

Marginalization in Indigenous Communities: Limited Recognition and Realization of Rights Based on a Transitional Justice Perspective

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Abstract

This study aims to examine the structural barriers to the recognition and realization of indigenous communities' customary rights in Indonesia and to develop a transitional justice framework for addressing their marginalization. Using a doctrinal legal research method, the study applies statutory and conceptual approaches to analyze constitutional and statutory provisions governing indigenous communities, customary land rights, equality before the law, and transitional justice. The findings demonstrate that constitutional recognition has not translated into effective rights protection because recognition remains conditional and procedurally dependent on state determination. Regulatory fragmentation and sectoral legalism further create inconsistencies between formal legal norms and their implementation, particularly in the protection of customary land and the exercise of indigenous autonomy. These conditions reveal a structural tension between formal equality and substantive equality: treating indigenous communities through uniform legal procedures may reproduce rather than eliminate historical disadvantage. The study's novelty lies in conceptualizing transitional justice as a normative framework for reconstructing indigenous rights protection beyond conventional recognition-based approaches. It argues that transitional justice requires affirmative and corrective measures that address historical exclusion, recognize customary law as living law, and strengthen indigenous communities' substantive equality. Accordingly, Indonesia requires an integrated and non-sectoral legal framework that shifts recognition from a conditional administrative process toward an enforceable rights-based mechanism, supported by affirmative protection, meaningful participation, and effective institutional guarantees for the realization of customary rights.

Keywords: Customary Rights; Indigenous Communities; Rule of Law; Transitional Justice

1. INTRODUCTION

Indonesia is known as a country with a high level of diversity, encompassing ethnic groups, cultures, religions, races, and social classes. In terms of ethnic diversity, Indonesia has 1,340 ethnic groups, each at varying levels of development and well-being.¹ In the context of *the nation-state*, the role of ethnic groups is very important. Among these ethnic groups, there are still communities that firmly uphold their culture, customs, and customary laws.² In academic and legal-technical literature, this community is given various names, as if following the motto “Bhinneka Tunggal Ika.” The terms used for this community in legislation include customary law community, indigenous community,

¹ Dewa Agung Gede Agung et al., “Local Wisdom as a Model of Interfaith Communication in Creating Religious Harmony in Indonesia,” *Social Sciences & Humanities Open* 9 (2024): 100827, <https://doi.org/10.1016/j.ssaho.2024.100827>.

² Andi Rahmat Hidayat, Otto Hospes, and C.J.A.M. Termeer, “Uneven Recognition: A Comparative Study of Indigenous Communities' Struggle for Securing Customary Land Rights in Indonesia,” *Land Use Policy* 167 (2026): 108061, <https://doi.org/10.1016/j.landusepol.2026.108061>.

customary law community unit, traditional community, and isolated indigenous community.³

Among these terms, the one first used and most frequently employed in legislation is “customary law community.” The term “customary law community” is a translation of “*rechtsgemeenschappen*,” a term first introduced by the champion of customary law, Cornelis van Vollenhoven, in his speech dated October 2, 1901. Later, Van Vollenhoven’s follower, Ter Haar, used the term “*adatrechtsgemeenschappen*,” which was translated as “customary law communities.” Ter Haar’s⁴ definition of “customary law communities” was elaborated at great length, leading Bushar Muhammad to reformulate it as follows: a customary law community (customary law community) is an organized human collective, settled in a specific region, possessing rulers and both tangible and intangible assets, where each member of the collective experiences life within the community as a natural and inevitable part of human existence, and none of the members have any intention or inclination to dissolve the bond that has grown or to abandon it in the sense of permanently severing ties.⁵⁶

Within the history of the indigenous peoples’ rights movement, the term “*masyarakat adat*” emerged as the translation of “indigenous peoples,” first proposed by the Network for the Defense of Indigenous Peoples’ Rights (JAPHAMA) in 1993. According to JAPHAMA, indigenous communities are defined as groups of people who have ancestral origins (passed down through generations) in a specific geographical area, and who possess their own systems of values, ideology, political economy, culture, society, and territory.⁷ Subsequently, this definition was refined by the Alliance of Indigenous Peoples of the Archipelago (AMAN) in 1999, which defines communities living based on ancestral lineage passed down through generations within a customary territory, possessing sovereignty over land and natural resources, and a social and cultural life governed by customary law and customary institutions, which manage the sustainability of their communities’ livelihoods.⁸ AMAN considers this term the most appropriate, as it can describe a community holistically. This term “indigenous community” has been accepted by lawmakers, both in terms of its terminology and substance.

³ I Gusti Agung Mas Rwa Jayantiari et al., “The Rights of Customary Law Communities to Resources: The Relationship of Coexistence of State Law and Customary Law,” *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 1 SE-Articles (April 28, 2025): 187–98, <https://doi.org/10.29303/ius.v13i1.1329>.

⁴ Ten Haar, *Asas-Asas Dan Susunan Hukum Adat (Beginselen En Stelsel van Hef Adatrecht)*, ed. Sobakti Poeponoto, 8th ed. (Jakarta: Pradnya Paramita, 2001).

⁵ Bushar Muhammad, *Fundamentals of Customary Law*, 5th ed. (Jakarta: Pradnya Paramita, 1991).

⁶ Brian Z Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Legal Theory and the Social Sciences* 30, no. 3 (2018): 447–83, <https://doi.org/10.4324/9781315091891-17>.

⁷ Jamie Davidson, David Henley, and Sandra Moniaga, *Custom in Indonesian Politics* (Jakarta: Yayasan Pustaka Obor Indonesia, 2010).

⁸ AMAN, “Profile of the Alliance of Indigenous Peoples of the Archipelago,” in AMAN, 2021, <https://www.aman.or.id/profile>.

The government has implemented development programs across all sectors, and significant progress has been made.⁹ However, there are still some customary law communities whose livelihoods remain subsistence-based, merely meeting basic needs by relying on the surrounding natural environment, whether due to limitations in knowledge and technology or a deliberate choice to preserve ancestral cultural heritage to harmonize with nature.¹⁰ AMAN's research on ILCs in Gampong Alue Capli (Aceh); Tana Ai (NTT); Sedukur Sikep (Central Java); and Bentek (NTB) found that poverty is not only caused by the depletion of natural resources but also by marginalization across various aspects of ILCs' lives as a consequence of the hegemony of modernization.¹¹ Research findings by Michaela Haug from CIFOR (Center for International Forestry Research) indicate that the Dayak Benuaq community in West Kutai Regency exhibits a higher level of poverty stagnation than before the era of decentralization.¹² The same situation is faced by the Anak Dalam tribe in Jambi, who were driven out of the forests where they lived because their forests were taken over by investors for plantations, forcing them to live along the Trans-Sumatra Highway as beggars and vagrants. The deterioration of the lives of Indigenous Peoples is largely caused by conflicts over customary land rights that have spread, in tandem with the increasing demand for land for investment.¹³

In general, the issues faced by the MHA are a lack of recognition and protection of their existence and rights. The recognition of MHA, in addition to being stipulated in Article 18B(2) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), is also regulated in Ministry of Home Affairs Regulation No. 52 of 2014 on Guidelines for the Recognition and Protection of Customary Law Communities. According to Muhammad Arman, Director of Policy, Legal, and Human Rights Advocacy at the Executive Board of the Alliance of Indigenous Peoples of the Archipelago (PB AMAN), by the end of 2017, only 17 regencies and cities had implemented recognition, involving 109 ILCs; however, this recognition mechanism has not yet been fully effective.¹⁴ Recognition instruments for ILCs, whether through Regent Decrees or Regional Regulations, serve as the initial foundation for ILCs to register their customary rights or submit applications for the designation of customary forests.

⁹ Brian Z. Tamanaha, "Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences," *Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 168–205, <https://doi.org/10.1080/07329113.2021.1942606>.

¹⁰ Bosompem Ahunoabobirim Agya, "Cultural Determinants of Sustainable WM Practices: A Review of Taboos, Norms, and Beliefs in Ghana's Rural Communities," *Waste Management Bulletin* 3, no. 4 (2025): 100242, <https://doi.org/10.1016/j.wmb.2025.100242>.

¹¹ Restu Achmaliadi and Angky Samperante, "Understanding the Dimensions of Indigenous Peoples' Poverty" (Jakarta, 2010), <https://www.aman.or.id/wp-content/uploads/2019/06/Memahami-Dimensi-dimensi-Kemiskinan-Masyarakat-Adat.pdf>.

¹² Michaela Haug, *Poverty and Decentralization in West Kutai: The Impact of Regional Autonomy on the Well-being of the Dayak Benuaq*, 2007, <https://doi.org/10.17528/cifor/002359>.

¹³ Herman Hidayat et al., "Forests, Law and Customary Rights in Indonesia: Implications of a Decision of the Indonesian Constitutional Court in 2012," *Asia Pacific Viewpoint*, 2018, <https://doi.org/10.1111/apv.12207>.

¹⁴ Wahyu Chandra, "Local Regulations, Customary Forests, and the Importance of Recognition for Indigenous Peoples," in *Ekuatorial* (Ekuatorial, 2021), <https://www.ekuatorial.com/2021/01/perda-hutan-adat-dan-pentingnya-pengakuan-bagi-masyarakat-adat/>.

The lack of recognition and protection for MHA is primarily due to the absence of legislation governing MHA, as mandated by Article 18B(2) of the 1945 Constitution of the Republic of Indonesia since the 2000 amendment. To date, many regulations regarding MHA are scattered across various laws and regulations; however, each of these regulations still contains sectoral biases, making them insufficient in resolving MHA-related issues.¹⁵ Legislation containing sectoral interests is prone to overlap, making conflicts of interest among government agencies inevitable and complicating implementation on the ground.¹⁶ As a result, ILCs are neglected, unprotected, impoverished, and remain entangled in both internal and external conflicts.

Efforts to regulate indigenous communities through specific legislation have already begun, though no results have yet been achieved. The House of Representatives, through the 2004–2009 National Legislation Program (Prolegnas), has proposed three draft laws related to indigenous communities: the Draft Law on the Rights of Indigenous Communities, the Draft Law on Remote Indigenous Communities, and the Draft Law on the Recognition and Respect for Indigenous Communities and Their Traditions. In 2021, the House of Representatives and the Government agreed to discuss 33 Priority Prolegnas Bills, one of which was the Bill on Customary Law Communities (MHA Bill). However, the MHA Bill has yet to be discussed and is scheduled to be addressed in 2022.

By comparison, neighboring countries with ethnic groups that are not as complex as Indonesia's have already enacted legislation regarding Indigenous Legal Communities. The Philippines, for example, has had the Indigenous Peoples' Rights Act (IPRA) of 1997. Malaysia has had the Aboriginal Act since 1954, which was subsequently amended in 1974. Australia also has the Native Title Act of 1993 to protect Aboriginal peoples.

In the international arena, efforts to protect indigenous peoples have gained momentum since the adoption of ILO Convention No. 107 of 1957 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Peoples in Independent Countries, which adopted an approach based on integration and assimilation. This principle was later revised with the adoption of ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries, which employs an approach of preservation and participation. The momentum of this recognition of indigenous peoples continued to grow, leading the United Nations to acknowledge the human rights of indigenous peoples through the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on September 13, 2007, with Indonesia being one of 144 countries that signed the declaration.

¹⁵ I Putu Endra Wijaya Negara and Deppa Ringgi, "Legal Recognition of Indigenous Peoples in the Era of Social Transformation: A Constitutional and Customary Law Perspective," *LEGAL BRIEF* 15, no. 1 SE-Customary and Cultural Law (April 18, 2026): 62–68, <https://doi.org/10.35335/legal.v15i1.1633>.

¹⁶ Ade Irwandi and Rifki Taufik, "Cultural Identity in the Shackles of Modernization: The Case of Mentawai Indigenous Peoples," *Jurnal Sosiologi Andalas* 9 (October 30, 2023): 211–28, <https://doi.org/10.25077/jsa.9.2.212-229.2023>.

The state's obligation to facilitate the recognition and protection of indigenous peoples is a matter that can no longer be postponed, as stipulated in Article 26 of the UNDRIP. This is because these communities have an equal right to be recognized and protected under state law. In essence, the better the recognition and protection of indigenous peoples, the better the outcomes will be. Nevertheless, regulations regarding such recognition and protection remain structurally hampered by the weak implementation of legal pluralism, which results in indigenous communities' autonomy in practicing their traditions being heavily dependent on state decisions. This issue clearly stands in contrast to the legal frameworks established by the Philippines, Malaysia, and Australia, which comprehensively protect and recognize the existence of their indigenous communities.

This article differs from the writings of Xanthaki¹⁷ and Baker¹⁸ focusing on the cultural rights of indigenous peoples as regulated in various international legal instruments, emphasizing that the substance of UNDRIP and ILO Convention 169 should serve as the foundation for all countries to recognize and respect indigenous peoples. On the other hand, this article focuses on the protection of the rights of indigenous peoples, which remains suboptimal due to the weak legal pluralism adopted by Indonesia. This paper is also clearly different from the articles by Cambou¹⁹ and Gilbert,²⁰ which emphasize the self-determination of indigenous peoples to govern and manage their own communities, territories, and resources, which should be recognized and respected by the government. The difference with this article lies in its broader scope, as it covers the protection of indigenous peoples' rights and does not stop merely at aspects of recognition and respect. In addition, the analysis in this article is more philosophical, as it links the fulfillment of indigenous peoples' rights with transitional justice.

The transitional justice approach is crucial in analyzing the right to recognition of indigenous communities amid the era of weak legal pluralism adopted by Indonesia. This is because the transitional justice perspective prioritizes special treatment for indigenous communities, which fall under the category of vulnerable groups. Furthermore, this perspective on justice also facilitates indigenous communities' access to equal opportunities and benefits to achieve peace and justice.

Issues related to customary law communities are of critical urgency to address, given that these communities are legal subjects and a key factor in the survival or demise

¹⁷ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards Self-Determination, Culture and Land*, 2007, <https://doi.org/10.1017/CBO9780511494468>.

¹⁸ David Baker, Francesca Panzironi, and Sydney Sparrow, *Aboriginal Peoples' Participation in the Review of the Aboriginal Heritage Act 1988 in South Australia, The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region*, 2012, <https://doi.org/10.4324/9780203116159-16>.

¹⁹ Dorothée Cambou, "Enhancing the Participation of Indigenous Peoples at the Intergovernmental Level to Strengthen Self-Determination: Lessons from the Arctic," *Nordic Journal of International Law* 87, no. 1 (2018): 26 – 55, <https://doi.org/10.1163/15718107-08701002>.

²⁰ Jérémie Gilbert and Corinne Lennox, "Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development," *International Journal of Human Rights* 23, no. 1–2 (2019): 104 – 124, <https://doi.org/10.1080/13642987.2018.1562921>.

of their customs and rights. Therefore, this article covers several subtopics: an analysis of the rule of law and equality before the law; the irony in the recognition and fulfillment of customary land rights of indigenous communities; and the construction of transitional justice and the fulfillment of customary land rights of indigenous communities. These three topics will be analyzed through various theories and perspectives that directly intersect with the concept of transitional justice in the fulfillment of the customary rights of indigenous communities.

2. METHOD

This study employs a doctrinal legal method, which is a form of legal research focused on the analysis of legal literature, legal norms, principles, and doctrines related to the recognition of the rights of indigenous communities.²¹ This method is highly relevant to the issues to be discussed, namely the lack of recognition and fulfillment of the rights of indigenous communities. Therefore, this study emphasizes an analysis of transitional justice to examine the causes of this lack of recognition, which has disrupted the fulfillment of the rights of indigenous communities. Within the framework of the doctrinal method, two specific approaches are employed: the statutory approach and the conceptual approach. The statutory approach examines the 1945 Constitution of the Republic of Indonesia, Law No. 5 of 1960 on Agrarian Principles, Law No. 39 of 1999 on Human Rights, and Law No. 25 of 2009 on Public Services. Meanwhile, the conceptual approach is used to explore theories related to the recognition of the rights of indigenous communities, primarily through the theory of transitional justice. By using these two approaches, it is hoped that issues regarding the recognition and fulfillment. The collected data were analyzed using content analysis, which consisted of three systematic stages: coding, data interpretation, and conclusion drawing. First, the data were coded by grouping relevant information according to its substantive meaning and organizing it into thematic categories. Second, the coded data were interpreted to identify patterns, relationships, and key issues concerning the recognition and realization of indigenous communities' rights. Finally, the findings were synthesized to conclude the extent to which the rights of indigenous communities are recognized and realized from a transitional justice perspective.²²

3. RESULTS AND DISCUSSION

3.1 The Rule of Law and Equality Before the Law

Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates that the State of Indonesia is a state governed by the rule of law. Before discussing the rule of law further, it is necessary to examine the lexical and terminological differences between “law” and “statutes.” Lexically, the word “law” is used in various

²¹ Gaurav Shukla, *Doctrinal Legal Research: A Library-Based Research-*, , 2023, <https://doi.org/10.4018/978-1-6684-6859-3.ch015>.

²² Satu Elo et al., “Qualitative Content Analysis,” *SAGE Open* 4, no. 1 (January 2014): 215824401452263, <https://doi.org/10.1177/2158244014522633>.

European countries with different terms, namely *recht* (Dutch, German), *law* (English), *droit* (French), and *derecho* (Spanish) to denote “law.” Meanwhile, for the term “statute,” the terms *wet* (Dutch), *Gesetz* (German), *loi* (French), *ley* (Spanish), and *act* (English) are used.²³

This distinction significantly determines the meaning of the rule of law in a narrow or broad sense. In the narrow sense, the meaning of the rule of law refers to “statutes” as written rules enacted by a legislative body. This narrow definition then gives rise to the concept of the rule of law as a state of laws *Wetsstaat*, *Gesetzstaat*, or *État de Loi* which aims solely to achieve legal order and certainty. Meanwhile, the concept of the rule of law in the broad sense refers to the ethical dimension of law, thereby giving rise to the concept of the rule of law as *Rechtsstaat*, *État de droit*, or Rule of Law. The meaning of the rule of law in this broad sense is not merely aimed at achieving legal certainty, but also at securing justice and the common good. In other words, the concept of law does not rely solely on law in the narrow sense, that is, written law interpreted as statutory regulations, but also on unwritten law (such as state conventions and customary law). This refers to General Explanation III of the 1945 Constitution, which, among other things, stipulates that these guiding principles embody the legal ideal (*rechtsidee*) that governs the country’s fundamental law, encompassing both written law (the Constitution) and unwritten law. Thus, the term “law” here is not limited to the meaning intended by Law No. 12 of 2011, which interprets it solely as statutory regulations.

In line with the above, the Pancasila Congress organized by UGM and the Constitutional Court in Yogyakarta on May 30 – 1 June 2009 concluded that the existence of national law, based on Pancasila, does not negate other legal systems; rather, national law based on Pancasila incorporates legal values that are alive and evolving in Indonesia, including religious law, customary law, international law, Western law, and other legal systems, while taking into account aspects of democracy, justice, truth, and human rights.²⁴

A similar view was expressed by Mahfud MD, who stated that deliberation and cooperation grounded in a spirit of kinship are the most prominent features of the Pancasila Legal System; thus, bringing a case to court, for example, would only be pursued if a resolution through kinship-based means proves unattainable. With this paradigm, every effort to enforce the law will be able to free itself from the traps of procedural formalities and encourage law enforcement officials to be creative and bold in

²³ Naomi Creutzfeldt, Marc Mason, and Kirsten Mc Connachie, “Routledge Handbook of Socio-Legal Theory and Methods,” *Routledge Handbook of Socio-Legal Theory and Methods* 4 (2019): 1–408, <https://doi.org/10.4324/9780429952814>.

²⁴ Agus Wahyudi, “Pancasila from Various Perspectives,” in *Proceedings of the Pancasila Congress* (Jakarta: General Secretariat and Registry of the Constitutional Court, 2009).

exploring the values of justice and upholding ethics and morals within society in every resolution of legal cases.²⁵

To complement the legal meaning from the perspective of the participant (legal expert), it is also necessary to consider the legal meaning from the perspective of the observer (legal observer), which is also useful for viewing the law from an interdisciplinary perspective. Law can also be viewed through systems theory, specifically the legal system²⁶ as articulated by Lawrence M. Friedman, who states: “A legal system in actual operation is a complex organism in which structure, substance, and culture interact.”²⁷ Following the functioning of a system to function, the legal system will operate effectively to achieve its legal objectives only if each subsystem legal structure, legal substance, and legal culture functions properly.²⁸

Returning to the concept of the rule of law as stated in Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The Explanatory Notes to the 1945 Constitution state that the Indonesian state is based on law (*rechtsstaat*), not on mere power (*machtsstaat*). The omission of the term in parentheses (*machtsstaat*) in the wording of Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia, according to Moh. Mahfud MD,²⁹ indicates that our legal policy encompasses a prismatic concept of the rule of law that incorporates the positive elements of the *rechtsstaat*³⁰ and the rule of law³¹ as well as other legal systems, all within a single, integrated concept whose implementation is adapted to developments. In this context, the Indonesian concept of the rule of law incorporates the principle of legal certainty from the *rechtsstaat*, the principle of justice from the rule of law, and spiritual values rooted in religion. Written law and all its procedural provisions (*rechtsstaat*) are accepted within Indonesia’s rule of law, but all of this must be situated within the framework of upholding justice (the rule of law); written provisions that hinder justice may be set aside. Between the *rechtsstaat* and the rule of law, there is a similarity: both concepts are centered on efforts to provide protection for human rights.³²

Specifically, Jimly Assiddiqie outlines thirteen fundamental principles of the rule of law applicable today, namely: (1) the supremacy of law, (2) equality before the law, (3) due process of law, (4) separation of powers, (5) independent executive branches, (6) an independent and impartial judiciary, (7) administrative courts, (8) constitutional courts, (9)

²⁵ Laely Nuhidayah, Peter J Davies, and Shawkat Alam, “Resolving Land-Use Conflicts over Indonesia’s Customary Forests,” *Southeast Asia* 42, no. 3 (2020): 372–97, <https://doi.org/10.2307/26996201>.

²⁶ Tatang Amirin, *System Theory* (Jakarta: Rajagrafindo Persada, 2001).

²⁷ Lawrence M Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).

²⁸ Tania Murray Li, “Epilogue: Customary Land Rights and Politics, 25 Years On,” *The Asia Pacific Journal of Anthropology* 21, no. 1 (January 1, 2020): 77–84, <https://doi.org/10.1080/14442213.2020.1680016>.

²⁹ Mahfud Mahmodin, *Debates on Constitutional Law Following the Constitutional Amendments* (Jakarta: Rajawali Pers, 2010).

³⁰ Jimly Asshiddiqie, *The Constitution and Constitutionalism in Indonesia* (Jakarta: Sinar Grafika, 2010).

³¹ Asshiddiqie.

³² Mahfud Mahmodin, *Law and the Pillars of Democracy* (Yogyakarta: Gama Media, 1999).

protection of human rights, (10) democratic nature, (11) functioning as a means to realize the state's objectives (welfare state), (12) transparency and social control, and (13) belief in the One and Only God.

The Declaration and the provisions of Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia state that the State of Indonesia is a state governed by law, which is further realized, among other things, in Article 27, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which stipulates that all citizens are equal before the law and the government and are obligated to uphold the law and the government without exception. Based on these two constitutional articles, it can be interpreted that every citizen has equal legal standing in all aspects of national and state life. Furthermore, these two constitutional articles also imply that every citizen of the Republic of Indonesia must be treated equally without any discrimination. Provisions prohibiting discrimination are also outlined in Article 28 I, paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that every person has the right to be free from discriminatory treatment on any grounds and has the right to protection against such discriminatory treatment. Law No. 39 of 1999 on Human Rights (Human Rights Law), specifically Article 3(3), also stipulates that every person has the right to protection of human rights and fundamental freedoms without discrimination. Similarly, Article 4 of Law No. 25 of 2009 on Public Services stipulates that the provision of public services is based, among other things, on equality of rights and equal treatment/non-discrimination.

In the hierarchy of laws and regulations, customary law communities are governed by Article 18B(2) and various other laws and regulations. Article 18B(2) stipulates that the state recognizes and respects customary law communities and their traditional rights as long as they remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia. The existence of indigenous customary law communities and their traditional rights is contingent upon four (4) conditions, namely: (1) as long as they remain in existence; (2) in accordance with societal developments; (3) in accordance with the principles of the Unitary State of the Republic of Indonesia; and (4) regulated by law.

In the context of the four legal requirements in Article 18B(2) of the 1945 Constitution of the Republic of Indonesia, Satjipto Rahardjo notes that the phrasing remains rooted in a tradition of absolutism and hegemony, reflecting how the state perceives itself as possessing all authority and power to determine what occurs within the Republic of Indonesia, including whether customary law remains in force or not.³³ Meanwhile, Soetandyo Wignjoesbroto³⁴ argues that these four requirements, whether

³³ Satjipto Rahardjo, "Customary Law in the Unitary State of the Republic of Indonesia (A Sociological-Legal Perspective)" (Jakarta, 2005).

³⁴ Soetandyo Wignjoesbroto, "Key Thoughts on the Four Conditions for Recognizing the Existence of Indigenous Communities" (Jakarta, 2005).

ipso facto or ipso jure, can easily be interpreted as a recognition that must be requested, with the burden of proof regarding the continued existence of the indigenous community resting on the indigenous community itself, while the policy to unilaterally recognize or not recognize such communities remains in the hands of the central government.³⁵

Saafroedin Bahar³⁶, a former member of the National Commission on Human Rights (Komnas HAM), argues that unlike the historical vision and moral stance of the nation's founders who respected the existence and rights of these customary law communities the fundamental attitude of second- and third-generation statesmen and government officials was to view customary law communities as a potential threat related to ethnicity, religion, race, and intergroup relations (SARA). It was during the era of these second- and third-generation statesmen that four clauses were established that indigenous communities must fulfill before they can obtain legal standing to defend their rights in court.³⁷ It is worth noting that among the many vulnerable groups whose rights must not only be protected but also fulfilled by the state, it is only indigenous communities that are subject to such numerous requirements.³⁸

In line with Saafroedin Bahar's view that customary law communities are vulnerable groups, it is only fair that such communities not be subject to onerous requirements for the recognition of their existence and rights. By comparison, people with disabilities, as regulated under Law No. 6 of 2016 on Persons with Disabilities, are not burdened with such conditions for their recognition. Article 2 states that the implementation and fulfillment of the rights of persons with disabilities are based, among other things, on non-discrimination, equal opportunity, equality, as well as special treatment and enhanced protection. In fact, Article 53(1) stipulates: The Government, Regional Governments, State-Owned Enterprises, and Regional-Owned Enterprises are required to employ at least 2% (two percent) of persons with disabilities out of the total number of employees or workers. Furthermore, Article 53(2) stipulates that private companies are required to employ at least 1% (one percent) of persons with disabilities out of the total number of employees or workers.

For example, there are two examples of laws and regulations that do not provide equal treatment before the law, making it very difficult for members of customary law communities to obtain justice and benefits in their lives. For adherents of certain beliefs, discrimination is initially evident in Article 61(1) and (2) of Law No. 23 of 2006 on

³⁵ Yance Arizona, Muki Trenggono Wicaksono, and Jacqueline A C Vel, "The Role of Indigeneity NGOs in the Legal Recognition of Adat Communities and Customary Forests in Indonesia," *The Asia Pacific Journal of Anthropology*, 2019, <https://doi.org/10.1080/14442213.2019.1670241>.

³⁶ Saafroedin Bahar, "A Human Rights Perspective on the Four Legal Requirements for the Existence of Customary Law Communities" (Jakarta, 2005).

³⁷ I Wayan Wiryawan, I Nyoman Putu Budiarta, and I Gede Sujana, "The Development of Customary Doctrine of Rechtsverwerking: How to Ensure Legal Certainty in Land Registration?," *Udayana Journal of Law and Culture* 9, no. 2 (2025): 221 – 239, <https://doi.org/10.24843/UJLC.2025.v09.i02.p04>.

³⁸ Yance Arizona and Miriam Cohen, "The Recognition of Customary Land Rights at the Constitutional Court of Indonesia: A Critical Assessment of the Jurisprudence," *Brill's Asian Law Series* 12 (2024): 173 – 194, https://doi.org/10.1163/9789004691698_008.

Population Administration, as amended by Law No. 24 of 2013 on Population Administration (hereinafter referred to as the Population Administration Law). These provisions govern the information entered on the Family Card (KK), which includes a religion column. For residents whose religion has not yet been recognized as a religion under applicable laws and regulations, or for adherents of indigenous beliefs, the religion column is left blank; however, they are still served and recorded in the population database. Additionally, Article 64(1) and (5) of the Population Administration Law govern the information on the Identity Card (KTP), which includes a religion column; for residents whose religion has not been recognized as a religion under applicable laws and regulations or for adherents of indigenous beliefs, the religion column is left blank, yet they are still served and recorded in the population database.

In response to these discriminatory provisions, four adherents of indigenous beliefs namely Nggay Meheng Tana (Marapu belief in Sumba), Pagar Demanra Sirait (Parmalim belief), Arnol Purba (Ugamo Bangsa Batak belief), and Carlim (Sapto Darmo belief in Brebes) filed a petition for a judicial review (judicial review) of Article 61(1) and (2) as well as Article 64(1) and (5) of the Population Administration Law to the Constitutional Court (MK). In response to this petition, the Constitutional Court issued Decision No. 97/PUU-XIV/2016 dated November 7, 2017, ruling that the Court granted the petitioners' request in its entirety and declared that the word "religion" in Article 61(1) and Article 64(1) of Law No. 23 of 2006 on Population Administration, as amended by Law No. 24 of 2013 on Population Administration, is inconsistent with the 1945 Constitution of the Republic of Indonesia and lacks binding legal force to the extent that it does not include "belief." Furthermore, the Constitutional Court also ruled that Article 61(2) and Article 64(5) of Law No. 23 of 2006 on Population Administration, as amended by Law No. 24 of 2013 on Population Administration, are inconsistent with the 1945 Constitution of the Republic of Indonesia and lack binding legal force.

This Constitutional Court decision was subsequently followed up by the Ministry of Home Affairs with the issuance of Minister of Home Affairs Regulation No. 118 of 2017 (Permendagri No. 118/2017). Permendagri No. 118/2017 was subsequently implemented through a Circular Letter from the Director General of Population and Civil Registration No. 471.14/10666/DUKCAPIL dated June 25, 2018, regarding the Issuance of Family Cards (KK) for Believers in the One Supreme God. Additionally, the ID card column for adherents of local beliefs has been revised to include a "Belief" column followed by a colon and the text "Belief in the One and Only God."

Despite the issuance of the Constitutional Court's ruling and the follow-up actions by the Minister of Home Affairs, there remain provisions in existing laws and regulations that still discriminate against adherents of a belief system, preventing them from accessing marriage certificates. This contradicts the provisions of Article 34(1) of the Population Administration Law, which states that a valid marriage, as defined by applicable laws and regulations, must be reported by the residents to the implementing agency of the

Population Administration Agency at the location where the marriage took place no later than 60 (sixty) days from the date of the marriage. In the author's research among the Baduy customary law community in Kanekes Village, Lebak Regency, Banten Province, it was revealed that since the enactment of the Population Administration Law, all Baduy people who have married possess only a Marriage Certificate (SK) issued by the Kanekes Village government and are not registered with the Population and Civil Registry Office.

Issuance of a decree (SK) contains at least three weaknesses. First, the government equates indigenous communities with non-indigenous belief organizations whose administrators are generally more advanced and educated. In reality, many members of indigenous communities have limited education, are highly traditional, and do not understand or recognize modern organizational structures. In some cases, indigenous communities even prohibit the establishment of modern organizations, such as the Baduy indigenous community, as stated in their customary law (*pikukuh*), including: *lojor teu meunang dipotong, pondok teu meunang disambung* (what is long must not be cut, what is short must not be extended). In the context of establishing modern organizations, the Baduy people would not form such structures because doing so would alter their established customary legal order. Second, the government does not consider empirical or field conditions, as not all believers within indigenous communities have organizations that span across regencies or cities. For example, the Baduy indigenous community exists only in one village, namely Kanekes Village, Leuwidamar District, Lebak Regency, Banten Province. Third, the government should understand that indigenous communities are fundamentally different from other social groups, so their treatment cannot be equated with modern societies. This principle has already been stipulated in the Constitution, specifically Article 28H paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which states that every person has the right to receive facilities and special treatment to obtain equal opportunity and benefit to achieve equality and justice. A similar provision is also emphasized in Article 6 paragraph (1) of Law No. 39 of 1999 on Human Rights, which states that in the enforcement of human rights, differences and needs within customary law communities must be recognized and protected by law, society, and the government.

Thus, it can be concluded that there are still laws and regulations that do not contain affirmative action clauses or do not provide strengthening or facilitation, but instead complicate and weaken the position of indigenous communities. This is even though the Constitution and the Human Rights Law clearly emphasize the need to provide special treatment to achieve equality and justice. This clearly contradicts the concept of the rule of law and equality before the law that should be upheld by the Government of Indonesia.³⁹

³⁹ Jayantiari et al., "The Rights of Customary Law Communities to Resources: The Relationship of Coexistence of State Law and Customary Law."

3.2 The Irony in the Recognition and Fulfillment of Customary Land Rights

In addition to discrimination related to civil registration services, particularly marriage certificates, indigenous communities also face difficulties in asserting the existence of their customary rights. Historically, there have been inconsistencies between the provisions of various laws and regulations and the 1945 Constitution of the Republic of Indonesia. In Law No. 5 of 1960 on the Basic Provisions of Agrarian Law (UUPA), specifically in Article 3, the recognition of customary land rights is subject to conditions.⁴⁰

Taking into account the provisions of Articles 1 and 2, the exercise of customary land rights and similar rights by customary law communities, to the extent that they still exist in practice, must be such that they are in accordance with national and state interests, based on national unity, and must not conflict with laws and other higher-ranking regulations.

Upon closer examination, the recognition of customary land rights of customary law communities is contingent upon four (4) conditions, namely: (1) as long as they actually still exist; (2) in accordance with national and state interests; (3) based on national unity; and (4) must not conflict with laws and other higher-ranking regulations. The same pattern is also used in the provisions of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the full text of which states that recognizes and respects customary law communities and their traditional rights as long as they remain in existence and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law.

The existence of customary law communities and their traditional rights is also contingent upon four (4) conditions, namely: (1) as long as they remain in existence; (2) in accordance with societal development; (3) in accordance with the principles of the Unitary State of the Republic of Indonesia; and (4) regulated by law.

During the deliberation of the UUPA Bill, particularly regarding the recognition of customary land rights, a member of the GR House of Representatives named Frans Seda, in the Joint Meeting of the Fourth Commission on September 1, 1960, criticized the recognition, noting that the drafters of this Bill were constantly plagued by apprehension toward customary law and customary rights, so that every time the relevant articles were discussed, restrictions were proposed using formulations that were consistently similar (namely, those that essentially reflected a fear of tribal selfishness versus national interests), for example, Article 2, paragraph (4), Article 3, and Article 5.⁴¹

However, Frans Seda's efforts were not heard or accommodated, so from the time it was first proposed until the enactment of the UUPA Draft, particularly the provisions

⁴⁰M Nazir Salim et al., "From Tradition to Transformation: Customary Land Dynamics and State Protection in Manggarai, Indonesia," *Humanities, Arts and Social Sciences Studies* 25, no. 1 (2025): 78 – 90, <https://doi.org/10.69598/hasss.25.1.267517>.

⁴¹E Z Octavia, M H Masykur, and M Fadil, "Legal Status of Former Customary Land Ownership Evidence after Its Validity Period Expires: Assessment of the Legal Certainty over Indigenous Peoples' Land Rights," *Law. Human. Environment* 16, no. 3 (2025): 160–72, <https://doi.org/10.31548/law/3.2025.160>.

regarding customary land rights, nothing changed at all. Regarding one of the prerequisites for the existence of customary land rights that they must be based on national unity Achmad Sodiki⁴² noted that the aspiration to establish a unified land law was intended to help strengthen national unity and cohesion. At that time, due to political upheavals and rebellions in regions seeking to form their own states, the integrity of the nation was threatened by the risk of national fragmentation. The same point was raised by Noer Fauzi,⁴³ who noted that the trauma of separatist rebellions reinforced the conviction that state control must be centralized.⁴⁴ This conflict produces a configuration of power that places national integration and stability as highly dominant political priorities. In this context, the state develops a rationality that views all forms of local autonomy, including customary law, as fragmentation that must be controlled through centralized governance.⁴⁵ This is also grounded in legal-political policy manifested in various legal instruments, particularly the concept of the “right of state control,” which provides the state with legitimacy to regulate and control natural resources. The consequence of this framework is that customary territories are often legally deconstructed into asymmetrical forms of state authority, rather than being recognized as autonomous entities with the capacity to govern themselves.⁴⁶ Within this context, it is important to understand that the relationship between the state and customary law communities is characterized by structural tension. The state monopolizes legal authority and juridical action, while indigenous communities are positioned in a condition where they must continuously negotiate their existence, rights, and territorial claims.⁴⁷

This centralist regulation, according to James C. Scott as cited by Nurhasan Ismail⁴⁸, stems from a simplifying approach, a strategy widely adopted by developing nations to facilitate legal governance. Simplification is achieved by developing the assumption that the social values held by lawmakers represent the social values held by diverse social groups. Consequently, the resulting legal provisions tend to be coercive and repressive, deemed necessary to regulate a diverse society.⁴⁹ However, within the framework of customary law communities, this simplification raises problems because it ignores legal

⁴² Achmad Sodiki, *Agrarian Law Politics* (Jakarta: Konpress, 2013).

⁴³ Noer Fauzi Rachman and Hasriadi Masalam, “The Trajectory of Indigeneity Politics Against Land Dispossession in Indonesia,” *Sriwijaya Law Review*, 2017, <https://doi.org/10.28946/slrev.vol1.iss1.13.pp122-142>.

⁴⁴ Silfi Iriyani et al., “Indigenous Custodianship and Timber Legality Assurance System: Challenges and Opportunities for Customary Forest Management in Indonesia,” *Jurnal Sylva Lestari* 12, no. 3 (2024): 929 – 947, <https://doi.org/10.23960/jsl.v12i3.948>.

⁴⁵ Nancy Peluso and Peter Vandergeest, “Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand,” *Journal of Asian Studies - J ASIAN STUD* 60 (August 1, 2001), <https://doi.org/10.2307/2700109>.

⁴⁶ Muhammad Alif K Sahide, Abdurrahman Abdullah, and Moira Moeliono, “Policy Forum: Indigenous Forest Rights at a Crossroads? A Critical Look at Indonesia’s Planned Forestry Law Amendment,” *Forest Policy and Economics* 185 (2026): 103730, <https://doi.org/https://doi.org/10.1016/j.forpol.2026.103730>.

⁴⁷ Nilna Hamida, “Adat Law and Legal Pluralism in Indonesia: Toward A New Perspective?,” *Indonesian Journal of Law and Society* 3 (March 19, 2022): 1, <https://doi.org/10.19184/ijls.v3i1.26752>.

⁴⁸ Nurhasan Ismail, “Law in the Circle of Life of Marginalized Groups” (Yogyakarta, 2013).

⁴⁹ Iriyani et al., “Indigenous Custodianship and Timber Legality Assurance System: Challenges and Opportunities for Customary Forest Management in Indonesia.”

pluralism that lives and develops, particularly within customary communities themselves. In such societies, customary law does not only function as a set of rules, but also as a normative structure embedded in the relationship between the community and its living territory. Thus, the reduction through legal simplification leads to the marginalization of customary law that has historically existed. This condition shows that the process of legal centralization through simplification has formed a hierarchy within the legal system in a plural society.⁵⁰

3.3 Transitional Justice and the Fulfillment of Customary Rights of Indigenous Peoples

From a legal perspective, Lon L. Fuller⁵¹ generally states in that good legislation must meet eight requirements, namely: (1) it must not be merely an ad hoc decision, (2) it must be published, (3) it must not be retroactive, (4) its wording must be understandable, (5) they must not contradict one another, (6) they must not contain requirements exceeding what is actually done, (7) they must not be frequently amended, (8) there must be consistency between what is enacted and daily implementation. Regarding the sixth requirement, Sudikno Mertokusumo stated that laws drafted in a detailed, narrow, strict, or casuistic manner will be unable to keep pace with societal developments and will eventually become obsolete. Laws that are overly detailed or casuistic often result in justice being undermined (*summum ius summa injuria*).⁵²

Regarding the type of justice suitable for application in Indonesia, Maria SW Sumardjono notes⁵³ In Indonesia, the provision of equal opportunity (commutative justice) and distribution based on merit and need (distributive justice) are difficult to implement due to differing initial capital among social groups.⁵⁴ Therefore, what is needed is corrective justice or positive discrimination, which aims to give greater attention to the most disadvantaged groups due to these differences in initial capital, so that relative balance can be achieved.⁵⁵ In light of this, when designing (land) policies grounded in the principle of commutative justice, these must be balanced with policies that provide special attention to those who will be disadvantaged by the implementation of such policies (corrective justice).⁵⁶

In line with corrective justice as described by Maria SW Sumardjono, Eddie Riyadi Terre emphasizes that in a normal and liberal society, conventional justice can be applied, but during extraordinary or transitional periods, such conventional justice sounds very

⁵⁰ Nancy Lee Peluso and Christian Lund, "New Frontiers of Land Control: Introduction," *The Journal of Peasant Studies* 38, no. 4 (October 1, 2011): 667–81, <https://doi.org/10.1080/03066150.2011.607692>.

⁵¹ Lon L. Fuller, *The Morality of Law*. (London: Yale University Press, 1964).

⁵² Sudikno Mertokusumo, *Indonesian Agrarian Legislation* (Yogyakarta: Liberty, 1988).

⁵³ S.W. Soemardjono, *Land from the Perspective of Economic, Social, and Cultural Rights* (Jakarta: KOMPAS, 2008).

⁵⁴ Zaka Firma Aditya and Sholahuddin Al-Fatih, "The Legal Protection System of Indigenous Peoples in Southeast Asia," *Jurnal Ilmiah Hukum Legality*, 2023, <https://doi.org/10.22219/ljih.v3i12.27619>.

⁵⁵ Xanthaki, *Indigenous Rights and United Nations Standards Self-Determination, Culture and Land*.

⁵⁶ G Goodwin, "Fictitious Commodification and Agrarian Change: Indigenous Peoples and Land Markets in Highland Ecuador," *Journal of Agrarian Change* 21, no. 1 (2021): 3–24, <https://doi.org/10.1111/joac.12368>.

naïve, as it is unrealistic and unresponsive to the unique, turbulent situation where all value systems and social systems are shaken and challenged both operationally and conceptually. During such a transitional period, according to Eddie Riyadi Terre, what is needed is transitional justice.⁵⁷ Transitional justice is a term frequently cited in the study of human rights law and political science.⁵⁸ However, in its development, transitional justice also encompasses social justice, particularly transitional justice regarding land rights.⁵⁹

During the transition period, Ruti G. Teitel also proposes another theory of justice: a theory of transitional justice. Teitel's thesis is that the conception of justice during periods of political change is both exceptional and constructivist, meaning that justice both shapes and is shaped by the transition itself. The conception of justice it engenders is contextual and partial. It is called contextual because what is considered just is contingent (dependent on the context).⁶⁰ It is called partial because what is considered just is also determined by the injustices that have occurred.

According to Eddie Riyadi Terre, Teitel's view of justice has not yet satisfied the victims' thirst for justice because it has not addressed the question of who is most entitled (preferentiality) to access justice during the transition period. It is this preferentiality (partisanship) that distinctly distinguishes transitional justice from conventional justice.⁶¹ Specifically for the transitional period, transitional justice is needed that prioritizes the principle of preferential priority, which is represented, among other things, in two adages: affirmative action and the preferential option for the poor.⁶²

Such a perspective on justice is derived from two sources: the feminist movement and social theology. While the concept of affirmative action is known within the feminist movement, social theology is known for the principle of *iustitia socialis* (social justice), which prioritizes the preferential option for the poor a commitment to the weak, the victims, and the marginalized.⁶³ A leading figure in social theology, Hollenbach, states that there are three strategic moral priorities: first, the needs of the poor take precedence over the desires of the wealthy; second, the freedom of the oppressed takes precedence over the

⁵⁷ Mengyao Li and Bernhard Leidner, "Transitional Justice," August 23, 2023, <https://doi.org/10.17192/es2022.0076>.

⁵⁸ Fernando Tormos-Aponte, "The Influence of Indigenous Peoples in Global Climate Governance," *Current Opinion in Environmental Sustainability* 52 (2021): 125–31, <https://doi.org/10.1016/j.cosust.2021.10.001>.

⁵⁹ Paige M Schmidt and Markus J Peterson, "Biodiversity Conservation and Indigenous Land Management in the Era of Self-Determination," *Conservation Biology*, 2009, <https://doi.org/10.1111/j.1523-1739.2009.01262.x>.

⁶⁰ Deni Yusup Permana et al., "Integrating Indigenous Wisdom in Environmental Protection: Exploring Village Authority within the Framework of State Responsibility in Indonesia," *Jambura Law Review* 7, no. 2 (2025): 359–89, <https://doi.org/10.33756/jlr.v7i2.29582>.

⁶¹ J. Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Washington: Georgetown University Press, 2006).

⁶² S Vancleef and P Foubert, "Affirmative Action: Exception to or Aspect of Equality?," in *Handbook of Equality of Opportunity*, 2024, 169–91, https://doi.org/10.1007/978-3-031-55897-9_19.

⁶³ Bhagat Oinam, "Rethinking Affirmative Action: Problematising the 'Least Privileged,'" *Journal of Indian Council of Philosophical Research* 41, no. 2 (2024): 225–40, <https://doi.org/10.1007/s40961-023-00306-z>.

freedom of those in power; third, the participation of marginalized groups takes precedence over the preservation of a social order that excludes them.⁶⁴

In the context of the existence of indigenous communities and their rights, two matters require attention. First, their rights as citizens in general must be treated equally with those of other citizens, for example, regarding public services related to civil registration documents.⁶⁵ For indigenous communities classified as vulnerable groups, they should not be burdened beyond their capacity; in other words, onerous conditions must be reviewed, and they must be treated equally before the law, as stipulated in Article 27(1) in conjunction with Article 28D(1) of the 1945 Constitution of the Republic of Indonesia. Second, indigenous communities, as a vulnerable group, should be granted affirmative action distinct from other communities by providing special accommodations and preferential treatment to ensure equal access to opportunities and benefits, thereby achieving equality and justice, as stipulated in Article 28H(2) of the 1945 Constitution of the Republic of Indonesia. This provision aligns with transitional justice, which states that during a transitional period, appropriate justice must be provided to ensure justice is achieved.⁶⁶ Treating different communities the same will prevent them from obtaining justice and will cause them to fall further behind the general public.⁶⁷ For example, the law providing for affirmative action is Law No. 1 of 2013 on Microfinance Institutions, specifically Article 39(1), which stipulates that Village Credit Institutions and Lumbung Pitih Nagari, as well as similar institutions that existed prior to the enactment of this Law, are recognized as existing under customary law and are not subject to this Law.

The assumption that these customary law communities are in a transitional phase is supported by several studies indicating shifts in customary law over time, driven by both external and internal conditions within these communities.^{68,69} National legal development strategies, particularly in areas involving legal pluralism, should follow two models: short-term and long-term. For the short term, the Pluralist Model (Bhinneka author) should be used, whereby the state must guarantee freedom of expression for minority groups that tend to be marginalized. Meanwhile, for the long term, the Cosmopolitan Model (Tunggal

⁶⁴ Vancleef and Foubert, "Affirmative Action: Exception to or Aspect of Equality?"

⁶⁵ Alejandro Fuentes, "Judicial Interpretation and Indigenous Peoples' Rights to Lands, Participation and Consultation. the Inter-American Court of Human Rights' Approach," *International Journal on Minority and Group Rights* 23, no. 1 (2016): 39 – 79, <https://doi.org/10.1163/15718115-02202006>.

⁶⁶ M Á Iglesias, "Some notes on indigenous law and special indigenous jurisdiction," *Cuadernos de Derecho Transnacional* 15, no. 1 (2023): 422–41, <https://doi.org/10.20318/cdt.2023.7547>.

⁶⁷ Giorleny Altamirano, Eric S Mosinger, and Kai M Thaler, "Statebuilding and Indigenous Rights Implementation : Political Incentives , Social Movement Pressure , and Autonomy Policy in Central America," *World Development* 175, no. December 2023 (2024): 106468, <https://doi.org/10.1016/j.worlddev.2023.106468>.

⁶⁸ Sediono Tjondronegoro, *Two Centuries of Land Tenure: Patterns of Agricultural Land Tenure in Java Through the Ages* (Jakarta: PT Gramedia Pustaka Utama, 1984).

⁶⁹ Yenny Febrianty, *Bajapuk Marriage: The Challenge of Traditional Values in the Context of Legal Dynamics and Globalization* (Yogyakarta: Genta Publishing, 2020).

Ika author) should be employed, which emphasizes equality once ethnic barriers have dissolved.⁷⁰

While society remains pluralistic, it is worth reflecting on the remarks made by former Deputy Chief of Staff of the Army, Lt. Gen. (Ret.) Kiki Syahnakri⁷¹ during a discussion of his book *East Timor: The Untold Story*. He stated that Indonesia failed to win the hearts of the East Timorese people because it disregarded their culture and customs. The traditional governance structures that existed in East Timor prior to 1975 were not properly preserved. Ultimately, Syahnakri concluded that a development approach that disregards humanity and local distinctiveness (customs, culture) will have serious consequences and become a cause of security disturbances that are difficult to resolve.

4. CONCLUSION

This study concludes that the constitutional recognition of indigenous communities in Indonesia has not been adequately translated into effective recognition and fulfillment of their customary rights, particularly customary land rights. The findings demonstrate that regulatory fragmentation, sectoral legal approaches, and the conditional and procedural nature of state recognition have produced a persistent gap between formal legal recognition and substantive justice, thereby reinforcing marginalization and undermining the principles of equality before the law and non-discrimination. The dominance of a formalistic conception of the rule of law also limits the capacity of the legal system to accommodate customary law as living law and to respond to the historical and structural vulnerabilities experienced by indigenous communities. The novelty of this study lies in positioning transitional justice as a normative framework for reconstructing indigenous rights protection within Indonesia's fragmented legal system. Rather than treating recognition merely as a procedural or administrative requirement, this study conceptualizes recognition and fulfillment of customary rights as a matter of substantive justice requiring corrective and affirmative legal measures for historically marginalized communities. Accordingly, legal reconstruction should move beyond fragmented and sectoral regulation toward an integrated, non-discriminatory, and rights-based framework that ensures effective recognition, protection, participation, and fulfillment of indigenous communities' customary rights. The enactment of a comprehensive legal framework specifically governing indigenous communities is therefore essential to institutionalize substantive equality and strengthen the realization of transitional justice in Indonesia.

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⁷⁰ Yudi Latif, *The Ideal State: The History, Rationality, and Relevance of Pancasila* (Jakarta: PT Gramedia Pustaka Utama, n.d.).

⁷¹ Kiki Syahnakri, *East Timor: The Untold Story* (Jakarta: Kompas Book Publisher, 2013).

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