenous peoples themselves to implement customary law in responding to and repairing the socio-cultural, economic, and political damages of the village.

The 1945 Constitution of the Republic of Indonesia has confirmed indigenous peoples whose rights need to be recognized and protected in all aspects of life (Mann et al., 2011). Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 81 of 2015 concerning Evaluation of Village and Sub-District Development, states that a Village is a place where customary law or what is referred to by another name, from now on referred to as Village is a legal community unit that has territorial boundaries that have the authority to regulate and administer government affairs, the interests of the local community based on community initiatives, origins, and traditional rights (customary law) that are recognized and respected in the government system of the Unitary State of the Republic of Indonesia.

This provision explicitly gives the same meaning between 'village' and 'customary village'; This confuses assessing the development of traditional villages in Indonesia. Observing the regulations of traditional village/village development, it turns out that no space is provided for local wisdom to support the development, including: (1). Attachment II to the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 18 of 2015 concerning Evaluation of Village and District Development, underlining that the existence of village apparatus based on local wisdom is not disclosed; (2). During the independence period, discussions on customary law have never been updated and reviewed although society is not static, constantly changing and undergoing a dynamic process. Changes in today's society usually run and spread rapidly due to advances in technology and science. Therefore, it is necessary to reconstruct the existing customary law to be in harmony with national law.



### **Harmonization of Customary Laws and Positive Laws of Ngadas Village Indigenous People**

The old doctrine of "*ubi societas ibi ius*" (where is a community, there is law), becomes the basis for the investigation of customary law. The community as a unit that produces culture inevitably also produces a social control system maintaining the balance of life and sustainability of the community from social disturbance potentially carried out by one of its members (Rahayu, 2021; Setiadi, 2018; Suharto, 2020).

The existence of customary law and its position in the national legal system can no longer be denied, even it is an unwritten law, based on the principle of legality (Marzuki, 2017). Hence, customary law is a legal law and enforced effectively in customary communities.

It will always exist and live in indigenous peoples, within the scope of the village/customary village as implemented by the customary law community of Ngadas Village, including traditional marriage ceremonies, circumcision, soul cleansing, inheritance distribution, ownership of houses, land, fields, respect for ancestral graves (*pepunden*), respect for the hearth at home, training for future generations, and traditional games-transferring the spirit of a dancing horse to intermediate players (Huda, 2015). These are part of Ngadas Village indigenous people with different religions and are proud to be the successors of ancestral customs/traditions, making the life of the community orderly prioritizing kinship and collectivity. When great debates exist, the customary leader and traditional community leaders (*shamans*) will deliberately decide. The decision is made with full awareness of their obligation to preserve their customs. This awareness is instilled in the younger generation, both in the application of customary law and maintaining the balance of nature.

The harmonization was aligned to positive laws to avoid a 'clash' in practice. In every village meeting, government officials negotiate matters of the lives of villagers. When a 'clash' takes place, every decision taken by the Village Head and Customary Leader must be in line with positive law or national law (Rato, 2016). The role of government officials in carrying out their duties and functions is necessary to maintain public order by combining customary law with positive law. Therefore, efforts are made to draft laws and regulations accommodating customary law. Positive law (*ius constitutum*) can run effectively and by the norms prevailing in society while maintaining customs/traditions to build harmony.

The awareness to prioritize kinship or collectivity through marriage between village members is essential so that the young families do not leave the village. They are given the responsibility to carry on the customs/traditions with ceremonies which are also part of the tradition as Indonesia's national cultural wealth (Tobin, 2014). In line with its development history, the concept and responsibility for state welfare initially emerge at the local level since the local government often reacted first to some social problems in the central government. Therefore, the culture and customs of Ngadas Village community must be preserved since it is their village customs and role models in the dynamics of indigenous peoples. As part of the state government structure in general, indigenous peoples must be positioned as an integral part of the development process.



In addition, development policies must be integrated based on customary law communities with their customary law, providing freedom of creativity according to the potential of the community and the surrounding natural environment.

### CONCLUSIONS

Understanding the harmonization of customary and state law and the placement of customary law in the positive law is necessary. The amendment to the 1945 Constitution of the Republic of Indonesia confirmed that customary law communities and their customary law do not interfere with the existence of the Republic of Indonesia as a political and legal entity. We believe that the purpose of this legal study question has been achieved where the substance of the enforcement of customary law and positive state law follows the provisions of the existing laws and regulations in Indonesia.

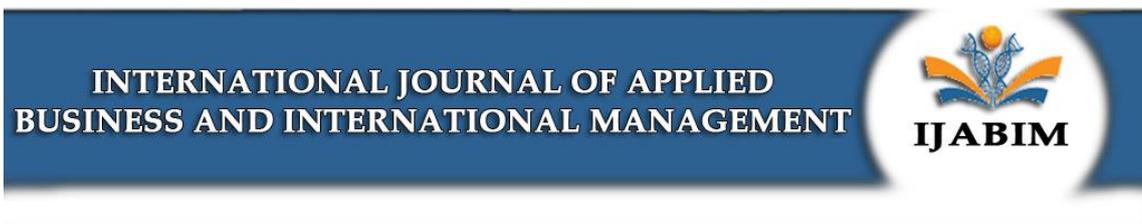
From the evidence in the literature, we find that the application of customary law does not contrast with the positive law of the state, underlining that there is nothing that makes customary law excluded from open changes of times. The government apparatus needs to prepare an evaluation instrument for the development of traditional villages while maintaining local wisdom. Thus, the structure of customary law in principle starts from humans bound to their communities, with a complete understanding of customary law. They are hampered to act as long as they do not violate legal boundaries. They do not have abstract rights but concrete legal force as members of a territorial alliance (land area), genealogical alliance (ancestral relationship), and other alliances. Therefore, customary law is of importance to answer the problems of globalization as it prioritizes the values of truth and justice to the exclusion of procedural rules that apply in law.

The development of a village into a traditional village requires legality, stipulated by a Regency/City Regional Regulation, taking into account the factors of village government, implementation of development, community development, community empowerment, and supporting facilities. The determination is an increase in the status of the village, further promoting tourism to provide the community with prosperity. Over time, customary law and local wisdom continue to develop, and they are the source of living law. The role of indigenous people and government officials creates the harmony unhindered.

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