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The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code

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Abstract

This recognition requires further regulation through a Government Regulation and serves as a procedural requirement for being acknowledged as indigenous peoples. The purpose of this article is to provide us an overview of how the recognition requirements for indigenous peoples as outlined in legislation, both before and after the enactment of the Criminal Code. Additionally, it examines the struggles of indigenous peoples in Ecuador, who have organized themselves into indigenous groups to fight for the rights that have been taken away from them. This research employs a statutory approach, a comparative approach, and an interdisciplinary approach in law commonly referred to as socio-legal research. As a result of this, indigenous peoples often find themselves in a weak position relative to the dominant authority of the state. The government needs to provide political recognition affirming that

indigenous peoples are equal legal subjects with the state and possess the capacity to act legally to represent their interests as indigenous groups. With the enactment of the National Criminal Code set for 2026, this recognition may pave the way for indigenous peoples to become equal parties when engaging with the state in matters of customary criminal law. Additionally, the indigenous movement in Ecuador serves as a significant point of reflection. Their ability to unite indigenous peoples and nations under a national framework has profoundly influenced the political and legal landscape.

Keywords
Recognition; Rights; Society; Custom; National Criminal Code.

Introduction

According to Soetandyo Wignjosoebroto, the state's "recognition" of indigenous peoples' rights particularly regarding all resources on and within their lands is a fundamental the state must acknowledge the autonomous existence of indigenous peoples in both physical and non-physical terms.[1] In human rights studies, "recognition" is intrinsically linked to the principle of "respect". It encompasses anything related to citizens who must be guaranteed, protected and respected for their human rights (general) and their rights as citizens (specific).

The Indonesian government has regulated the issue of recognition of "customary law communities"[2] in Article 18B Paragraph 2 of the 1945

[1] Soetandyo Wignjosoebroto's statement quoted by Upik Djalins and Noer Fauzi Rachman in Cornelis van Vallenhoven's work. See in Cornelis van Vallenhoven, Orang Indonesia Dan Tanahnya (Yogyakarta: INSISTPress, 2020), xxi.

[2] The many terms in legislation, the term "customary law community" is most widely used. This term is equivalent to "customary law society". According to Yance Arizona, the term "customary law community" refers to a category of community groupings called legal communities (rechtsgemeenchappen). This term can be interpreted as a society in which all members of the community are bound as a unit based on the law used, namely customary law. This term was also popularized by customary law thinkers such as Cornelis van Vallenhoven and Ter Haar. For more details, see the paper from Yance Arizona, "Masyarakat Adat Dalam Kontestasi Pembaruan Hukum," Badan Perencanaan Pembangunan Nasional, May 15, 2013, https://www.academia.edu/3537826/Masyarakat_adat_dalam_kontestasi_pembaruan_hukum .

Constitution, explaining that the state recognizes and respects the unity of customary law communities along with their traditional rights, provided they remain in existence and align with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law. However, the constitution imposes limitations to the principle of recognition. The state's recognition of indigenous peoples is arguably incomplete as it is conditional on their continued existence and conformity with the development of society and the principles of the Unitary State of the Republic of Indonesia. Furthermore, the recognition of "indigenous peoples" has even been fragmented across various pieces of legislation, including Law No. 5/1960 on Basic Agrarian Principles, Law No. 39/1999 on Human Rights, and Law No. 41/1999 on Forestry.

Recognition of customary law communities is outlined in Article 3 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles. This article stipulates that the implementation of customary rights and similar rights of customary law communities, provided they still exist in practice, must be in such a way that it must align national unity, and must not contradict higher laws and regulations. Similarly, Article 6 Paragraphs 1 and 2 of Law No. 39/1999 on Human Rights emphasizes the need to respect and protect the clause of customary rights as part of the protection and enforcement of human rights. However, the article also provides limitations on the recognition of customary law communities as long as the customary rights are actually conditional on the validity and upheld in the customary law community, held firmly by the local customary law community, with due regard to laws and regulations and do not conflict with the principles of the rule of law which are based on justice[3] and the

[3] Sunardi Purwanda et al., "Haluan Kesejahteraan Sosial Dalam Diskursus Teori-Teori Keadilan," Jurnal Dinamika Hukum 25, no. 1 (2024): 152–61, https://doi.org/10.35315/dh.v25i1.9819 .

welfare[4] of the people. Likewise, Article 4 Paragraph 3 of Law No. 41/1999 on Forestry includes a clause with the same provision, stating that in matters of forest tenure, the rights of customary law communities must be considered as long as they still exist in practice, are recognized, and do not conflict with national interests.

These regulations have placed limitations on the principle of recognition of indigenous peoples—both from the constitution and laws and regulations—and even if they are recognized, they must go through a process of standardization. Natural practices by indigenous peoples are only considered to "exist" according to the constitution and law, if they fulfil the following elements: (a) Remain alive (exist); (b) Align with the development of society; and (c) Implementation of customary rights does not conflict with higher laws and regulations.

The state's recognition of indigenous peoples has been established through various regulations, often requiring certain conditions to be met before such recognition is granted. This conditional approach to recognizing indigenous peoples and their rights, such as their customary land and the resources contained within them, has the potential to create a risk of dependency on the "generosity" of the state. Moreover, conditional recognition can also dominate the political interests of state power holders. The state may justify setting aside indigenous rights under the pretext of "state interests." Even more concerning by the state to the extent that it is considered contrary to the political interests of state power holders.

The political interest of the Indonesian state in the enactment of Law Number 1 Year 2023 on the Criminal Code, referred to as the National Criminal Code or "*KUHP Nasional*"[5] is rooted in a desire to

[4] Mustawa Mustawa, Abd. Haris Hamid, and Sunardi Purwanda, "Refund of State Financial Losses in Realizing the Welfare State of Law," Amsir Law Journal 4, no. 1 (2022): 51–61, https://doi.org/10.36746/alj.v4i1.125 .

[5] The term "KUHP Nasional" refers to the Draft Explanation of the Draft Law of the Republic of Indonesia on the Criminal Code issued by the government through the Ministry of Law and Human Rights. Rudy Satriyo Mukantardjo, "Rancangan KUHP Nasional Menghindari Pidana Mati," Jurnal

move beyond the practice of decolonization, including reliance on the Dutch Criminal Code (*Wetboek van Strafrecht*).[6] This intention is the primary narrative presented to the public. However, certain implications remain unclear, leaving questions about potential outcomes—positive or negative—of indigenous peoples following the enactment of the National Criminal Code, which is set to take effect three years later from the date of promulgation of the regulation.

In fact, Law No. 1/2023 on the Criminal Code also has a clause on indigenous peoples. Even in its formulation, the Draft Criminal Code has recognized the existence of customary law provisions—unwritten laws that exist within the community (*hukum yang tidak tertulis yang hidup dalam masyarakat)*—[7]which are considered capable of circumventing the principle of legality. This recognition is reflected in Article 2 of the Draft Criminal Code. Regarding the issue discussed in this article, we would like to argue that the enactment of the National Criminal Code further reinforces the existence of the requirement of recognition of customary law communities. The purpose of this article is to provide an overview of the existence of the requirements for

Legislasi Indonesia 2, no. 1 (2018): 37–52, https://e-jurnal.peraturan.go.id/index.php/jli/article/download/284/171 .

[6] The 1886 Dutch Criminal Code is the parent and main source of the Indonesian National Criminal Code. The codification of the Criminal Code to date has undergone several changes. The history of this codification began when Napoleon Bonaparte of France colonized the Netherland region in 1795-1813. On February 1, 1808, a criminal code was enacted in the Netherlands under the name Crimineel Wetboek voor het Koningrijk Holland (Penal Code for the Kingdom of Holland). This Penal Code did not remain in force for long because three years later, on March 1, 1811, the Kingdom of the Netherlands merged with the French Empire. From then on, the 1810 French Penal Code was also applied in the Netherlands. However, after the Netherlands proclaimed its independence from the French colony in 1813, a new round of independent codification of Dutch criminal law began even though it was still oriented towards the French Criminal Code. Several revisions were made to this Criminal Code until 1870 until it was enforced in the colonies, including Indonesia. See further in Ahmad Bahiej, "Perbandingan Jenis Pidana Dan Tindakan Dalam KUHP Norwegia, Belanda, Indonesia, Dan RUU KUHP Indonesia," Jurnal Sosio-Religia 7, no. 4 (2008): 1–15, https://d1wqtxts1xzle7.cloudfront.net/52371619/ .

[7] The Draft Explanation of the Draft Law of the Republic of Indonesia on the Criminal Code issued by the government through the Ministry of Law and Human Rights formulates the term "*hukum yang tidak tertulis yang hidup dalam masyarakat*". After being enacted into law, Article 2 Paragraph 1 of Law No. 1/2023 on the Criminal Code only mentions "*hukum yang hidup dalam masyarakat*".

recognition of indigenous peoples through legislation before and after the enactment of the National Criminal Code. It explains how the potential strengthening of these requirements for recognition of indigenous peoples may inadvertently weaken the position of indigenous peoples in relation to the state, even after the enactment of the National Criminal Code.

The enactment of Law No. 1/2023 on the Criminal Code, also known as the National Criminal Code, carries a political objective of freeing Indonesia from the practice of decolonization, including the legacy of the Dutch Criminal Code. While this intention is evident to the public, there is more to be examined behind the ratification of this regulation. Certain implications remain unclear whether they will bring benefits or challenges in the future, particularly concerning the fate of indigenous peoples after the enactment of the National Criminal Code. Although the regulation will only come into force three years after its passage, Law No. 1/2023 has the potential to pose significant threats, especially to the integrity and rights of indigenous peoples.

It is important to note that during the formulation of the National Criminal Code, when it was still in the form of a Draft Law of the Criminal Code, the provisions of customary law were expressed through the phrase "unwritten laws that exist within the community (*hukum yang tidak tertulis yang hidup dalam masyarakat).*" This phrase has even been viewed as capable of undermining the principle of legality. Now that the law has been passed, we can find the regulation in Article 2 of the National Criminal Code. This is the focus of the discussion in this article. This article examines whether the enactment of the National Criminal Code will strengthen the requirements for the recognition of indigenous peoples or, conversely, weaken them? Furthermore, should we reflect on the struggle for recognition and protection of indigenous peoples in Ecuador, where the issue of indigenous peoples was elevated to a broader societal concern?

This research article is closely related several studies from the legal and social sciences that have examined the issue of "recognition of indigenous peoples". Most researchers have identified problems with the recognition of indigenous peoples by the state. The following five studies cover an outline of the problem articles published over the past two decades in Indonesia. First, an article by Hayatul Ismi, "*Pengakuan dan Perlindungan Hukum Hak Masyarakat Adat atas Tanah Ulayat dalam Upaya Pembaharuan Hukum Nasional*", published in the Jurnal Ilmu Hukum in 2012,[8] discusse the position of indigenous peoples in the process of national legal reform. She highlights that the recognition of indigenous peoples by the state is "conditional" and "layered", providing certain limitations in the law that can make it difficult for indigenous groups in the process of national legal reform in the future. Second, from Jawahir Thontowi, "*Perlindungan dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia*", published in the Jurnal Hukum Ius Quia Iustum in 2013,[9] emphasizes that the rights of indigenous peoples have been regulated in the constitution, but in its implementation, indigenous peoples find it very difficult to obtain them from the state. This cannot be separated from the problem of contradictory rules plus several state institutions that are reluctant to fulfill these rights to indigenous peoples. Third, from Zayanti Mandasari, "*Politik Hukum Pengaturan Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi)*", published in the Jurnal Hukum Ius Quia Iustum in 2014,[10] examines the legal positioning of indigenous peoples' rights and the Constitutional Court judges' stance on protecting and

[8] Hayatul Ismi, "Pengakuan Dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional," Jurnal Ilmu Hukum 3, no. 1 (2013): 21–43, https://doi.org/10.30652/jih.v3i01.1024 .

[9] Jawahir Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat Dan Tantangannya Dalam Hukum Indonesia," Jurnal Hukum Ius Quia Iustum 20, no. 1 (2013): 21–36, https://doi.org/10.20885/iustum.vol20.iss1 .

[10] Zayanti Mandasari, "Politik Hukum Pengaturan Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi)," Jurnal Hukum Ius Quia Iustum 21, no. 2 (2014): 227–50, https://doi.org/10.20885/iustum.vol21.iss2 .

recognizing these rights when presented before them. Basically, the state has incorporated the rights of indigenous peoples into various laws, and the court judges have consistently upheld these rights "as long as in fact they still exist and are recognized". Fourth, Sulaiman et al.'s article, "*Ketidakteraturan Hukum Pengakuan dan Perlindungan Masyarakat Hukum Adat di Indonesia*", published in Law Reform in 2019,[11] explains the disorder in the legal recognition and protection of indigenous peoples. These issues are mainly found in existing laws and regulations some of which available have been invalidated by the Constitutional Court. Lastly, J. T. Pareke and Fahmi Arisandi's article, "*Pengakuan Masyarakat Hukum Adat dan Perlindungan Wilayah Adat di Kabupaten Rejang Lebong*", published in the Jurnal Bina Hukum Lingkungan in 2020,[12] highlights how the recognition of indigenous peoples by the Regional Government of Rejang Lebong Regency is regulated through the mechanism of Regional Regulations. The local government officially acknowledges "*Kutei*" as a social unit that lives and thrives in Rejang Lebong Regency.

The urgency of our research in this article lies in building on the findings of previous research results, where we found various arrangements regarding the recognition of indigenous peoples by the state that are "conditional" and "layered" as demonstrated by the works of Ismi (2012), Thontowi (2013), Mandasari (2014), Sulaiman, et al. (2019), and Pareke and Arisandi (2020). Through an examination of the constitution and various laws regarding the recognition of indigenous peoples' rights in Indonesia, it becomes evident that while all legislation acknowledges the existence of these rights, it does so under the condition: "as long as in fact they still exist and their existence is recognized." This

[11] Sulaiman Sulaiman, Muhammad Adli, and Teuku Muttaqin Mansur, "Ketidakteraturan Hukum Pengakuan Dan Perlindungan Masyarakat Hukum Adat Di Indonesia," Law Reform 15, no. 1 (2019): 12–24, https://doi.org/10.14710/lr.v15i1.23352 .

[12] J. T. Pareke and Fahmi Arisandi, "Pengakuan Masyarakat Hukum Adat Dan Perlindungan Wilayah Adat Di Kabupaten Rejang Lebong," Bina Hukum Lingkungan 4, no. 2 (2020): 313–28, https://www.bhl-jurnal.or.id/index.php/bhl/article/view/119 .

condition is similarly embedded in the latest legislation in criminal law, Law No. 1/2023 on the Criminal Code.

Interestingly, the National Criminal Code has acknowledged the existence of "laws that live in the community" equating this concept with "customary law, or it can also be interpreted as unwritten law that is still valid and developed in the life of the people in Indonesia". However, the Code also stipulates that the Government Regulation will later serve as a guideline for formulating Regional Regulations concerning the recognition of indigenous peoples. The key difference with previous research lies in this crucial issue: The Central Government hands over matters related to the recognition of the indigenous peoples' rights to the Regional Governments. We regard the findings of Pareke and Arisandi (2020) that highlighted the recognition of indigenous peoples by the Regional Government of Rejang Lebong Regency through the mechanism of Regional Regulations as a "mistake". This aligns with Sulaiman, et al. (2019) who describe such issues as "disorder"[13] within juridical mechanism in Indonesia.

Juridically, this mechanism is hierarchically "flawed". Regional regulations cannot serve as a source of law to recognize the existence of indigenous peoples, as this is an unconstitutional act that contradicts Article 18B Paragraph 2 and Article 28I Paragraph 3 of the 1945 Constitution. Recognition through the mechanism of Regional Regulations can also has the potential, sociologically to render indigenous peoples dependent on the "generosity" of local governments. Furthermore, the process of granting recognition of indigenous peoples through mechanism of Regional Regulations is often influenced by regional political interests that can be exploited at any time through the regional head election process. More critically, from a philosophical perspective, the quality of the legal subjects of indigenous peoples is no

[13] The term "disorder" was borrowed by Sulaiman, et al. from the inaugural speech of a professor of law at Diponegoro University, Satjipto Rahardjo, entitled "Teaching Order, Finding Disorder".

longer equal to the central government. Their status becomes subordinate to the central government, which may no longer consider this issue its responsibility, having delegated the matter to regional governments to manage the existence and unity of indigenous peoples.

The purpose of this article is to present an overview of the requirements for the recognition of indigenous peoples through legislation, both before and after the enactment of the National Criminal Code. This analysis will explain how the potential strengthening of these requirements for the recognition of indigenous peoples could paradoxically weaken the position of indigenous peoples in relation to the state, even with the introduction of the National Criminal Code. Additionally, it is also worth examining the struggles of indigenous peoples in Ecuador, who have organized themselves into indigenous groups to reclaim their rights that have been taken from them.

Method

The type of research used in this article employs normative-empirical research with a legislative approach, comparative studies, and an interdisciplinary approach to social science to examine legal phenomena as its object of study. The statutory approach is applied to identify the position of indigenous people's as outlined in various legislative products. This article analyzes the harmonization of arrangements[14] concerning the recognition of indigenous peoples' rights in Indonesia examines the extent of the weakness's legislation. A comparative study is conducted to analyze and compare the relevant literature[15] and social phenomena occurring in Indonesia and Ecuador, particularly in their efforts to reclaim indigenous people's rights taken by the state. Additionally, the interdisciplinary social science approach, often referred to as three perspectives—Sociology,

[14] Irwansyah Irwansyah, Penelitian Hukum; Pilihan Metode & Praktik Penulisan Artikel (Yogyakarta: Mirra Buana Media, 2020), 116.
[15] Suteki and Galang Taufani, Metodologi Penelitian Hukum (Filsafat, Teori, Dan Praktik) (Depok: Rajawali Pers, 2018), 136.

Politics, and History—to observe and interpret phenomena related to the recognition of indigenous peoples' rights.

Result and Discussion

A. The Fate of Indigenous Peoples' Rights Recognition by the Government Under the Regulation of the Enactment of Law No. 1/2023

Recognition by the state of indigenous peoples is found in Article 18B Paragraph 2 of the 1945 Constitution as well as in various pieces of legislation, including Article 3 of Law No. 5/1960 on Basic Agrarian Regulations, Article 6 Paragraphs 1 and 2 of Law No. 39/1999 on Human Rights, and Article 4 Paragraph 3 of Law No. 41/1999 on Forestry, all of which mention the recognition of indigenous peoples, which generally contains certain recognition requirements. Even in the latest regulation on Law No. 1/2023 on the Criminal Code, the provision in Article 2 Paragraph 1 of Law No. 1/2023 on the Criminal Code further reinforces the existence of recognition requirements for indigenous peoples.

Article 2 Paragraph 1 of Law No. 1/2023 on the Criminal Code explains the misuse of the provisions of the principle of legality contained in Article 1 Paragraph 1 of Law No. 1/2023 on the Criminal Code. Article 2 Paragraph 1 emphasizes the recognition of customary law communities through the phrase "*hukum yang hidup dalam masyarakat.*" In the elucidation list of Article 2 Paragraph 1 of Law No. 1/2023 on the Criminal Code, the phrase "*hukum yang hidup dalam masyarakat*" is interpreted as the same as customary law, or it can also be interpreted as unwritten law that is still valid and developed in the life of the people in Indonesia.

However, Article 2 Paragraph 3 of Law No. 1/2023 on the Criminal Code stipulates that the recognition of customary law communities must be further regulated through a Government Regulation. The explanation

of Article 2 Paragraph 3 of Law No. 1/2023 on the Criminal Code stipulates that the Government Regulation will serve as a guideline for formulating Regional Regulations related to the recognition of customary law communities. Therefore, if a customary law community in a region wishes to be recognized, every law that is practiced within the community and is part of the customary law must be submitted in the draft Regional Regulation. Without this submission, the customary law community will never be considered as an entity of the customary law community. The submission for recognition becomes a procedural requirement that indigenous peoples must follow in order to gain official recognition.

This practice of conditional recognition is not a new occurrence. Long before this, during the New Order era, such conditional proposal had become a "weapon" for the government in limiting the rights of indigenous peoples in a region or area in Indonesia.[16] According to Teddy Anggoro, the New Order government only recognized indigenous peoples conditionally if they fulfilled sociological, political, juridical and procedural requirements. The government required verification of the existence of customary law communities—whether they still exist or not—even if they did, their actions must not conflict with national interests, adhere to higher laws and regulations, and be formalized through Regional Regulations.

This reality of conditional recognition persisted into the post-reform period. Despite the introduction of two key post-reform laws intended to usher in a more democratic Indonesia, the issue of conditional recognition remained unaddressed. Legislation such as Law No. 39/1999 on Human Rights and Law No. 41/1999 on Forestry failed to provide unconditional recognition for the interests of indigenous peoples in post-reform Indonesia. Both laws still perpetuate the

[16] Teddy Anggoro, "Kajian Hukum Masyarakat Hukum Adat Dan HAM Dalam Lingkup Negara Kesatuan Republik Indonesia," *Jurnal Hukum Dan Pembangunan* 36, no. 4 (2006): 487–98, https://scholar.archive.org/work/ijyo3es3kbgvdgmjhukfn2ykjq/access/wayback/http://jhp.ui.ac.id/index.php/home/article/download/1477/1392.

government interests, as evidenced in Article 6 Paragraphs 1 and 2 of Law No. 39/1999 on Human Rights and Article 4 Paragraph 3 of Law No. 41/1999 on Forestry.

Such reality of this conditional recognition actually began to improve with the enactment of Law No. 32/2009 on Environmental Protection and Management and Law No. 39/2014 on Plantations. These laws demonstrate a shift toward eliminating conditional recognition in their articles. Furthermore, they provide a clear definition of what constitutes customary law communities. Article 1 of Law No. 32/2009 on Environmental Protection and Management and Article 1 of Law No. 39/2014 on Plantations state that customary law communities are "groups of people or communities who have, for generations, inhabited specific geographical areas in Indonesia due to their ancestral ties, strong connection to their environment or land, and who uphold value systems, traditional governance institutions, and legal structures that shape the economic, political, social, and legal aspects within their customary territories (*kelompok masyarakat atau sekelompok orang yang secara turun-temurun menempati atau bermukim di wilayah geografis tertentu di Indonesia karena adanya ikatan pada asal-usul leluhur, hubungan kuat dengan lingkungan hidup atau tanahnya, dan memiliki sistem nilai, pranata pemerintahan adat, tatanan hukum yang membentuk bidang ekonomi, politik, sosial dan hukum pada wilayah adatnya).*"

The definition of customary law communities in these two regulations no longer includes conditional stipulations, such as recognition being valid only if the community still exists, aligns with societal developments, or does not conflict with higher laws and regulations. Therefore, any community group or a group of people that has inhabited an area for generations,[17] connected to ancestral origins,

[17] The first "Kongres Masyarakat Adat Nusantara", in March 1999, agreed that Indigenous Peoples are groups of people who have ancestral origins (from generation to generation) in a certain geographical area and have their own value system, ideology, economy, politics, culture, social, and territory.

maintains a strong relationship with the environment or land, and upholds a system of values, customary organizations, and legal order can be recognized as a group of indigenous people.

As a sociological fact, indigenous peoples can actually be identified from their various social activities. These include the presence of customary administrators, including customary institutions and customary courts. They can also be recognized by their customary territories, such as living in forests, valleys, streams, or across vast grasslands. Additionally, the social activities of customary law communities can also be recognized in their unique land use practices. For example, in Manggarai Regency, East Nusa Tenggara, agricultural land is organized in a spiderweb pattern known as the *linko* system. Similarly, some communities employ agroforestry systems in various tropical forests, where land use is divided into settlements, fields, woodlots, and other functional zones.[18]

Article 63 Paragraphs 1, 2 and 3 of Law No. 32/2009 on Environmental Protection and Management once again reflects a state-centric approach on how the government's legislative product favors the state by granting duties and authority to central, provincial, and district/city governments to establish policies regarding procedures for the recognition of indigenous peoples, along with all their local wisdom and rights related to environmental protection and management. While the law does not explicitly outline the procedures or mechanisms for the recognition of indigenous peoples by the government, these are addressed in the Regulation of the Minister of Home Affairs No. 52/2014.[19] Article 3 Paragraph 2 of this regulation grants the authority to the Governor and

[18] Noer Fauzi Rachman and Mia Siscawati, Masyarakat Hukum Adat Adalah Penyandang Hak, Subjek Hukum, Dan Pemilik Wilayah Adatnya; Memahami Secara Kontekstual Putusan Mahkamah Konstitusi Republik Indonesia Atas Perkara Nomor 35/PUU-X/2012 (Yogyakarta: INSISTPress, 2014), 6-7.

[19] See further in the legal review report of the Ministry of Law and Human Rights of the Republic of Indonesia. Abdurrahman, Mekanisme Pengakuan Masyarakat Hukum Adat (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional Kemenkumham, 2015), 66-68.

Regent/Mayor to recognize and protect indigenous peoples. The procedure or mechanism is detailed in Article 4 of the Regulation of the Minister of Home Affairs, which stipulates that the recognition and protection process involves identifying indigenous peoples, followed by verification and validation, and finally, the government's formal determination of their status as indigenous peoples.

This condition suggests that there is clear evidence of reconditioning of governance reminiscent of the New Order era under the current government of President Joko Widodo. Evidence of this can be seen in the reaffirmation of conditions for recognizing customary law communities through Article 2 Paragraph 2 of Law No. 1/2023 on the Criminal Code. This article introduces the requirement for conformity with Pancasila, the 1945 Constitution, human rights, and general legal principles recognized by the community of nations. Furthermore, Article 2 Paragraph 3 of the same law stipulates that the procedures or mechanisms for recognition must go through procedures established by Government Regulations. Once ratified, these Government Regulations will serve as guidelines for Regional Heads in formulating Regional Regulations, further reinforcing state control over the recognition process.

The clear evidence of re-conditioning to the New Order era can be interpreted as a reflection of nostalgia within the current government of ex-President Joko Widodo. It appears to stem from a sense of satisfaction with the past glory of a hegemonic government's control over society, a concept seemingly revived through the concepts of conditional recognition reaffirmed in Law No. 1/2023 on the Criminal Code. According to Rikardo Simarmata, the situation of the previous government does not introduce a new consciousness but rather perpetuates an "old ideology"[20] that labels indigenous peoples as

[20] The old ideology referred to by Rikardo Simarmata is the doctrine of terra nullius. This doctrine is referred to as an excuse for the conquering nations for the territories visited as no man's land (terra nullius). Humans encountered in the conquered territories were considered not human

uncivilized people who must be facilitated to become civilized. He also considers it as a petty form of governance, one that merely capitalizes on following trends without meaningful innovation. His statement is well-founded, as it mirrors the doctrine of "*terra nullius*"[21] an old ideology that was embedded in the concept of *domeinverklaring*[22] under the Agrarische Wet of 1870[23] and later adopted by the New Order regime.[24]

Furthermore, the notion of legal unification[25] introduced by the Netherlands is also noteworthy. In addition to reconditioning aspects of the New Order era, the current government appears to be reviving the debate surrounding the Dutch concept of legal unification. This idea can be traced back to the proposal made by the Kuyper Cabinet[26] in 1904, which was later endorsed by the Dutch Parliament's acceptance through

because they did not have civilisation. With this argument, they considered themselves carrying a mission to civilise the indigenous nations. Rikardo Simarmata, "Menyongsong Berakhirnya Abad Masyarakat Adat: Resistensi Pengakuan Bersyarat," in International Advocacy and Capacity Building for Indigenous Peoples in Indonesia (Aliansi Masyarakat Adat Nusantara, 2004), https://www.academia.edu/13006509/ .

21 Merete Borch, "Rethinking the Origins of Terra Nullius," Australian Historical Studies 32, no. 117 (2001): 222–39, https://doi.org/10.1080/10314610108596162 .

22 The concept that all land that is proven not to be privately owned is state land, including forestry land. The main proponents of this concept were legal scholars from Utrecht University, such as G.J. Nolst Trenité, Izak A. Nederburgh and Eduard H. s'Jacob. According to them, control of customary territories by indigenous communities should be a public right of the government on the grounds of state sovereignty. The indigenous people only have the right to occupy, control and utilise, not the right to own. Ownership of land by natives cannot be recognized, natives are only *bewerkers* or cultivators. However, this statement was considered erroneous by Vallenhoven and his students. In fact, Vollenhoven sued *domeinverklaring* as the source of all chaos. Noer Fauzi Rachman and Mia Siscawati, *Op.Cit.*, 2014, 10 & 16.

23 The passing of the Agrarische Wet 1870 could not be separated from the influence of private capitalists through their representatives in the Dutch Parliament. Their representatives succeeded in winning the argument that it was not only the state that could benefit from colonialism, but also private companies. *Ibid*, 2014, 9.

24 Rikardo Simarmata, *Op.Cit.*

25 Cornelis van Vallenhoven, *Op.Cit.*

26 During this period, a bill was proposed to replace customary law with European law. The Dutch Government had an interest in subjecting the indigenous population to one law, which it termed legal unification. However, this attempt failed because the Kuyper Cabinet accepted an amendment to van Idsinga that only allowed the replacement of customary law with European Law, if the social needs of the people required it. See further in Bewa Ragawino, Pengantar Dan Asas-Asas Hukum Adat Indonesia (Bandung: FISIP Universitas Padjajaran, n.d.), 26.

the van Idsinga Amendment.[27] The plan to enforce the Civil Code uniformly across all groups in the Dutch East Indies was announced in 1914. Efforts to realize this unification continued with the contributions of figures such as Th. B. Pleyte[28] in 1919, F.J.H. Cowan[29] in 1923, and Rutgers[30] in 1927.

The government's actions through the reaffirmation of conditional recognition under Law No. 1/2023 on the Criminal Code resemble a repeat of the debate on the idea of legal unification by the Dutch, in which indigenous groups were relegated to the status of weak subjects under the state's dominant authority. Indigenous peoples are considered as incapable of knowing what is best for their interests, thereby justifying state intervention. This dominant position directly contradicts the politics of recognition,[31] and the principle of "self-determination"[32] which fundamentally acknowledges indigenous peoples as legal, social and political subjects whose existence and rights must be respected and upheld. The international community has also recognized the existence of indigenous peoples as reflected in Article 4 of the United Nation Declaration in the Rights of Indigenous Peoples (UNDRIP).[33] This

[27] The van Idsinga Amendment was a draft law on the application of Dutch law that could only be carried out if deemed necessary by the indigenous population. This amendment was accepted due to protests raised through a paper by Cornelis van Vollenhoven entitled "Geen Juristenrecht voor de Inlander". Muhammad Hisyam, "Islam and Dutch Colonial Administration: The Case of Panghulu in Java," Studia Islamika 7, no. 1 (2000): 91–118, https://doi.org/10.15408/sdi.v7i1.717 .

[28] Action came from Pleyte, but reaction also came from van Vollenhoven. Pleyte pushed the Dutch Government through a bill that attempted to bring indigenous groups under the jurisdiction of Dutch law and ignored the nomenclature of customary law. *Ibid*.

[29] A new plan for the Civil Code was announced by the Dutch Government as a unification plan. This attempt failed due again to criticism from van Vollenhoven in his work Juridisch Confeetiewerk. Bewa Ragawino, *Op.Cit*.

[30] Rutgers was Cowan's successor as Director of Justice in Batavia. He was quite pessimistic about the implementation of legal unification, even informing the government that continuing the implementation of the Civil Code was futile. *Ibid*.

[31] Charles Tylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

[32] Edward L. Deci and Richard M. Ryan, "Self-Determination Theory," Handbook of Theories of Social Psychology 1, no. 20 (2012): 416–36, https://pure.ewha.ac.kr/en/publications/self-determination-theory-2 .

[33] Indigenous peoples are recognized as one of the most vulnerable, disadvantaged and marginalized communities in the world. Spread across the globe from the Arctic to the South

article lays down the principle of self-determination, granting indigenous peoples the flexibility to determine their own destiny, exercise autonomy rights, and manage the financing procedures of their functions independently. This perspective further reinforces the notion that the indigenous groups should be recognized as equal parties, given that their entities have existed long before the establishment of the republic.[34]

Therefore, from a juridical perspective, the mechanism of conditional recognition under Law No. 1/2023 on the Criminal Code can be can be considered "defective" in terms of hierarchy. Regional regulations should not serve as a legal basis for recognizing the existence of indigenous peoples, as this constitutes an unconstitutional act and a violation of human rights. It also contradicts Article 18B Paragraph 2 and Article 28I Paragraph 3 of the 1945 Constitution, as well as Article 4 of UNDRIP. Sociologically, recognition through the mechanism of Regional Regulations has the potential to create dependency among indigenous peoples on the "generosity" of local governments. Such dependence can be precarious as it can deeply affect indigenous peoples. The granting of recognition of indigenous peoples through the mechanism of Regional Regulations is often driven by political interests in the regions, making them highly vulnerable to exploitation in the regional political processes. Philosophically, the quality of legal subjects of indigenous peoples will never be equal to that of the central government. Those who control everything at the center will always view this issue as no longer a central matter, as it has been handed over to the regions, which are responsible for managing the unity of indigenous

Pacific. They are estimated to number more than 370 million in some 90 countries, where they make up five percent of the world's population, with 15 percent of the world's poor and one-third of the world's extremely poor. Indigenous peoples have lobbied domestically and internationally for human rights violations against them and their organizations. After decades of being ignored by the international community, indigenous peoples are increasingly raising their voices in international forums. This is one of the underlying reasons for the establishment of UNDRIP. Marco Odello, The United Nations Declaration on the Rights of Indigenous Peoples (London: Routledge, 2016).

[34] Hayatul Ismi, *Op.Cit*.

peoples. Some experts or constitutional judges may argue that recognition through regional regulations is an attempt at decentralization, but this is highly dangerous and vulnerable to abuse.

Actually, the government only needs to provide political recognition that indigenous peoples are legal subjects equal to the state and have the ability to act legally to represent their interests as indigenous groups. This concept is known as Fraser's political model of recognition, or the identity recognition model. According to Fraser, the model is built through mutual recognition that is constitutive of each subject. This means that a person is only considered subject if they are able to recognize the existence of other subjects.[35]

The essence of recognition in this sense is to challenge dominant cultural perspectives and treatment of groups. Therefore, recognition does not necessarily come in the form of procedural mechanisms determined by the dominant authority or those in power. If this condition continues to influences the perspective of state authorities, then the fate of indigenous peoples after the enactment of the National Criminal Code, set to be enacted in 2026, is likely to leave them as weak subjects when dealing with the state as a party in matters of customary criminal law.

B. Reflecting on the Organizing Struggle for the Recognition and Protection of Indigenous Peoples' Rights in Ecuador

The wave of struggle for the recognition and protection of the rights of indigenous peoples is no longer just a national issue; in fact, it has become a global issue since the last century. The period of the struggle can be traced back to the end of the First World War.[36] History records

[35] Fadhili Ferdinand Muganyizi, Negotiating Recognition of 'Indigenous Peoples' in Tanzania: Development, Conflict and Rights Struggles (Den Haag: International Institute of Social Studies, 2017), https://thesis.eur.nl/pub/41672/ .

[36] While there remains much dispute about the origins of the First World War, many historians agree that people, the so-called 'men of 1914'. Annika Mombauer, "Sir Edward Grey, Germany, and the Outbreak of the First World War: A Re-Evaluation," International History Review 38, no. 2 (2016): 301–25, https://doi.org/10.1080/07075332.2015.1134622 .

that around the 1920s, indigenous leaders of Haudenosaunee (Iroquois) Cayuga, such as Levi General or commonly known as Deskaheh, persuaded the League of Nations to recognize the treaty rights of self-government. However, the attempt was thwarted by the UK, which argued that it was an internal matter unrelated to the League of Nations agenda. Although the endeavor failed, the struggle did not stop there. In 1945, the struggle was reignited. Through the United Nations, the same issue was raised, but it was again rejected. Bolivia's initiative in 1948 to propose the establishment of a sub-commission focused on studying the social problems of indigenous peoples was also unsuccessful.

Later, in 1970, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was established, which recommended a study on the issue of discrimination against indigenous peoples. A year later, Jose R. Martinez Cobo of Ecuador was appointed as the Special Rapporteur on this issue.[37] Thanks to the earnest efforts of Jose R. Martinez Cobo, a report entitled "Study on the Problem of Discrimination against Indigenous Peoples" was published in 1982.[38] Special rapporteur Jose R. Martinez Cobo initiated drastic progress in the struggle[39] for the recognition and protection of the rights of indigenous

[37] Jose R. Martinez Cobo was commissioned to recommend national and international measures to eliminate the problem of discrimination against indigenous peoples. Cobo submitted its final report between 1981 and 1984. The report addressed a range of issues including the definition of indigenous peoples, the role of intergovernmental and non-governmental organisations, the elimination of discrimination, and basic human rights principles, as well as specific areas of action in areas such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, and equality in the administration of justice. Ellen Lutz and Nicole Ledema, "Addressing Indigenous Rights at the United Nations," Cultural Survival, 2010, https://www.culturalsurvival.org/publications/cultural-survival-quarterly/addressing-indigenous-rights-united-nations .

[38] Agung Wibowo, "Masyarakat Adat Menggugat Dunia," Tirto.id, 2021, https://tirto.id/gjrc .

[39] This progress was due to the UN's desire to establish a sub-commission focused on drafting the declaration. The working group first submitted a draft declaration to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994. The draft was then sent for consideration to the UN Commission on Economic, Social and Cultural Rights. The draft was then elaborated by an inter-sessional working group for adoption at the UN General Assembly. As the working group failed to elaborate the first draft declaration during 1995-2004, their tenure was extended for two decades, from 2005-2015-although it was only completed a few years later. On June 29, 2006, the United Nations Human Rights Council adopted the Declaration on the Rights of

peoples, culminating in the ratification of UNDRIP in 2007.

The work of Ecuadorians like Jose R. Martinez Cobo in the global arena cannot be separated from the historical and cultural influence of Ecuadorians who yearn for the unity of indigenous peoples and nationalities in their own country. Those who had been politically and culturally marginalized in their own land began to realize the importance of organizing. Following the advice of the Partido Socialista Ecuatoriano and the Partido Comunista del Ecuador, they began to form small movement nodes.

In 1944, these small movement nodes were brought together in a grand event called *Primer Congreso Ecuatoriano de Indígenas*, held at Casa del Obrero, Quito. Traditional leaders gathered and names like Jesús Gualavisí, Dolores Cacuango, Tránsito Amaguaña, Agustín Vega, Ambrosio Lasso enliven the event. They then agreed to establish Federación Ecuatoriana de Indios.[40] Gradually, new organizations were formed, such as Federación de Trabajadores Agropecuarios (1965), which later changed its name to Federación Nacional de Organizaciones Campesinas (1968). Another organization, Ecuador Runakunapak Rikcharimuy (1972), was formed, incorporating indigenous peoples from Imbabura, Pichincha, Cotopaxi, Bolívar, Chimborazo dan Cañar tribes.

Meanwhile, in the Amazon region, the process was slower. A larger

Indigenous Peoples. Then, on December 28, 2006, the General Assembly's Third Committee on Socio-Economic and Cultural Affairs adopted a draft resolution supported by several European and Latin American countries. But an initiative led by Namibia, along with a number of African countries, produced a draft amendment. In its new form, it asked the Assembly to decide "to postpone and carefully consider the UN Declaration on the Rights of Indigenous Peoples, and to allow time for further consultations in individual countries." Finally, on September 13, 2007, the Declaration on the Rights of Indigenous Peoples was adopted by 144 states. A total of 11 countries abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine). While only four countries opposed, namely Australia, Canada, New Zealand and the United States. At that time, the four countries found it difficult to recognize indigenous tribes in their countries because they were still thick with expressions of white supremacy. *Ibid*.

[40] Marc Becker, "Comunistas, Indigenistas e Indígenas En La Formación de La Federación Ecuatoriana de Indios y El Instituto Indigenista Ecuatoriano," Revista de Ciencias Sociales 27 (2007): 135–44, https://www.yachana.org/research/iconos.pdf .

union was only formed in 1980. Congresses were also held in this region, called Primer Congreso Regional de las Nacionalidades Indígenas de la Amazonía, which brought together associations such as Federación de Nacionalidades Indígenas del Napo, Federación de Centros Shuar, Organización de Pueblos Indígenas de Pastaza, Asociación Independiente del Pueblo Shuar Ecuatoriano, and Jatun Comuna Aguarico. These groups later established the Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana as a major association for their group.

Basically, this makes it easier for them to communicate with one another and identify common issues they have been facing. This can also be observed in the coming together of two major factions of indigenous peoples' unions: Ecuador Runakunapak Rikcharimuy and Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana. They even agreed to appoint a national coordinator for indigenous peoples' unions. This goal was achieved with the establishment of the Confederación de Nacionalidades Indígenas del Ecuador in 1986 in Quito,[41] the same location where the Primer Congreso Ecuatoriano de Indígenas was held. The purpose of the newly formed organization in Ecuador, Confederación de Nacionalidades Indígenas del Ecuador was to fully reclaim indigenous lands as community property, maintain indigenous culture including traditional medicinal practices, promote indigenous education and awareness, seek alliances and funding to establish an indigenous bank, and coordinate policies for all indigenous organizations in Ecuador.[42]

The action movement by the Confederación de Nacionalidades Indígenas del Ecuador that drew significant attention was their manifesto, which outlined sixteen key demands. These included a public declaration that Ecuador is a pluralistic country as reflected in the

[41] Philipp Altmann, "Una Breve Historia de Las Organizaciones Del Movimiento Indígena Del Ecuador," Antropología. Cuadernos de Investigación 12 (2013): 105–21, https://doi.org/10.26807/ant.v0i12.76 .

[42] *Ibid*.

constitution, and the government grants land and land rights to its citizens; Addressing water and irrigation needs; Elimination of indigenous debt; Freezing the prices of consumer products; Completing indigenous projects with special priority; Abolition of the rural land tax; Decommissioning of the Instituto Lingüístico de Verano; Other key points included the tax-free sale of commercial handicrafts; Protection of archaeological sites; Legalization of domestic medicine; Cancellation of government decisions on harmful land reforms; Government grants for nationalities; Government grants for bilingual education; Respect for children's rights; Setting a fair price for products.[43]

The action of the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) also extends to aspects of handling land conflicts. Since the 1960s, CONAIE has resolved most of the land disputes in Ecuador, often through low-level legal or political instruments.[44] Most notably, the actions of the Confederación de Nacionalidades Indígenas del Ecuador played a crucial role in toppling Abdalá Bucaram's regime and influenced the 1997/1998 Constituent Assembly.[45] Furthermore, CONAIE has established itself as equal legal subjects *vis-à-vis* the state, asserting its position as part of Ecuador's indigenous peoples and nation. The multiculturalism within the union has shaped a new discourse of struggle, one that intertwines ethnicity and class. This unique approach enables them to address issues of territory, nationality, plurality and interculturality—a capability that is completely lacking among indigenous groups living in other countries, especially outside Latin America.

According to Dahlan, Latin American countries, which are predominantly Spanish-speaking, have generally made significant

[43] Jorge León Trujillo, De Campesinos a Ciudadanos Diferentes (Quito: CEDIME/Abya-Yala, 1994), 61.

[44] Floresmilo Simbaña, "El Movimiento Indígena y El Actual Proceso de Transición," América Latina En Movimiento 423 (2007): 21–24, https://www.alainet.org/es/active/23034?language=en .

[45] Alejandra Santillana, Proceso Organizativo y Límites Del Proyecto Político de Pachakutik (Quito: Instituto de Estudios Ecuatorianos, 2006), 215-265.

progress in fulfilling and protecting the rights of indigenous peoples. He notes that many countries in the region have recognized the rights of indigenous peoples, with a shared understanding that the term "*pueblo*"[46] should be included in their respective constitutions. What drives this progress in fulfilling and protecting the rights of indigenous peoples? Dahlan identifies the emergence of political and legal awareness as a key factor, describing it as a relatively new phenomenon for Latin America. This awareness, according to him, has fostered a self-affirmation of indigenous identity, which serves as a catalyst for deconstructing various forms of alienation of indigenous peoples from their living space, both in terms of legal, political, international relations and economic contexts.

The government essentially only needs to provide political recognition that indigenous peoples are legal subjects equal to the state, with the capacity to act legally in representing their interests as indigenous groups. This approach would bring greater clarity to the fate of indigenous peoples following the enactment of the National Criminal Code (set to take effect in 2026). Their recognition would no longer be limited to lower-level regional regulations but would be established at a higher regulatory level. Indigenous peoples must be treated as equal subjects when engaging with the state as a party, particularly in matters related to customary criminal law.

Conclusion

Recognition of indigenous peoples by the state is reflected in the Constitution and applicable legislation, and Law No. 1 of 2023 on the Criminal Code. Article 2 Paragraph 3 of the law acknowledges the existence of customary law communities but needs further regulation through a Government Regulation. This form of recognition imposes a procedural requirement that indigenous peoples must fulfill to gain formal

[46] From Spanish, the equivalent of the term "marhaen" or poor in the Indonesian vocabulary. Muhammad Dahlan, "Rekognisi Hak Masyarakat Hukum Adat Dalam Konstitusi," Undang: Jurnal Hukum 1, no. 2 (2019): 187–217, https://doi.org/10.22437/ujh.1.2.187-217.

recognition. This conditional recognition echoes the practices of the New Order period and seems to justify the doctrine of terra nullius (old ideology) a colonial ideology applied during the period of legal unification under the Dutch rule. Consequently, indigenous peoples remain in a subordinate position relative to the state's dominant authority. This situation calls for reflection on the indigenous movement in Ecuador, where the successful organization of indigenous peoples and nations into a unified national movement has significantly influenced the country's political and legal landscape.

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