



When Custom Meets the State: The Place of Customary Law in the Legal Systems of Indonesia and Madagascar

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Abstract

Contemporary legal systems increasingly face the challenge of accommodating customary norms within state legal frameworks. While state law serves as the primary source of legal authority, customary norms continue to regulate important aspects of social life in many communities. Indonesia and Madagascar provide particularly interesting examples because both countries acknowledge the existence of customary communities while adopting different approaches to their legal recognition. This article examines the place of customary law within the legal systems of Indonesia and Madagascar Comparative doctrinal legal research based on constitutional provisions, legislation and legal scholarship. It analyzes the legal foundations of customary law, the mechanisms through which customary communities are recognized, and the challenges that arise from the coexistence of state law and customary norms and argues that legal recognition alone is insufficient. Effective protection requires institutional mechanisms capable of balancing cultural diversity with the requirements of a modern legal system. The study finds that both countries recognize the importance of customary law, but differ in the degree of formal legal protection granted to customary communities. Indonesia has developed a more explicit constitutional framework, whereas Madagascar relies more heavily on the social legitimacy of customary institutions. Although both jurisdictions formally acknowledge customary law, Indonesia relies on explicit constitutional recognition, whereas Madagascar primarily depends on the continued social legitimacy of customary institutions

Keywords : Customary Law; Legal Pluralism; Legal Certainty; Indigenous Communities; Indonesia; Madagascar

Introduction

State law and customary law continue to constitute one of the most significant debates in contemporary legal scholarship. Despite the expansion of modern state legal systems, customary norms remain an essential source of social regulation for millions of people worldwide. In many societies, local communities continue to rely on customary rules to govern land tenure, family relations, dispute resolution, natural resource management, and community governance. Rather than disappearing with the consolidation of state institutions, customary law has adapted and continues to coexist with formal legal systems, giving rise to what legal scholars describe as **legal pluralism**. According to **John Griffiths**, legal pluralism exists whenever multiple normative orders operate simultaneously within the same social field, thereby challenging the traditional assumption that law derives exclusively from the State¹.

This perspective is complemented by **Eugen Ehrlich's** theory of *living law*, which emphasizes that effective legal norms frequently emerge from social practices rather than from formal legislation². Building upon these theories, **Sally Engle Merry** further argues that legal pluralism should not be understood as the mere coexistence of different legal orders, but rather as a dynamic interaction in which state law and non-state normative systems continuously influence

¹ John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1–55.

² Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Harvard University Press 1936).

and reshape one another³. These theoretical perspectives provide an appropriate framework for examining the relationship between state law and customary law in Indonesia and Madagascar.

Indonesia and Madagascar constitute particularly relevant jurisdictions for examining this issue. Both countries possess rich customary traditions and culturally diverse communities whose customary institutions continue to regulate important aspects of social life. Nevertheless, they have adopted different legal approaches to the recognition of customary law. Indonesia has progressively incorporated indigenous communities (*masyarakat hukum adat*) into its constitutional and statutory framework, notably through Article 18B paragraph (2) of the 1945 Constitution and subsequent judicial developments. Madagascar, by contrast, continues to rely predominantly on the social legitimacy of customary institutions, whose authority derives largely from long-established community practices rather than comprehensive constitutional or legislative recognition. Although both jurisdictions acknowledge the continuing importance of customary law, they illustrate distinct models of legal pluralism and different approaches to balancing state authority with community-based normative systems.

The coexistence of state law and customary law raises fundamental questions concerning legal certainty, state authority, and the protection of customary communities. Existing scholarship has extensively examined customary law in Indonesia and Madagascar independently, particularly in relation to constitutional recognition, indigenous rights, and land governance. However, comparatively little attention has been devoted to analysing how different models of legal recognition influence the practical effectiveness of customary law through a comparative legal perspective. This gap is particularly significant because formal legal recognition does not necessarily guarantee that customary institutions retain their normative autonomy or receive effective legal protection in practice.

Against this background, this article adopts a comparative doctrinal legal approach to examine the recognition of customary law in Indonesia and Madagascar. Rather than merely comparing constitutional and legislative provisions, it argues that the effectiveness of customary law depends not only on its formal legal recognition but also on the institutional mechanisms governing its interaction with state law. By analysing the legal foundations, recognition mechanisms, and practical challenges encountered in both jurisdictions, this study seeks to contribute to the broader debate on legal pluralism while offering a comparative perspective on how contemporary legal systems may reconcile legal certainty with the effective protection of customary normative orders.

Methodology

This research adopts a qualitative legal methodology grounded in doctrinal and comparative analysis. It does not rely on empirical data collection, but rather on the systematic interpretation of legal norms and authoritative legal materials.

The doctrinal approach is used to examine primary sources of law, including constitutional provisions, statutory frameworks, and relevant judicial decisions. Particular attention is given to constitutional texts and case law that shape the legal recognition of customary law in both Indonesia and Madagascar. These materials are analyzed in their normative context in order to understand how state law defines, limits, and interacts with customary legal systems.

The comparative dimension of the study follows a functional approach. Rather than focusing solely on formal legal structures, it examines how each legal system addresses similar social and legal issues related to customary law, including recognition, authority, and institutional integration. This allows for a structured comparison between two different legal traditions while maintaining analytical consistency. The interpretation of legal materials is informed by legal pluralism theory, particularly the idea that multiple normative orders may coexist within a single social field. In this regard, Griffiths (1986) argues that “legal pluralism is a social fact”, highlighting that law cannot be reduced exclusively to state-produced norms. This perspective provides the conceptual framework for understanding the interaction between state law and customary norms in both jurisdictions.

The analysis is conducted through qualitative content interpretation of legal texts and academic literature. Sources are selected based on their doctrinal relevance, authority, and contribution to understanding the evolving relationship between customary law and state legal systems.

³ Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869–896

The Recognition of Customary Law: Between Constitutional Affirmation and Institutional Reality

The recognition of customary law is often regarded as one of the most visible expressions of legal pluralism in contemporary states. However, as Griffiths (1986) argues, the coexistence of multiple normative orders within the same society does not necessarily imply equality among them. In practice, state law generally retains a dominant position, allowing public authorities to determine the conditions under which non-state norms may be recognized and applied.

This observation is particularly relevant in the cases of Indonesia and Madagascar. While both countries acknowledge the continuing importance of customary practices within their respective societies, such recognition operates within distinct institutional frameworks. The issue is therefore not merely the existence of customary law, but rather the way in which the State defines and manages its place within the national legal order.

In Indonesia, the recognition of *masyarakat hukum adat* is grounded in Article 18B (2) of the 1945 Constitution⁴. This provision acknowledges the existence of customary law communities and their traditional rights, provided that they remain consistent with national development objectives and the principles of the Republic of Indonesia.¹ According to Bedner (2010), this constitutional recognition reflects an attempt to accommodate legal diversity while preserving the State's authority over its institutional implementation.

Constitutional Court Decision No. 35/PUU-X/2012 represents a significant development in this regard. By distinguishing customary forests from state forests, the Court strengthened the legal position of indigenous communities in relation to natural resource management. Nevertheless, Arizona and Cahyadi (2013) note that important challenges remain, particularly regarding administrative recognition procedures and the effective enforcement of customary land rights.

In Madagascar, a different configuration can be observed. Customary institutions continue to play a substantial role in local governance and dispute resolution, notably through the *fokonolona*. Unlike the Indonesian model, however, their authority is derived less from explicit constitutional recognition than from longstanding social legitimacy. As Ramangasoavina (1962) observed, the transition toward a modern legal system did not eliminate customary mechanisms, which continued to serve as important instruments of social regulation and conflict management.

This persistence of customary practices echoes Eugen Ehrlich's concept of "living law," according to which law is not confined to statutes and judicial decisions but also emerges from the norms effectively observed within society⁵. From this perspective, the continued relevance of customary law in both Indonesia and Madagascar illustrates the capacity of local normative systems to survive alongside formal state institutions.

Yet the recognition of customary law remains marked by a fundamental tension. As Ubink and Weeks (2017) argue, contemporary states frequently seek to balance two objectives that are not always easy to reconcile: the protection of customary practices on the one hand, and the preservation of legal unity and legal certainty on the other. This tension helps explain why formal recognition does not always translate into genuine autonomy for customary institutions.

Customary Law in the Contemporary Legal Order: How Much Autonomy Remains?

The recognition of customary law is often portrayed as a legal and political achievement. In many countries, it reflects an effort to acknowledge the social and cultural realities of communities whose normative practices predate the modern State. Yet reducing the discussion to a simple distinction between recognition and non-recognition risks

⁴ Article 18B(2) of the Indonesian Constitution recognizes customary law communities (*masyarakat hukum adat*) and their traditional rights, provided that they remain compatible with national development and the principles of the Republic of Indonesia.

⁵ Ehrlich developed this idea in *Fundamental Principles of the Sociology of Law* (1913), where he argued that the true centre of gravity of legal development lies within society itself rather than exclusively in state institutions.

overlooking a more fundamental issue. The experiences of Indonesia and Madagascar suggest that the real question is not whether customary law is recognized, but how much autonomy it retains once recognition occurs.

At first sight, the two countries appear to have followed different paths. Indonesia has progressively incorporated customary law into constitutional and legal frameworks, particularly through the recognition of indigenous communities and their traditional rights. Madagascar, by contrast, continues to rely more heavily on social legitimacy and local practice than on detailed constitutional or legislative recognition. Despite these differences, both experiences reveal a similar tension. Customary norms do not derive their authority from the same sources as State law. Their legitimacy often rests on social acceptance, historical continuity, and their ability to adapt to local circumstances⁶. State law, on the other hand, tends to operate through formal rules, institutional procedures, and legally defined categories. The encounter between these two logics is therefore rarely neutral.

In this context, recognition may produce an unexpected effect. By seeking to protect customary law, the State often becomes responsible for defining its scope, identifying its holders, and determining the conditions under which it may operate. What is gained in legal certainty may sometimes be accompanied by a reduction in flexibility. A customary norm that must be formally identified and administratively validated may no longer function in exactly the same way as before. This observation should not be understood as an argument against legal recognition. Recognition may provide important safeguards against marginalization and legal insecurity. Nevertheless, the Indonesian and Malagasy experiences demonstrate that protection cannot be measured solely by the presence of legal provisions. It also depends on the extent to which customary institutions remain capable of evolving according to their own social dynamics.

The comparison therefore invites a broader reflection. Customary law is not necessarily preserved because it is recognized, nor is it necessarily endangered because it lacks formal recognition. What appears more significant is the nature of the relationship established between customary norms and State institutions. The challenge is not merely to recognize customary law, but to do so without depriving it of the characteristics that give it social meaning and practical relevance.

Can Customary Law Be Recognized Without Being Distorted?

The question is often framed as a choice between two alternatives. On the one hand, customary law is expected to preserve its original character and remain rooted in local traditions. On the other hand, it is encouraged to adapt to the requirements of a modern legal system based on written rules, legal certainty, and institutional oversight. This opposition, however, may be misleading.

In countries such as Indonesia and Madagascar, customary law does not exist outside the State, nor is it entirely absorbed by it. Instead, it operates in a space of interaction where local practices, social expectations, and formal legal institutions continuously influence one another. The challenge is therefore not whether customary law should be recognized, but how such recognition can occur without reducing it to a simplified version of itself.

A common assumption in legal discourse is that modernization necessarily requires the gradual replacement of customary norms by formal legal institutions. Yet this assumption deserves to be questioned. Many customary mechanisms continue to perform functions that remain relevant in contemporary societies. Their value does not lie merely in their historical origins but in their capacity to provide solutions adapted to specific social realities.

For example, not every social conflict requires judicial intervention. Certain disputes affecting community life may be resolved more effectively through dialogue, mediation, and collective reconciliation than through formal litigation. In such situations, customary mechanisms should not automatically be regarded as outdated alternatives to State law but as complementary forms of regulation capable of contributing to social harmony.¹

⁶ Eugen Ehrlich developed a similar idea through the concept of "living law," arguing that many legal norms emerge from social practices and community interactions rather than exclusively from State institutions. See: Ehrlich, E. (2002). *Fundamental Principles of the Sociology of Law*. New Brunswick: Transaction Publishers (original work published 1913).

The real challenge therefore lies in avoiding two extremes. The first would consist of treating customary law as an untouchable relic of the past, incapable of evolving. The second would be to transform it into a mere extension of State law, stripped of the social foundations that give it legitimacy. Between these two approaches lies a more balanced perspective: recognizing that customary law can evolve, interact with modern institutions, and even become partially institutionalized without necessarily losing its identity.

From this perspective, the relationship between customary law and State law should not be understood as a struggle between tradition and modernity. Rather, it should be seen as an ongoing process of negotiation through which different normative systems contribute to the construction of a more inclusive legal order.

Conclusion

The comparative analysis of Indonesia and Madagascar demonstrates that the recognition of customary law remains one of the most significant challenges faced by contemporary legal systems operating within plural legal environments. Although both countries acknowledge the continued importance of customary institutions in regulating social relations, they have adopted different legal approaches to integrating customary law into the state legal order. Indonesia has progressively strengthened constitutional and judicial recognition of indigenous communities, whereas Madagascar continues to rely primarily on the social legitimacy of customary institutions. These different approaches illustrate that legal pluralism does not develop according to a single model but reflects each country's historical, political, and institutional context.

This study argues that the effectiveness of customary law cannot be assessed solely by the existence of formal legal recognition. Constitutional provisions and legislative measures undoubtedly provide an important legal foundation for the protection of customary communities. Nevertheless, effective protection ultimately depends on the institutional mechanisms through which customary norms interact with state law while preserving their normative autonomy. Where such mechanisms remain weak or inconsistent, legal recognition risks becoming largely symbolic rather than practically effective. The comparison further demonstrates that legal certainty and legal pluralism should not be regarded as opposing principles. On the contrary, an appropriate balance between state law and customary law may strengthen both the legitimacy of the legal system and the protection of community rights. Rather than seeking to replace customary law with uniform state regulation, contemporary legal systems should develop institutional frameworks capable of accommodating legal diversity while ensuring consistency, equality before the law, and respect for fundamental rights.

Ultimately, the experiences of Indonesia and Madagascar illustrate that the future of customary law depends not merely on expanding formal legal recognition but on establishing legal and institutional arrangements that enable customary normative systems to function effectively within the broader state legal order. This comparative perspective contributes to ongoing debates on legal pluralism by demonstrating that genuine protection of customary communities requires not only recognition in law but also meaningful implementation in practice.

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