A Discourse of the Indigenous Peoples' Rights and Their Contributions to the Indonesian Development: Lessons Learned from New Zealand

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DOI: https://doi.org/10.22304/pjih.v10n3.a3

Submitted: February 12, 2023| Accepted: September 21, 2023

Abstract

The struggles of indigenous peoples in both New Zealand and Indonesia to gain legal recognition remain ongoing. This study focuses on two central aspects. Firstly, it examines the historical-legal journey of indigenous peoples in their quest for legal acknowledgment. Secondly, it makes a comparative analysis with New Zealand, highlighting the potential contributions that indigenous peoples can provide to their respective countries. The study follows a legal research methodology, linking existing issues with authoritative sources and real-world situations. The findings reveal that in New Zealand, indigenous peoples possess a legal standing, albeit not entirely comprehensive. Conversely, Indonesian regulations do not provide strong legal support for indigenous people's rights. Despite their limited rights, indigenous peoples in New Zealand have made significant contributions to the nation's development. Additionally, the article contends that given their fundamental role in the founding of the Indonesian State, it is time for indigenous peoples to receive proper recognition for their substantial contributions to the nation's development.

Keywords: economic contribution, indigenous peoples' rights, New Zealand experience.

A. Introduction

Since 2010, the progress in enacting laws and policies aimed at respecting and safeguarding the rights of indigenous peoples has been quite limited. Conversely, there have been developments in various policies, including the issuance of the Laws on Job Creation, the Revision of the Mineral and Coal, the Nusantara Capital City, the National Criminal Code, etc. That poses a significant threat to indigenous territories and traditional rights. By 2022, the Indonesian Government had managed to designate portions of 105 traditional territories as customary forests, covering a total area of 148.488 hectares. However, this occurred instead of expediting the restoration of indigenous peoples' rights to customary forests, as mandated in the Indonesian Constitutional Court's Decision Number 35 of 2012. This decision had

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identified that as many as 2.400 hectares of customary lands were confiscated through social forestry programs.[1] Furthermore, at the conclusion of the plenary session of the Indonesian House of Representatives in 2022, the Indigenous Peoples Bill failed to be enacted as law.[2]

The Bill on the Indigenous Peoples or Customary Law Community underlies the legal requirement for the state recognition that the Indigenous Peoples have the same rights as other citizens.[3] The Bill comprises 17 chapters and 58 articles; amendments generated 20 articles. The Working Committee of the House of Representatives had meetings and hearings involving members of the Archipelago Indigenous Peoples Alliance, as stated in the report by the Chairperson of the Working Committee to the speakers and members of the House. In general, the position of the indigenous peoples has so far been economically, legally, socially, and culturally vulnerable, including in human rights.[4] As a result of marginalization, they also face internal conflicts with other parties.[5] In addition, there is a clash when customary law is confronted with positive law.[6]

The Bill of Customary Law Community recognizes that, in general, the living space of the indigenous peoples clashes with various uses and utilizations of natural resources whose permits have been regulated by other laws.[7] Such a phenomenon reveals that the indigenous peoples are positioned in the reverse. After the recognition process, placing customary law community protection will only legalize their position in the rear. The Bill should guarantee what the state must immediately do to protect them, regardless of whether there is a legality to protect them, from collisions with corporations that can potentially displace their living space. The Bill of Customary Law Community also protects the customary law community from various positive legal conflicts and deprivations of customary law community rights by state and corporate interests. For example, on August 26, 2020, an indigenous community leader in Central Kalimantan was arrested. A team of police arrested Effendi Buhing, Head of the Laman Kinipan Indigenous Community, on charges of

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1 Muhammad Risky Surya Pratama, Arum Ayu Lestari, and Rimas Intan Katari, "Pemenuhan Hak Bagi Masyarakat Adat oleh Negara di Bidang Hutan Adat," *Jurnal Hukum Ius Quia Iustum* 29, no. 1 (2022): 189, https://doi.org/10.20885/iustum.vol29.iss1.art9.

2 Aliansi Masyarakat Adat Nusantara, *Catatan Tahun 2022: Melawan Penundukan* (Jakarta: Aliansi Masyarakat Adat Nusantara, 2022), 12

3 Syahriza Alkohir Anggoro and Tunggul Anshari Setia Negara, "The Struggle for Recognition: Adat Law Trajectories under Indonesian Politics of Legal Unification," *International Journal on Minority and Group Rights* 29, no. 1 (2021): 40, https://doi.org/10.1163/15718115-bja10040.

4 Wahyu Nugroho, "Konstitusionalitas Hak Masyarakat Hukum Adat Dalam Mengelola Hutan Adat: Fakta Empiris Legalisasi Perizinan," *Jurnal Konstitusi* 11, no. 1 (2016): 111.

5 Qembig Al Gezon, "Inklusi Sosial dalam Agenda Setting Rancangan Undang-Undang (RUU) Masyarakat Hukum Adat," (Ph.D. Dissertation Universitas Jenderal Soedirman, 2021), 80-81.

6 Nyoman Serikat Putra Jaya, "Hukum (Sanksi) Pidana Adat Dalam Pembaharuan Hukum Pidana Nasional," *Masalah-Masalah Hukum 45*, no. 2 (2016): 125, https://doi.org/10.14710/mmh.45.2.2016.123-130.

7 Mahdi Syahbandir, "Kedudukan Hukum Adat Dalam Sistem Hukum," *Kanun Jurnal Ilmu Hukum* 12, no. 1 (2010): 5-6.

taking part in seizing assets belonging to PT Sawit Mandiri Lestari (SML).[8] It resulted from the weak position of the indigenous peoples and their customary rights following the establishment of the state based on the 1945 Constitution. Through the doctrine of state control rights (HMN –*Hak Menguasai oleh Negara*) over natural resources, the property rights of indigenous peoples over customary rights are no longer complete and autonomous.

The COVID-19 pandemic has not dampened the phenomenon of expropriation of traditional customary land territories. The impression that the state was using the pandemic as a pretext for expanding the confiscation of indigenous territories is hard to resist.[9] One clear example is reported by the pusaka.or.id, which indicates that there had been an increase in the expansion of oil palm plantations in Papua during the pandemic. From January to May 2020, 1.488 hectares of forest in Papua disappeared.[10] The Alliance of Indigenous Peoples noted 40 cases of criminalization and violence against the indigenous peoples from 2020 to 2021 (Table 1).

Table 1. The Alliance of Indigenous Peoples of the Archipelago. The figure only represents cases on the surface. The actual figure is much higher considering the typology of conflicts, which are primarily latent and do not always surface.

Year	Number of Conflicts
2020	40 (forty)
2021	13 (thirteen)
2022	19 (nineteen)

Table 1 illustrates that the appropriation of indigenous territories continued to occur. Likewise, criminalization and violence almost always followed seizing territory customs. Several recorded events show that the law always became a tool that legitimizes the deprivation or exclusion of Indigenous Peoples. Meanwhile, perpetrators of criminalization, intimidation, and violence against the indigenous peoples were carried out by state actors such as the Indonesia National Army (*Tentara Nasional Indonesia*-TNI), Indonesia National Police (*Kepolisian Republik Indonesia*- POLRI), and the governments from the center to the villages, as well as non-state organizations such as companies that use services thugs. For instance, what happened between the indigenous peoples in the District of Sikka depicts that

[8] Fifink Praiseda Alviolita, "Perlindungan Hak Masyarakat Hukum Adat Terhadap Perbuatan Kriminalisasi Dalam Mempertahankan Tanah Ulayat," *Juris Humanity: Jurnal Riset dan Kajian Hukum Hak Asasi Manusia* 1, no. 1 (2022): 70.

[9] Teguh Ilham, Mila Dewanti, Tiara Navy, and Ivan Renaldi Sudarso, "Menakar Afirmasi Media Terhadap Kelompok Marginal: Analisis Pemberitaan Masyarakat Adat di Indonesia," *Jurnal Dialektika: Jurnal Ilmu Sosial* 20, no. 1 (2022): 8.

[10] Admin Pusaka, "Konflik dan Penggundulan Hutan Meningkat di Papua," accessed on November 2, 2022, https://pusaka.or.id/konflik-dan-penggundulan-hutan-meningkat-di-papua.

the violence was perpetrated by a company owned by an institution of religion in the area.

The mechanism for determining customary forests has not been made more accessible, so efforts to protect the indigenous peoples have been slow. Customary forests are believed to be the best solution to keep native communities from land conflicts due to various projects. The Ministry of Environment and Forestry has issued 89 decisions recognizing customary forests. The area of indigenous forest belonging to the 89 communities reached 148.488 hectares in 2022 (see Table 2).

Table 2. Indigenous Peoples Alliance of the Archipelago (AMAN) Data on Asset Redistribution Indigenous Forest (2016-2022)

Year	Number of Indigenous Forest	Number of Indigenous Community
2016	7.950 hectares	8 indigenous communities
2017	3.348 hectares	9 indigenous communities
2018	12.929 hectares	19 indigenous communities
2019	10.839 hectares	28 indigenous communities
2020	21.833 hectares	11 indigenous communities
2021	69.147 hectares	not informed
2022	75.783 hectares	not informed

Table 2 illustrates that the government succeeded in designating parts of 105 traditional territories as customary forests with a total area of 148.488 hectares. Recognition of typical forests has been slow, and appropriation of traditional territories continues to be carried out by plantation and mining companies, which destroy productive food crops as a source of food and income for the indigenous peoples. The ambitious project for the nation's capital, *Ibu Kota Nusantara* (IKN), has created massive conflicts and land tenure.[11] Several indigenous people's communities have lost their traditional territories because of this, which is allocated by the state to develop IKN. Access to the indigenous peoples and their familiar environment becomes closed. Even the indigenous peoples have experienced various intimidations when they access their traditional territories. On the other hand, the allocation of land is carried out by the state apparatus collaborating with non-state actors. State land and traditional territories are granted easily to temporary investors. The indigenous peoples' and custom's territorial rights are not protected.[12]

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[11] Indra Nugraha, "Menanti Keseriusan Pemerintah Lindungi Masyarakat Adat," accessed on December 30, 2022, https://www.mongabay.co.id/2022/08/09/menanti-keseriusan-pemerintah-lindungi-masyarakat-adat/.

[12] Andrew McWilliam, "Historical Reflections on Customary Land Rights in Indonesia," *The Asia Pacific Journal of Anthropology* 7, no. 1 (2006): 45–64, https://doi.org/10.1080/14442210600551859.

This article argues that the potential for land tenure by the indigenous peoples, based on the information in Table 1, seems to have a significant contribution to agricultural outcomes and environmental preservation. In the long term, this condition will indirectly strengthen economic development if managed measurably and sustainably.[13]

As a comparison, New Zealand can be worth reference in recognizing the indigenous peoples, primarily their contribution to economic development. The recognition of Indigenous Maori People in New Zealand is reflected in the *Te Ture Whenua Moari* Act 1993, Foreshore and Seabed Act 2004, and Deed of Completion of Moari Commercial Aquaculture Claims 2004. The Maori people are the aboriginal inhabitants of New Zealand (*Aetearoa*) and are believed to have come to the New Zealand islands from East Polynesia in 800 CE.[14] Due to British colonization, the Maori population has declined and now they are a group of state minorities, representing only 15 percent of the total population of 4.25 million people.[15] The Maori people are strongly connected to their land, which is *turangawaewae*.[16] New Zealand is a country that ratified the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social Cultural Rights on December 28, 1978. The legal system in New Zealand is unique at the domestic level because it has the advantages of the Treaty of Waitangi.[17] It is a crucial document passed on February 6, 1840, to the Maori Indigenous People because the treaty was a binding agreement between the Maori and the British Empire.[18] The Maori have accommodated a framework for self-determination by combining two main elements: power (*nga puo mana*) and the factor of exercising self-determination rights (*temana whakahere*). The Treaty's substance is to support and recognize the right to self-determination and the economic rights of the indigenous people of Maori toward their land problems.[19]

Chile can also be the primary concern in accommodating the interests of the indigenous and tribal peoples. Aucan Huilcaman is the State of Chile's recognition of

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13 David C. Buxbaum (ed.), *Family Law and Customary Law in Asia: A Contemporary Legal Perspective* (Dordrecht: Springer Netherlands, 1968), 12.

14 Muhammad Sayuti Hassan, Kalsum Umar, and Marshelayanti Mohamad Razali, "Pembangunan Ekonomi Orang Asli di Semenanjung Malaysia: Pengajaran yang Boleh Dipelajari Dari pada Masyarakat Maori di New Zealand," *UUM Journal of Legal Studies* 13, no. 1 (2022): 450–458, 10.32890/uumjls2022.13.1.17.

15 Andrew Erueti, "Observations Relating to the UN Special Rapporteur's Report of Maori People in New Zealand-2011: Introducing a Human Rights Discourse to Treaty Jurisprudence," *Ariz. J. Int'l & Comp. L*. 32, no. 1 (2015): 195.

16 Keakaokawai Varner Hemi, "Closing Geographical Distances: The Value of a New Zealand Perspective on the Admission Policy of a Native Hawaiian School," *Waikato Law Review: Taumauri* 24 (2016): 14-42.

17 Diana Qiu, "Human Rights Protection Under The ICCPR: When Can and Should States Derogate? A Critical Analysis in the Context of New Zealand's COVID-19 Response," *The International Journal of Human Rights* 27, no. 5 (2022): 1-4, 10.1080/13642987.2022.2066080.

18 I Huygens, "Pākehā and Tauiwi Treaty Education: An Unrecognised Decolonisation Movement?" *Kōtuitui: New Zealand Journal of Social Sciences Online* 11, no. 2 (2016): 146-150, https://doi.org/10.1080/1177083X.2016.1148057.

19 Mason Durie, "Interview: Kaupapa Maori: Shifting the Social," *New Zealand Journal of Educational Studies* 47, no. 2 (2012): 21-29.

its indigenous people, the Mapuche, regarding land, territory, and self-determination rights.[20] The Indigenous Peoples' rights to self-determination in economics is a prerequisite for realizing other human rights, such as land, forests, and cultural identity.[21] In addition, representatives from the National Aboriginal and Torres Strait Islander Legal Services Secretariat Limited of Australia state that environmental development can only be carried out with the recognition of self-determination rights for the indigenous peoples,[22] especially the freedom to manage their natural resources.[23] Ecuador's (2008) and Bolivia's (2009) constitutions further formulate multiculturalism by giving equal status to and coexisting with state law, the indigenous institution's largely uncodified customary law, judicial mechanism, and autonomy.[24] The constitutional legal norms of Latin American countries which significantly influenced the development of the 2007 United Nations Declaration on the Rights of Indigenous Peoples and Latin American countries have been a leading voice for indigenous peoples' issues in international forums.[25] In the Global South, constitutional recognition of legal pluralism is one of the essential innovations fundamentally challenging the dominance of the tradition of legal monism.[26] Constitutionalizing collective rights has been widely accepted as a constitutional reform strategy for resolving the indigenous peoples' conflicts over land rights and resource access.[27]

Indonesia, in general, deals with limited financial capital. This situation triggers the exploitation of natural resources after inviting big financiers as investors. There are many reasons, including the pretext of benefits in the form of job opportunities for low-income people.[28] Based on many experiences, schemes like this have contributed significantly to the decline of indigenous peoples who live in areas rich in natural resources. Such a situation confronts the indigenous peoples with capital

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20 Hugo Amigo, Patricia Bustos, Santiago Muzzo, Ana María Alarcón, and Sergio Muñoz, "Age of Menarche and Nutritional Status of Indigenous and Non-Indigenous Adolescents in The Araucanía Region of Chile," *Annals of Human Biology* 37, no. 4 (2010): 554-557, 10.3109/03014460903456324.

21 Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007), 52.

22 J. Hendry, *Reclaiming Culture: Indigenous People and Self-Representation 2005th Edition* (New York: Palgrave Macmillan, 2005), 73.

23 Siegfried Wiessner, "Defending Indigenous Peoples' Heritage: An Introduction," *Thomas Law Review* 14, no. 2 (2001): 271.

24 Rosalind Dixon and Tom Ginsburg (ed.), *Comparative Constitutional Law in Latin America* (United Kingdom: Edward Elgar Publishing, 2017), 126.

25 Sylvanus Gbendazhi Barbanas, "The Legal Status of UN Declaration on The Rights of Indigenous Peoples," *International Human Rights Law Review* 6, no. 2 (2017): 242, https://doi.org/10.1163/22131035-00602006.

26 Raymond M Nichol, *Growing Up Indigenous: Developing Effective Pedagogy for Education and Development* (Rotterdam: Sense Publisher, 2011), 68.

27 Rachel Sieder, "The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition," *Brown Journal of World Affairs* 18, no. 2 (2012): 103.

28 Annisa Indah Nuari, "Legalisasi Masyarakat Hukum Adat Dalam Pengelolaan Hutan Adat di Indonesia," (Ph.D. Dissertation Universitas Sebelas Maret, 2022), 31-32.

owners and the government as the facilitators in the field.[29] However, various cases have proven that development continues the spirit of colonialism by seizing the Indigenous Peoples' lands, marginalizing, and destroying production patterns and the political order of the indigenous peoples. It triggers the indigenous peoples' movement to emerge and strengthen[30].

Based on the background, it is urgent to establish robust regulations, notably particular instruments, to strengthen the indigenous peoples' legal position to support state economic development[31] based on four indicators. The first is the indigenous peoples and recognition. Recognizing and protecting their individual and communal rights are not yet optimal, failing to achieve prosperity for them and the emergence of conflicts in customary law communities. This empirical situation threatens national security stability. The second is legal harmonization. The existing arrangements are not in harmony with the constitution. Thus, the indigenous peoples have an unclear position legally.[32] Third, there have been criminalization of the indigenous peoples who strive to defend their rights. There are violations of human rights in their territories. Fourth, the indigenous peoples are the victims of other communities or corporations in the name of development, which is impartial and does not involve the Indigenous Peoples.[33]

This article describes New Zealand's Legal regulations in recognizing its indigenous peoples and compares New Zealand's methods to Indonesia's. The article reporting the outline is divided into five discussion sections: (1) Background, namely the historical-legal trajectory of Indonesian Indigenous Peoples; (2) Indigenous Peoples' status in the Bill of the Indonesian Customary Law and the Law on Environmental Protection and Management; (3) Decree of the Indonesian Constitutional Court Number 35/PUU-X/2012 and the Existence of Indigenous Peoples; (4) The comparison on the legal frameworks to New Zealand's recognition and indigenous peoples' contribution to the economic development.

B. Analysis of the Indigenous Peoples in the Bill of the Indonesian Customary Law

Before indigenous peoples or a customary law community receives protection, the state must recognize them through a formal legal process. The recognition is carried out by a committee that will identify, verify, and validate their existence based on the characteristics specified in the Bill.[34] A customary law community is legitimate as

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29 Syamsudin, Syamsudin, "Beban Masyarakat Adat Menghadapi Hukum Negara," *Jurnal Hukum Ius Quia Iustum* 15, no. 3 (2008): 340-344, 10.20885/iustum.vol15.iss3.art9.

30 Mohammad Mulyadi, "Pemberdayaan Masyarakat Adat Dalam Pembangunan Kehutanan," *Jurnal Penelitian Sosial dan Ekonomi Kehutanan* 10, no. 4 (2013): 224–234, https://doi.org/10.20886/jpsek.2013.10.4.224-234.

31 Dip Kapoor and Edward Shizha (ed.), *Indigenous Knowledge and Learning in Asia/Pacific and Africa* (New York: Palgrave Macmillan US, 2010), 98.

32 Dewan Perwakilan Rakyat, "Laporan Singkat Rapat Dengar Pendapat Rancangan Undang-Undang Masyarakat Hukum Adat Fraksi Partai Nasdem," (House of Representative Public Hearing Report, 2019), 3-4.

33 YLBHI,"Kriminalisasi Masyarakat Adat: Ancaman dan Usulan Kebijakan," accessed on October 20, 2022, https://ylbhi.or.id/publikasi/artikel/kriminalisasi-masyarakat-adat-ancaman-dan-usulan-kebijakan/.

34 Mukmin Zakie, "Konflik Agraria yang Tak Pernah Reda," *Legality: Jurnal Ilmiah Hukum* 24, no. 1 (2017): 42.

the indigenous peoples whose rights are regulated by the state if they have received an official letter of recognition from an official at the ministerial level. Therefore, there are several weak points in this Bill.

First, in general, the living spaces of the indigenous peoples are now in conflict with various uses and users of natural resources whose permits are regulated by other laws. The Indigenous Peoples have been placed in the back row and do not receive services on par with other community groups. Thus, placing the protection of the indigenous peoples after the recognition process will only perpetuate their position in the back row.[35] The Bill should ensure that the state immediately must protect them, regardless of whether there is a legal recognition of their existence, from conflicts with corporations that have displaced their living space. The indicative customary territory status should be an instrument for protecting the indigenous peoples.[36]

In comparison, the state forest areas receive positive legal protection even though state officials at the ministerial level have not recognized and ratified it. When the Bill cannot either ensure the deadline for the process of identification, verification, and validation or establish the legality of the indigenous and tribal peoples, they will always be behind the line of investment, which will now receive greater recognition and privileges through the Bill of Job Creation. Thus, the Bill of Indigenous Peoples cannot satisfy people. The indigenous peoples will forever be marginalized. Downey says that law without justice is like a wound without medicine: gaping and aching forever. The legalization of the indigenous peoples and their territories can become one unit. It is stipulated in Articles 11 and 13. However, a provision must govern their whereabouts if their territory is burdened with other permits. Traditional territories should prioritize obtaining prior determination as a form of affirmative policy.[37] Consequently, the Bill needs to regulate an addendum to permits if there are already indigenous peoples. The paradigm needs to become a political decision if it is true that rules are made to provide a legal certainty for everyone.

Second, the Indonesian Indigenous People Committee, appointed by the regent or mayor, governor, or minister as stipulated in Articles 7 to 9, is also in charge of verifying the results of identifying a customary law territory stipulated in Article 15. If allowed to happen, it will lead to an incomparable conflict of interest that will give rise to bad governance. In addition, the announcement of the identification results, as stated in Article 13, is only mentioned at the local village office. Participation

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35 Ria Maya Sari, "Potensi Perampasan Wilayah Masyarakat Hukum Adat Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," *Mulawarman Law Review* 6, No: 1 (2021): 5-6, https://doi.org/10.30872/mulrev.v6i1.506.

36 Hariadi Kartodihardjo, "Empat Kelemahan RUU Masyarakat Adat," accessed on December 2022, https://www.forestdigest.com/detail/745/empat-kelemahan-ruu-masyarakat-adat.

37 Wahyu Nugroho, "Konstitusionalitas Hak Masyarakat Hukum Adat dalam Mengelola Hutan Adat: Fakta Empiris Legalisasi Perizinan," 110.

through disclosure of information should cover the regency or city, province, or national territory, depending on the location of the ancestral law territory. Infrastructure development and issuance of natural resource utilization permits should pay attention to this announcement.

Third, administrative obstacles to identification, verification, and validation processes can happen when boundaries do not exist. The five-year accumulation of traditional area distribution should be included in the spatial planning, revised every five years. So far, the classification of areas in spatial planning is only based on function and structure. It does not include the element of control over that space. The classification is relevant when the characteristics of the relationships between indigenous peoples and forests or protected areas such as those in Papua and West Papua are robust. Without information on land and forest tenure in spatial planning, large scale control by certain parties and land grabbing will get stronger, which will seem to be allowed by the state by not developing control instruments.[38] Changes to the current spatial arrangement, through the Bill of Job Creation, should include traditional territories as an instrument of conflict control and affirm legal certainty of rights to land, forests, and waters in the future.[39]

Indeed, the meaning of control by the state does not refer to the definition of ownership. Still, governmental, and institutional authority in practice limits the flexibility of customary law community relations with rights over the surrounding natural resources. [40] Ostrom's (1992) idea on the bundle of rights states that the more established a country is with various regulatory institutions, the position of indigenous peoples over natural resources shifts from the complete owner to owner but without transfer rights (proprietor) to the claimant who only has the rights to access-take-manage, then to just an authorized user. The shift reaches the weakest position: visitors without any rights (entrants) to their traditional territory.[41]

Following the collapse of the New Order regime, recognition of the indigenous peoples was included in the second amendment to the 1945 Constitution on August 18, 2000. According to Article 18B, Paragraph 2, the state recognizes and respects customary law community units and their traditional rights. For example, the definition of customary forest can be moderated in the Law on Forestry based on the concept of state property rights. In 2012, following a lawsuit by representatives of indigenous peoples and AMAN, the Constitutional Court decided that customary forests are not state forests but only forests within the territory of indigenous and tribal peoples. According to the Constitutional Court, the customary forest is another

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38 David Lea, *Property Rights, Indigenous People and The Developing World: Issues from Aboriginal Entitlement to Intellectual Ownership Rights* (Netherlands: Brill, 2008), 162; Garth Nettheim, Donna Craig, and Gary D. Meyers, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Canberra: Aboriginal Studies Press, 2002), 106.

39 David Lea, 112.

40 Ani Widyawati, "Akar Konflik Dalam Masyarakat Multikultural di Karimunjawa," *Yustisia* 4, no. 3 (2015): 602-603, https://doi.org/10.20961/yustisia.v4i3.8692.

41 Yunita Maya Putri, "Communal Rights as The Hegemony in Third World Regime: An Indonesia Perspective," *Indonesian Journal of International Law* 19, no. 2 (2022): 298, https://doi.org/10.17304/ijil.vol19.2.5.

form within the realm of private forest with customary law communities as its legal subject.[42] The court believes Law Number 41 of 1999 on Forestry treats the indigenous peoples differently from other legal subjects.

The three legal subjects in this law are the state, land rights holders on which there are forests, and the indigenous people communities. The state controls land and forests. The holders of land rights also have rights over forest resources. According to the court, the customary law communities are unclear since the Law on Forestry places customary forests as part of state forests. Unfortunately, the progressive view is conditional. The Constitutional Court maintains Article 67 Paragraph (2) of the Law on Forestry that the confirmation of the existence or elimination of the indigenous peoples must be through regional regulations.[43] Thus, recognizing customary rights must begin with formally determining the indigenous peoples based on local policies, meaning that recognizing customary law communities is nothing without any regional legal support.

The Ministry of Environment and Forestry has consistently followed the logic of the Decree of Constitutional Court Number 35/PUU-X/2012. In Regulation of the Minister of Environment Number P.21/2019 on Private and Customary Forests, recognition of customary forests is non-negotiable. Thus, the indigenous peoples must apply for the state's recognition of their territories and existence.[44] The application must be submitted to the local government. The policy of recognizing customary rights seems like nothing. Article 7 Paragraph 2 of the Regulation of the Minister of Environment and Forestry, states the acceleration of recognition of the indigenous peoples through an indicative map after obtaining approval from the regent or mayor of the customary law community. Decree of the Minister of Environment and Forestry Number 312/2019 on Maps of Customary Forests and Indicative Areas of Customary Forests explains that the indicative areas of customary forests can be processed following a legal stipulation through regional regulation.

C. The Indonesian Indigenous People under the Constitutional Court Decision Number 35/PUU-X/2012

There are many laws in the field of land and other natural resources. Law Number 41 of 1999 on Forestry is the most frequently reviewed by the Constitutional Court, up to seven times. The Constitutional Court has granted three and has rejected two of them. It shows that the Law on Forestry still has many constitutional issues.

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42 Ernestus Lalong Teredi, "Strategi Gerakan Politik Keterlibatan: Tiga Pola Kerja Politik Aliansi Masyarakat Adat Nusantara (AMAN)," *Politika: Jurnal Ilmu Politik* 12, no. 1 (2021): 159, https://doi.org/10.14710/politika.12.1.2021.158-173.

43 Tesy Veronika and Atik Winanti, "Keberadaan Hak Atas Tanah Ulayat Masyarakat Hukum Adat Ditinjau Dari Konsep Hak Menguasai Oleh Negara," *Humani (Hukum dan Masyarakat Madani)* 11, no. 2 (2021): 316, http://dx.doi.org/10.26623/humani.v11i2.4397.

44 Ernestus Lalong Teredi, "Strategi Gerakan Politik Keterlibatan: Tiga Pola Kerja Politik Aliansi Masyarakat Adat Nusantara (AMAN)," 160.

Perhaps it is due to its formation in 1999, carried out before implementing the four amendments to the 1945 Constitution (1999-2002). Unsurprisingly, many substances in the law are not in line with the norms of the new post-amendment Constitution.[45] The Constitutional Court's Decision Number 35/PUU-X/2012 corrects the nationalization of traditional territories. This nationalization is a source of denial of the existence of the indigenous peoples and their rights and criminalization of the peoples. The decree concerns two constitutional issues: customary forests and conditional recognition of the existence of indigenous peoples. The Decree of the Constitutional Court Number 35/PUU-X/2012 contains several points.[46]

First, according to the Constitutional Court, the Law on Forestry has included customary forests as a part of state forests. It is a form of neglect of indigenous people's rights; it violates the Constitution. The Constitutional Court, in its decision, declared that positioning customary forests as part of state forests is a disregard for the rights of the indigenous peoples and customary law communities (p. 173-4). The statement should make the government more aware of restoring the rights of the indigenous peoples that have been deprived or ignored. Second, the customary forest is removed from its position, previously part of the state forest, and then included in the private forest category. This circumstance results from changes to Article 1 Point 6 of the Law on Forestry.

Table 3. Changes to Article 1 Point 6 of the Law on Forestry

Prior to The Constitutional Court's Decision	After The Constitutional Court's Decision
Customary forest is state forests in the territory of customary law communities. [*Hutan adat adalah hutan **negara** yang berada dalam wilayah masyarakat hukum adat*].	Customary forest is ~~**state**~~ **forests** in the territory of customary law communities. [*Hutan adat adalah hutan ~~**negara**~~ yang berada dalam wilayah masyarakat hukum adat*].

The decree of the Constitutional Court in bold states that the customary forest is no longer part of the state forest, so the category of the private forest must be included in the customary forest. It also states that the customary forest is a part of the customary land of customary law communities. In Indonesian, the customary forest is termed *hutan adat, hutan marga, hutan pertuanan,* or other designations. It is within the scope of customary rights because it is in a single area of the customary law community, whose demonstration is based on a tradition that lives within the

[45] Subarudi Subarudi, "Kebijakan Pengelolaan Hutan Adat Pasca Putusan Mahkamah Konstitusi No. 35/PUU-X/2012: Suatu Tinjauan Kritis," *Jurnal Analisis Kebijakan Kehutanan* 11, no. 3 (2014): 207–24, https://doi.org/10.20886/jakk.2014.11.3.207-224.

[46] Yance Arizona, "Peluang Hukum Implementasi Putusan MK 35 Ke Dalam Konteks Kebijakan Pengakuan Masyarakat Adat di Kalimantan Tengah," in *Fakta Tekstual (Quo Vadis) Hutan Adat Pasca Putusan MK No.35/PUU-X/2012* (Paper Presented Workshop WWF Central Kalimantan Program and AMAN Kalteng, Palangkaraya 2013), 2–3.

people (*in de volksfeer*). It has a central management body that is authoritative throughout its territory. The AMAN estimates that forty million hectares of customary forests have been designated state forests.[47] The area coverage is certainly fantastic and extensive.

In addition, the change in the position of the customary forest once again shows that a forest area is not the same as a state forest. In addition to state forests, there can be customary forests and forests belonging to individuals or legal entities within the forest areas. Unfortunately, until now, the Ministry of Forestry has not accepted the paradigm that forests must be seen as areas that function as forests so that the Ministry of Forestry's control can be more comprehensive, not only over state forests but also over customary and private forests.[48] The control is the Ministry of Forestry's responsibility to provide legal certainty and promote customary forests and private forests located on customary and private lands. Third, land rights holders are forest rights holders. The Constitutional Court states three legal subjects regulated in the Law on Forestry: state, customary law communities, and holders of land rights containing forests. The state controls both land and forests. The land rights holders also hold rights over forests, but the regulation on customary law communities is unclear.[49] The different treatment is also the basis for the Constitutional Court to state that the indigenous peoples' rights to forests have been neglected. The principle also emphasizes the status of forests, which consist of state forests, customary forests, and forests belonging to individuals or legal entities. It is the principle of vertical tenure, in which the party controlling the land also controls the rights on the land.[50]

Fourth, there are various state authorities over state forests and customary forests. The Constitutional Court states that, regarding state forests, the state has full authority to regulate and decide on supply, allocation, utilization, management, and legal relations in state forest areas. Management authority by the state in the forestry sector should be given to the ministry, whose field includes forestry affairs. Reviewing customary forests, the Constitutional Court believes that the state's authority is limited to the extent to which the contents of that authority are included in customary forests. Indonesian customary forest is within the scope of customary rights because it is in a single area of customary law community, whose demonstration is based on the tradition that lives within the people (*in de volksfeer*). It has a central management body that is authoritative throughout its territory.

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47 Yance Arizona, "Peluang Hukum Implementasi Putusan MK 35 Ke Dalam Konteks Kebijakan Pengakuan Masyarakat Adat di Kalimantan Tengah."

48 Daru Adianto and Muamar Muamar, "Peranan Budaya Hukum Kementerian Lingkungan Hidup dan Kehutanan Dalam Penetapan Hutan Adat," *Jurnal Suara Hukum* 4, no. 2 (2022): 435–455, https://doi.org/10.26740/jsh.v4n2.p435-455.

49 Constitutional Court of The Republic of Indonesia Decision Number 35/2012.

50 Michael Byers, *Custom, Power and The Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 2009), 207.

Indeed, there are differences in state authority over state forests and customary forests. However, the Ministry of Environment and Forestry still has general authority in the forestry sector to all types of forests, including state, customary, and privately-owned forests.[51] The general authority, for example, determines the status of state forests, customary forests, and individual or legal entity rights forests. The Ministry of Environment and Forestry never exercises authority. No ministerial decree determines the status of a state forest, customary forest, or individual or legal entity private forest. So far, the decision to determine forest area has been consciously and wrongly equated with the determination of state forest status, even though a forest area is not the same as a state forest.

Based on an analysis of the previous Bill, this article argues that the indigenous peoples have not received robust legal recognition. The consequences of this situation have impacted the contribution of the indigenous peoples to economic development, both at the regional and national levels.[52] This article argues that for the indigenous peoples to contribute in line with the regional and central government agendas, for the first step, they should be given full legal rights to contribute their skills and uniqueness to economic development. This article indicates that this contribution will also indirectly increase the economic level of the indigenous peoples and, at the same time, maintain the sustainability of the ecosystem.[53]

D. Lessons from New Zealand: Recognition of the Maori Traditional Economic System

The better development and advancement of New Zealand's indigenous Maori community can be used as a reference for the recognition of the rights of traditional communities. Economic growth in the Maori community reached $42 million and contributed five percent of New Zealand's economy.[54] The Maori have developed trade by building the largest market in Hamilton, being involved in building residential areas in Auckland, and building significant industries in New Zealand, such as fishing, forestry, and agriculture.[55] The Maori economic growth was significant, from NZ$4.6 million in 1997 to NZ$42.6 million in 2013.[56] The Maori community in New Zealand has received recognition for their right to self-determination and

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51 Dewi Gunawati, "Urgensitas Harmonisasi Hukum Perlindungan dan Pengelolaan Hutan Dalam Mitigasi Perubahan Iklim Global Melalui Program Reducing Emmision Deforestation and Forest Degradation and Enhancing Stok Carbon," *Yustisia* 4, no. 1 (2015): 146, https://doi.org/10.20961/yustisia.v4i1.8630.

52 Paul Sillitoe, Alan Bicker, and Johan Pottier, *Participating in Development: Approaches to Indigenous Knowledge* (London: Taylor and Francis, 2002), 98.

53 Laurent Mayali and Pierre Mousseron (ed.), *Customary Law Today* (Cham: Springer International Publishing, 2018), 332.

54 Kiri Rangi Toki, "The Maori Economy and Access to Justice," *Yearbook of New Zealand Jurisprudence* 15 (2017): 102-117.

55 Kiri Rangi Toki, 103.

56 Kiri Rangi Toki, 102–117.

economic rights.[57] The traditional economic system rests on a unique philosophical understanding. This situation involves a unique social and spiritual relationship between the Maori and the natural environment.[58] The uniqueness is reflected by the economic unit in a traditional Maori institution consisting of *whanau*, *hapu*, and *iwi*.[59] To deal with economic development, the Maori focus on sustainable economic development.[60] To ensure the preservation of the natural surroundings, they consider four main elements: (1) *taonga* (value); (2) *kanga* (traditional or cultural); (3) *mauri* (the life principle of animate and inanimate things); and (4) *kaitiaka* (guardian of natural resources in a sustainable manner).[61]

The Maori also has six other principles that play a role in the protection and maintenance of nature: (1) *mana* (individual qualities, animals, and plants); (2) *tapu* (sacred in economic development); (3) *rahui* (a unique explanation of *tapu* under economic development; (4) *Noa* (avoiding destruction); (5) *tohatoha* (a strong relationship among fellow citizens); and (6) *Ahi ka Roa* (occupying an area of land since ancient times).[62] Integrating elements can ensure the welfare and sustainability of natural resources for future generations and provide a more memorable legacy than just targeting economic profit. The philosophical teachings of the economic system and sustainable development align with the concept of self-determination and the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

The Waitangi Treaty supports the Maori's economic development. The Treaty is a foundation since the purpose is to recognize indigenous peoples in New Zealand's laws. Like other indigenous peoples, the Maori economic system has a concept of collective ownership. It emphasizes *whanaungatanga* (kinship), *kotahitanga* (unity), *kaitikitanga* (guarding), and *mana whenua* (ownership and control over land). In line with Daes' view, the concept can foster harmonious economic development to achieve the individual wealth of the Maori People.[63] From the perspective of modern life, the Maori economy encompasses the ownership of assets and income generation of the people. The people formed cooperative bodies which they collectively owned. Based on the juridical perspective, the law in New Zealand

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57 Muhammad Sayuti Hassan, Kalsum Umar, and Marshelayanti Mohamad Razali, "Pembangunan Ekonomi Orang Asli di Semenanjung Malaysia: Pengajaran yang Boleh Dipelajari Dari pada Masyarakat Maori di New Zealand," 431–458.

58 Ruth Omonigho Mrabure, "Indigenous Business Success: A Hybrid Perspective," *Journal of Enterprising Communities: People and Places in The Global Economy* 13, no. 1 (2019): 24-41, https://doi.org/10.1108/JEC-10-2018-0076.

59 John O'Sullivan and Teresa Dana, "Redefining Maori Economic Development," *International Journal of Social Economics* 35, no. 5 (2008): 364-365, https://doi.org/10.1108/03068290810861611.

60 Mason Durie, *Te Mana, Te Kāwanatanga: The Politics of Self-Determination* (Auckland: Oxford University Press, 1998), 107.

61 Mason Durie.

62 John O'Sullivan and Teresa Dana, 365.

63 Michaela Moura-Koçoğlu, *Narrating Indigenous Modernities: Transcultural Dimensions in Contemporary Māori Literature*, Cross/Cultures 141 (New York: Rodopi, 2011), 39.

accommodates the autonomous rights of the Maori Indigenous People.[64] From an economic dimension, it is better than recognizing the indigenous peoples in Indonesia. Recognition and respect for economic development are noted in legal sources, such as the Maori Land Law 1993 (*Te Ture Whenua* Maori Act 1993),[65] the Maori Fisheries Act 2004, the Foreshore and Seabed Act 2004,[66] the Natural Resources Management Act 1991, and the Maori Commercial Aquaculture Lawsuit Settlement Act 2004. The Bill of the Customary Law in Indonesia must go through four stages (identification, verification, validation, and determination). The validation referred to in the Bill of Customary Law Community is an administrative inspection activity on the validity of the verification results. The determination referred to in the Bill of Customary Law is carried out through a decision of the Regional Head.[67] Based on the elaboration of this recognition comparison, New Zealand recognizes the existence of its customary law community in law (act). On the other hand, the Bill of the Indonesian Customary Law only stipulates a decision of the Regional Head. The issue of determination becomes interesting if indigenous and tribal peoples must deal with state laws and policies at a higher level than regional heads.

Recognizing Maori land through the Maori Land Act 1993 (*Te Ture Whenua Moari Act* 1993) is important because it significantly contributes to the economic development of the Maori Community. Johnson argues that the amendment to the law in 2016 was to focus economic attention because the benefits of Maori Land were not being used to their full potential. It happened due to colonialism and its laws, which caused the Maori People to be unable to manage the land properly. In contrast to the Indonesian situation, the Maori Statutory Law has undergone several progressive transformations. The most recent revision of the law is *Te Ture Whenua Maori*.[68] In addition, there is also an example that deserves appreciation, namely the formation of a Special Court. The Maori Land Court can resolve disputes over Maori Customary Land. The court was formed based on Section 95 of *Te Ture Whenua Maori Act* 1993. It contains special regulations of the Maori Land Court Rules 2011. The leading role of this court is to promote the process and use of the indigenous Maori Land and facilitate the occupation, development, and use of land.[69]

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64 Dean Sully and University College, London (ed.), *Decolonising Conservation: Caring for Maori Meeting Houses Outside New Zealand*, Publications of the Institute of Archaeology, University College London (Walnut Creek, Calif: Left Coast Press, 2007), 59-70.

65 D. C Webster, "Te Ture Whenua Maori Act 1993," *Te Mata Koi: Auckland University Law Review* 7, no. 3 (1994): 715, 10.3316/agis_archive.19945244.

66 Richard Boast, "Maori Proprietary Claims to the Foreshore and Seabed After Ngati Apa," *New Zealand Universities Law Review* 21, no. 1 (2004): 20, 10.3316/agispt.20043950.

67 Article 6 to 17 of the Legal Draft of Law on Indigenous Peoples.

68 Richard Boast, "Māori Land and Land Tenure in New Zealand: 150 Years of The Māori Land Court," *Comparative Law Journal of The Pacific* 23 (2017): 97-98.

69 Margaret Courtney, "What Role Does the Māori Land Court Have in Modern Aotearoa New Zealand's Legal System?"(Ph.D. Dissertation University of Otago, 2022), 101.

The economic development of the Maori Community is also encouraged by an institution, namely *Te Puni Kokiri* or the Maori Economic Development Panel (PPEM). The PPEM was established to encourage the development of the Maori Economy.[70] *The Te Puni Kokiri* (TPK) encourages the Maori Community to progress domestically and globally by implementing strategies and activities to encourage the economic development of the Maori Community.[71] Another interesting reference is the right of self-determination in the fishing industry. The fishery is accommodated in the Waitangi Treaty. It reads, "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession." The statement means that fishing activities for Maori are a critical traditional economic resource and a source of sustenance for their survival apart from the land.[72]

Maori fishing rights are also recognized explicitly in Section 82 (2) of the Fisheries Act 1983. The New Zealand Court recognizes that the rights could be examined in the case of *Te Weehi v Regional Fisheries Officer 1986*. The court accepted based on the law by justifying the Maori Fishing Rights in disputed areas. The court relies on the doctrine of *native title* rights.[73] The Maori Community brought another case to the Waitangi Tribunal. It was the dispute over the Muriwhenua Fishing Claim Report (1988) and the *Ngai Tahu Maori Trust Board & Ors v Director General of Conservation & Ors Ca 18/95* [September 22, 1995]. The issue of fisheries has brought implications to the law on the Maori Fishing Industry. Currently, the Maori Customary Rights to fishing also include commercial fishing.

E. Conclusion

In conclusion, this study underscores that while the Indonesian Constitution provides guarantees for recognizing and respecting customary law communities, including their role in environmental management, the legislative sector has not established responsive arrangements. This lack of legal support means that customary law communities are unable to exercise their rights and fulfill their responsibilities. It also hinders their optimal involvement in natural resource and environmental management. The tenure rights of indigenous peoples in forest management have

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70 Jason Paul Mika, Nicolas Fahey, and Joanne Bensemann. "What Counts as an Indigenous Enterprise? Evidence From Aotearoa New Zealand," *Journal of Enterprising Communities: People and Places in the Global Economy* 13, 3 (2019): 372, https://doi.org/10.1108/JEC-12-2018-0102.

71 Te Puni Kōkiri, *Understanding Whānau-Centred Approaches: Analysis of Phase One Whānau Ora Research and Monitoring Results* (Kawatanga: Te Puni Kokiri, 2015), 80-81.

72 Valmaine Toki, "Adopting a Maori Property Rights Approach to Fisheries," *New Zealand Environmental Law* 14 (2010): 197.

73 Valmaine Toki, 198.

historically ensured forest sustainability long before the establishment of the Unitary State of the Republic of Indonesia. Achieving sustainable natural resource and environmental management cannot solely rely on a governance-based model in which the state assumes complete authority and ownership.

Both Indonesia and New Zealand have ratified international human rights instruments. Indonesia can draw lessons from how New Zealand's legal framework recognizes and respects indigenous peoples, offering them autonomy in regulating economic development, customary land, fishing industry, coastal and seabed management, natural resource management, and the settlement of Maori commercial aquaculture claims. Therefore, it is imperative to strengthen and empower customary law communities in Indonesia based on the principles of community-based natural resource management to enhance the well-being of these communities. Thus far, customary law communities have been relegated to passive roles, serving as mere onlookers in their own ancestral lands.

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