

## Constitutional Provisions About Indigenous People in Indonesia and Brazil: Lessons Learned

C. Clarissa Intania<sup>1</sup>

### Abstract

Due to the indigenous peoples' condition of being prone to conflict and discrimination, it is important for the law, especially the constitution, to protect indigenous peoples. In this article, the author discusses the recognition and protection of indigenous peoples under the Indonesian and Brazilian constitutions. This research is a normative research. Based on the comparison, the approach used by the 1988 Brazilian Constitution on regulating the indigenous peoples' recognition and protection are more specific than the approach used by the Amended 1945 Indonesian Constitution. The 1988 Brazilian Constitution regulates the indigenous rights which is a direct result from the constitutional recognition and protection. These include the right to be different, the ability to file a lawsuit, and provision on land rights, which are not included in the Amended 1945 Indonesian Constitution.

**Keywords:** indigenous people, rights, recognition, protection, constitution.

### Intisari

Berdasarkan keadaan masyarakat adat yang rentan terhadap konflik dan diskriminasi, sangat penting untuk masyarakat adat untuk dilindungi oleh hukum, terutama konstitusi. Dalam artikel ini, penulis akan membahas pengakuan dan perlindungan dari masyarakat adat di bawah konstitusi Indonesia dan Brazil. Penelitian ini adalah penelitian normative. Berdasarkan perbandingan, pendekatan yang digunakan Konstitusi Brazil Tahun 1988 dalam mengatur pengakuan dan perlindungan dari masyarakat adat, lebih spesifik dibandingkan pendekatan yang digunakan oleh UUD NRI Tahun 1945. Ini termasuk hak untuk menjadi berbeda, kemampuan untuk mengajukan gugatan, dan pengaturan hak tanah, yang tidak termasuk dalam UUD NRI Tahun 1945.

**Kata kunci:** masyarakat adat, hak-hak, pengakuan, perlindungan, konstitusi.

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<sup>1</sup> Class of 2017, Bachelor of Law Candidate from Constitutional Law Department, Universitas Gadjah Mada's Faculty of Law

## A. Introduction

Indigenous peoples consist of 176.6 million people from 5,000 groups spread across 90 different countries.<sup>1</sup> Among them, 70% of all indigenous peoples live in the Asia-Pacific, 16.3% in Africa, 11.5% in Latin America, and 0.1% in Europe and Central Asia.<sup>2</sup> Indigenous peoples currently occupy about 22% of the land area worldwide and contribute to a large part of the world's cultural diversity, including speaking most of the world's 7000 languages.<sup>3</sup> There is no universally accepted definition of indigenous peoples. However, they generally possess these common characters:

- a. Occupation of ancestral lands, or at least of part of them;
- b. Common ancestry with the original occupants of these lands;
- c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
- d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e. Residence in certain parts of the country, or in certain regions of the world;
- f. Other relevant factors.<sup>4</sup>

Indigenous peoples have a special connection with the land they have lived in for generations and possess the knowledge on the sustainable management and protection of the natural resources around them.<sup>5</sup>

Indigenous peoples, as one of the most marginalized and discriminated groups in the State, often face conflicts that threaten their territory, way of living, and their existence as a whole. In 2019, there were 15 cases of arrests of, violence towards, evictions of, and land grabs from indigenous peoples groups.<sup>6</sup> For example, with traditional farmers were criminally penalized in Central and West Kalimantan.<sup>7</sup> Maulidin and Sarwani, farmers who practice the traditional "cut and burn framework" when working the fields<sup>8</sup> to develop rice in a region less than one hectare were both

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<sup>1</sup> International Labour Organization, *Implementing The ILO Indigenous And Tribal Peoples Convention No. 169: Towards An Inclusive, Sustainable And Just Future* (Switzerland: ILO Publications, 2019), 13.

<sup>2</sup> *Ibid.*

<sup>3</sup> "No Indigenous Peoples", *UNESCO*, accessed 12 December, 2020, <https://en.unesco.org/indigenous-peoples>.

<sup>4</sup> Benedict Kingsbury and William S. Grodinsky, "Self-Determination and "Indigenous Peoples", *Proceedings of the Annual Meeting (American Society of International Law)* 86 (1992): 386.

<sup>5</sup> *Ibid.*

<sup>6</sup> "Indigenous Peoples in Indonesia", *International Work Group for Indigenous Affairs*, last modified 2020, accessed 12 December, 2020, <https://www.iwgia.org/en/indonesia/3602-iw-2020-indonesia.html>

<sup>7</sup> *Ibid.*

<sup>8</sup> Andre Barahamin, "Menyasar dan Memenjarakan Para Peladang", accessed 10 December, 2020, <https://www.mongabay.co.id/2019/12/10/menyasar-dan-memenjarakan-para-peladang/>

accused of burning the forest.<sup>9</sup> The criminalisation of traditional farmers in Kalimantan was massive that some of the few cases that made it to trial.<sup>10</sup>

Brazil also faces problems regarding their indigenous people's protection. According to Amnesty International, in 2020, Brazil's indigenous land right and natural environment were threatened by people or parties who commit wildfires, Illegal mining, and land grabbing for illegal farming and agribusiness.<sup>11</sup> According to the data collected by National Institute for Space Research, there was an increase of 9.5% forest destruction consisting of more than 11,000km<sup>2</sup> area between August 2019 and July 2020 compared to the previous period.<sup>12</sup>

Due to the indigenous peoples' conditions of being prone to conflict and discrimination, it is important for the law, especially the constitution, to protect indigenous peoples. As the supreme law of the State, the constitution defines the governmental structure, institutions, political power distribution, recognition and protection of fundamental rights, and the relationship between the government and the citizens.<sup>13</sup> By having indigenous peoples recognized within the constitution, it would provide indigenous peoples with the enhanced protection they need to exercise their rights. These provisions should encompass:<sup>14</sup>

- a. Clear and enforceable provisions regarding the protection of indigenous people through fundamental rights;
- b. Recognition of indigenous peoples' right and equality;
- c. Consistent protection of indigenous peoples since the constitution is harder to change than that of statutory law;
- d. Prioritize indigenous peoples' protection when making legislations and policies;
- e. Recognition of more than one sources of law, especially customary law;
- f. Establishment of institutions relating to indigenous peoples' protection;
- g. Establishment of indigenous peoples' right to self-determination, autonomy, and self-government;
- h. Recognition of indigenous peoples' identity, specialized rights and processes, and constitutional commitments to equality and non-discrimination.

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<sup>9</sup> International Work Group for Indigenous Affairs, *International Work Group for Indigenous Affairs*.

<sup>10</sup> According to *Ibid*, those cases are:

- a. Gusti Mauludin and Sarwani (Central Kalimantan);
- b. Saprudin part of Lebu Juking Pajang (Central Kalimantan);
- c. Nadin and Akhmad Taufiq (Central Kalimantan);
- d. Layur (West Kalimantan);
- e. Reto, Petrus Sabut's son and Hero, Reto's son (Central Kalimantan);
- f. Antonius (passed away) (Central Kalimantan).

<sup>11</sup> Amnesty International, "Brazil 2020", accessed 26 October 2021, <https://www.amnesty.org/en/location/americas/south-america/brazil/report-brazil/>

<sup>12</sup> *Ibid*.

<sup>13</sup> Amanda Cats-Baril, *Indigenous Peoples' Rights in Constitutions Assessment Tool* (Stockholm: International Institute for Democracy and Electoral Assistance, 2020), 9.

<sup>14</sup> *Ibid*, 9-10.

In this paper, the recognition and protection of indigenous peoples under the Indonesian Constitution and Brazilian Constitution are discussed. Indonesia is an archipelagic country with strong indigenous diversity<sup>15</sup> and Indonesia recognizes indigenous peoples within its constitution. Similarly, Brazil has numerous matters of the State and traditions that involve its indigenous peoples.<sup>16</sup> Brazil also recognizes indigenous peoples in its constitution. However, there remains different approaches in each constitutions when it comes to recognizing and protecting their indigenous peoples. The author used Brazil's Constitution as a model on how more specific provisions in Indonesian Constitution can accommodate indigenous rights better.

## **B. Indigenous Peoples' Recognition and Protection Under Indonesian Constitution**

Indonesian regulations recognize numerous terms referring to indigenous people, such as:

- a. "*masyarakat hukum adat*" (*adat law community*) in Law No. 5 of 1960 regarding Basic Agrarian Law, Law No. 39 of 1999 regarding Human Rights, Law No. 41 of 1999 regarding Forestry, Law No. 21 of 2001 regarding Special Autonomy Papua, Law No. 7 of 2004 regarding Water Sources, Law No. 18 of 2004 regarding Plantation, Law No. 32 of 2009 regarding Environmental Protection and Utilisation, Agrarian Minister/Head of National Land Agency No. 5 of 1999 regarding Guidance on *Adat Law Community's Ulayat Right Dispute Resolution*;
- b. "*masyarakat tradisional*" (*traditional community*) in Article 28I (3) of the Amended Indonesian 1945 Constitution and Law No. 27 of 2007 regarding Coastal Area and Small Islands Management;
- c. "*masyarakat adat*" (*adat community*) in Law No. 21 of 2001 regarding Special Autonomy Papua and Law No. 27 of 2007 regarding Coastal Area and Small Islands Management;
- d. "*masyarakat adat yang terpencil*" (*marginalized adat community*) in Law No. 30 of 2003 regarding National Education System;
- e. "*kesatuan masyarakat hukum adat*" (*adat law community unit*)" in Law No. 32 of 2004 regarding Regional Government.
- f. "*masyarakat lokal*" (*local community*) in Law No. 27 of 2007 regarding Coastal Area and Small Islands Management.

The term of *adat law community* was first introduced by Van Vollenhoven, which referred to the native people of Indonesia.<sup>17</sup> This term was introduced in relation to the enactment of a policy made by the Dutch Government in 1939, which was the

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<sup>15</sup> Until 2018, Indonesia approximately has 2371 indigenous community registered under *Aliansi Masyarakat Adat Nusantara* with ± 70 million indigenous people in Melati Kristina Andriarsi, "Sebaran Masyarakat Adat", last modified 2020, accessed 12 December, 2020, <https://katadata.co.id/padjar/infografik/5f8030631f92a/sebaran-masyarakat-adat>.

<sup>16</sup> "Indigenous Peoples in Brazil", *International Work Group for Indigenous Affairs*, last modified 2019, accessed 12 December, 2020, <https://www.iwgia.org/en/brazil.html>.

<sup>17</sup> J.F. Holleman (ed.), *Van Vollenhoven on Indonesian Adat Law*, (The Hague: Springer-Science+Business Media, 1981), 5.

*Indische Staatregeling* (Indies Constitution).<sup>18</sup> Due to the more common use of “adat law community” in regulations,<sup>19</sup> the term “*adat* law community” will be used when talking about indigenous peoples in the Indonesian context.

Indonesia has gone through changes in form of state and government since its independence, which has resulted in the drafting of four versions of the Indonesian Constitutions:

- a. Indonesian 1945 Constitution (*Undang-Undang Dasar 1945*), the first Indonesian Constitution established in 1945;
- b. Indonesian Federal Constitution (*Undang-Undang Dasar Republik Indonesia Serikat*), the Constitution established when Indonesia was a Federal State in 1949-1950;
- c. Indonesian 1950 Temporary Constitution or Law No. 7 of 1950 (*Undang-Undang Dasar Sementara Republik Indonesia*), the temporary Constitution established in 1950 as the result of the Indonesian Federation termination;
- d. Amended Indonesian 1945 Constitution (“*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*”), the amended 1945 Constitution or the present Constitution.

During the discussion of the Indonesian 1945 Constitution (“**1945 Constitution**”), the main focus was to consolidate political power and to have that Constitution only as a temporary Constitution.<sup>20</sup> However, during this discussion, two founding fathers, Yamin and Soepomo initiated a discussion on territorial *adat* law society in Indonesia, where there were *zelfbes turendelandshappen* and *volkgemeenshappen* consisted of 21,000 villages in Java, 700 *nagari* Minangkabau, and many more.<sup>21</sup>

Even though *adat* law society was not explicitly mentioned, that discussion resulted to the Article 18 of the 1945, stated:

“The division of the area of Indonesia into large and small regional territories together with the structure of their administration, shall be prescribed by statute, with regard for and in observance of the principle of deliberation in the

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<sup>18</sup> Jawahir Thontowi, “Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia”, *Jurnal Hukum Ius Quia Iustum* 20(1), (2013): 22.

<sup>19</sup> Kementerian Perencanaan Pembangunan Nasional/Badan Perencanaan Pembangunan Nasional, *Masyarakat Adat di Indonesia: Menuju Perlindungan Sosial yang Inklusif* (Jakarta: Direktorat Perlindungan dan Kesejahteraan Masyarakat Kementerian PPN/Bappenas, 2013), 2-7.

<sup>20</sup> Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat* (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Hak Asasi Manusia RI, 2014), 14-15.

<sup>21</sup> Syafruddin Bahar, *et. al.* (edt), *Risalah Sidang BPUPKI dan PPKI*, 3<sup>rd</sup> Ed., (Jakarta: Sekretariat Negara Republik Indonesia, 1995), 18.

governmental system of the State, and the traditional rights in the regional territories which have a special character.”<sup>22</sup>

This article recognizes the uniqueness of regions and their natives along with their origin rights in order to support the central government.<sup>23</sup> In the Indonesian Federal Constitution (*Undang-Undang Dasar Republik Indonesia Serikat*), the closest article related to *adat* law community and their indigenous rights is Article 47. However, issues related to civil rights and the relations between people and natural resources had not been considered urgent and topic of the *adat* law community has not been thoroughly discussed since this Constitution was mostly about regulating political power.<sup>24</sup>

The Indonesian 1950 Temporary Constitution (1950 Temporary Constitution) also did not regulate *adat* law societies. It regulated regions and autonomous regions known as *swapraja*, which was closer in meaning to *zelfbesturende landschappen* than *adat* law society that is currently being discussed.

Indonesia returned to use the 1945 Constitution after reverting to being a unitary State once again. Since Article 18 of the 1945 Constitution did not explicitly mention *adat* law societies, the lower laws would be the ones expected to provide more explicit regulations. One of these lower laws is Law No. 5 of 1960 regarding Basic Agrarian Law,<sup>25</sup> which still applies as of the writing of this paper. The Basic Agrarian Law covers the provisions regarding the *adat* law community and their land rights (*hak ulayat*).

The law and society in Indonesia has progressed alongside social, economic, and political conditions. Instead, the freedom of the *adat* law community has increasingly gotten more marginalized.<sup>26</sup> The *adat* law community has often been viewed as or associated with primitive societies that isolate themselves from the development of technology and science.<sup>27</sup> They are oftentimes called “illegal cultivator (*peladang liar*), “illegal loggers” (*penebang liar*), “alienated tribe” (*suku terasing*), “alienated society” (*masyarakat terasing*), and other labels which refer to their marginalized conditions.<sup>28</sup>

Since 1998, the Reformation era marked a new beginning for the *adat* societies’ effort to have their basic rights legally accommodated.<sup>29</sup> The Congress of Association of the *Adat* Community of the Archipelago (*Kongres Asosiasi Masyarakat Adat*

<sup>22</sup> Indonesian 1945 Constitution (1945) [hereinafter 1945 Constitution], Article 18.

<sup>23</sup> Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat*, 15.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 12.

<sup>26</sup> Tania Murray Li, “Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia’s Forest Zone”, *Modern Asian Studies* 35, no. 3 (July, 2001): 655.

<sup>27</sup> *Ibid.*

<sup>28</sup> Thontowi, “Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia”, 23 and Tania Murray Li, “Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia’s Forest Zone”, 655.

<sup>29</sup> *Ibid.*, 27.

*Nusantara/KAMAN*) voiced their disagreement in identifying the *adat* law community as alienated groups or illegal loggers.<sup>30</sup> According to KAMAN, the *adat* law community is a community with a specific geographical origin that has its own values, ideologies, economy, politics, territory, and culture.<sup>31</sup> The government, which as a result of Reform leaned more towards the decentralisation of powers, was receptive to the idea of supporting the *adat* societies in taking care of their own territories as regional government units.<sup>32</sup>

KAMAN's statement was later acknowledged by the *Ad Hoc* Committee I of the People Consultative Assembly (*Majelis Permusyawaratan Rakyat/MPR*) of the Republic of Indonesia and realised in the amendment process of the 1945 Constitution. The expected amendment was presented in Article 18B (2) of the Amended Indonesian 1945 Constitution (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945/Amended 1945 Constitution*) provides that:

“The State shall recognize and respect entities of the *adat* law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws.”<sup>33</sup>

This recognition is also manifested in Article 28I(3) of Amended 1945 Constitution, which states that “the cultural identity and the right of traditional societies shall be respected in harmony with the development of the age and civilization.”<sup>34</sup> It is clear that Article 18B(2) and Article 28I(3) of the Amended 1945 Indonesian Constitution use different terms to describe indigenous peoples. Article 18B(2) uses “*adat* law community” while Article 28I(3) uses “traditional communities”. These terms, however, do not bear significant difference. According to the translation of Indigenous and Tribal Peoples Convention of 1989, indigenous and tribal peoples are translated to “*adat* law community”, in accordance with the term used by the National Commission of Human Rights and the Constitutional Court, while other common translations are *adat* community and traditional community.<sup>35</sup>

Article 18B(2) of the Amended 1945 Constitution also provides the criteria for indigenous peoples to be included as the *adat* law society, which requires that they: a) still exist; b) are in line with societal development; c) in line with the ideology of Indonesia; and d) regulated further by law.<sup>36</sup> Rahardjo mentioned these criteria as a form of hegemonic State power to determine the existence of the *adat* law community

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<sup>30</sup> Gregory L. Acciaioli, "Memberdayakan Kembali Kesenian Totua: Revitalisasi Adat Masyarakat To Lindu di Sulawesi Tengah", *Antropologi Indonesia* 25, no. 65 (2001): 61.

<sup>31</sup> *Ibid.*

<sup>32</sup> Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", 27.

<sup>33</sup> Amended Indonesian 1945 Constitution (2002) [hereinafter Amended 1945 Constitution], Article 18B (2).

<sup>34</sup> Amended 1945 Constitution, Article 28I (3).

<sup>35</sup> International Labor Organization, *Konvensi Masyarakat Hukum Adat 1989* (Jakarta, International Labor Organization, 2007), 5.

<sup>36</sup> Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat*, 21.

because the State always intends to interfere, regulate, define, share, and classify things.<sup>37</sup> Wignjosuebrototo mentioned that these criteria, in theory and in practice, are interpreted as a petition-based recognition (*pengakuan yang dimohonkan*), where the *adat* law community should prove their own existence in order to be recognized by the State.<sup>38</sup>

In Article 18B(2) and 28I(3), the *adat* law community is recognized and respected. By recognising means giving acknowledgement and respect by the State to the *adat* legal systems and their indigenous rights.<sup>39</sup> The acknowledgement in Article 18B(2) emphasizes that the *adat* law community has the right to live and said right accorded to them is as important as is given to other administrative units, e.g., city and municipality.<sup>40</sup> Therefore, the Amended 1945 Indonesian Constitution has provided more explicit provisions on *adat* law community.

There are two phrases which needs to be carefully observed, which are “[..] in harmony with the development of the age and civilization”<sup>41</sup> in Article 28I(3) and “in accordance with [...] and the principle of the Unitary State of the Republic of Indonesia”<sup>42</sup> in Article 18B(2). For the first phrase, it was made to respond to the future challenges of globalization.<sup>43</sup> It is done in hopes that when the locals face the difficulty of facing globalization and exploitation in the future, the State, as the stronger institution, would be there to support them.<sup>44</sup> For the second phrase, Syafrudin and Na’a note that the recognition on traditional customary rights should be based on the principle or ideology of Indonesia<sup>45</sup> which may refer to Pancasila as the *staatsfundamentalnorm*. This is similar with one of the four conditions previously mentioned by Rahardjo. These criteria, however, show that the recognition of the *adat* law community is conditional.<sup>46</sup> This recognition can only can be given if the four requirements are fulfilled.

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<sup>37</sup> Satjipto Raharjo, "Hukum Adat Dalam Negara Kesatuan Republik Indonesia (Perspektif Sosiologi Hukum)", in *Inventarisasi Dan Perlindungan Hak Masyarakat Hukum Adat*, ed. Hilmi Rosyida and Bisariyadi (Jakarta: Komisi Nasional Hak Asasi Manusia, Mahkamah Agung Republik Indonesia, dan Departemen Dalam Negeri, 2005), 7.

<sup>38</sup> Soetandyo Wignjosuebrototo, "Pokok-Pokok Pikiran Tentang Empat Syarat Pengakuan Eksistensi Masyarakat Adat", in *Inventarisasi Dan Perlindungan Hak Masyarakat Hukum Adat*, ed. by Hilmi Rosyida and Bisariyadi (Jakarta: Komisi Nasional Hak Asasi Manusia, Mahkamah Agung Republik Indonesia, dan Departemen Dalam Negeri, 2005), 39.

<sup>39</sup> Amended 1945 Constitution, Article 18B (2).

<sup>40</sup> Ni'matul Huda, "Otonomi Daerah; Filosofi, Sejarah Perkembangan Dan Problematika", in *Republik Desa, Pergulatan Hukum Tradisional Dan Hukum Modern Dalam Desain Otonomi Desa* ed. Ateng Syarifudin & Suprin Naa (Bandung: PT Alumni, 2010), 45.

<sup>41</sup> Amended 1945 Constitution, Article 28I (3).

<sup>42</sup> Amended 1945 Constitution, Article 18B (2).

<sup>43</sup> Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", 27.

<sup>44</sup> *Ibid.*

<sup>45</sup> Ateng Syafrudin and Suprin Na'a in Rosyada, Warassih, and Herawati, "Perlindungan Konstitusional Terhadap Kesatuan Masyarakat Hukum Adat Dalam Mewujudkan Keadilan Sosial", 2.

<sup>46</sup> Sartika Intaning Pradhani, "Dynamics of Adat Law Community Recognition: Struggle to Strengthen Legal Capacity", 284.



The requirements for *adat* law society recognition then further elaborated and regulated in the Constitutional Court Decision No. 31/PUU V/2007 (Decision) and Law No. 6 of 2014 regarding Village (Village Law). According to the Decision:<sup>47</sup>

- a. *Adat* law societies exist when:
  - i. they share an in-group feeling (*perasaan kelompok*),
  - ii. have customary governmental body (*pranata pemerintahan adat*),
  - iii. have assets and/or customary objects,
  - iv. have customary norm, and
  - v. have certain areas (especially for *adat* law societies who are territorial in nature);<sup>48</sup>
- b. They are in line with societal development when:
  - i. their existence has been recognized by the law and regulations as a reflection of development values that are being considered ideal in today's society, and
  - ii. their traditional rights are recognized and respected by the concerned and wider members of community and do not conflict with human rights;<sup>49</sup>
- c. They are in line with the ideology of Indonesia when they are not threatening the existence of the Unitary States Republic of Indonesia as a political and legal entity by:
  - i. Not threatening the sovereignty and integrity of the Unitary State Republic of Indonesia, and
  - ii. Has appropriate customary norms substance that do not conflict with the laws and regulations.<sup>50</sup>

The Village Law created a significant development in *adat* law society recognition by having the principle of recognition in Article 3.<sup>51</sup> The principle of recognition means recognition on origin rights (*hak asal usul*).<sup>52</sup> Recognition principle is the state's acknowledgement and respect for *adat* law societies and their traditional rights.<sup>53</sup> Since traditional rights are innate rights, any *adat* law society's authority arising from those rights is not accountable to the government.<sup>54</sup>

If compared to Article 18 of the 1945 Indonesian Constitution before the amendment, there were no requirements at all for the *adat* law community to be

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<sup>47</sup> The Constitutional Court Decision No. 31/PUU-V/2007 only elaborates further the first, second and third requirement. However, it still mentions all four requirements. This does not mean the fourth requirement ceased to exist.

<sup>48</sup> Constitutional Court Decision No. 31/PUU-V/2007, 165-166.

<sup>49</sup> Constitutional Court Decision No. 31/PUU-V/2007, 166.

<sup>50</sup> Constitutional Court Decision No. 31/PUU-V/2007, 166.

<sup>51</sup> Mulyanto, "Penguatan Masyarakat Hukum Adat dalam Undang-Undang Nomor 6 Tahun 2014 tentang Desa dari Perspektif Kajian Yuridis", *Journal of Indonesian Adat Law* 2, no. 3 (December, 2018): 95.

<sup>52</sup> Law No. 6 of 2014 regarding Village, Elucidation of Article 3.

<sup>53</sup> Mulyanto, "Penguatan Masyarakat Hukum Adat dalam Undang-Undang Nomor 6 Tahun 2014 tentang Desa dari Perspektif Kajian Yuridis", 95.

<sup>54</sup> *Ibid.*

legally recognized. Saafroedin Bahar, the Commissioner of the *Adat* Law Community Department in the National Committee of Human Rights has noted that the past Dutch colonial government recognized the *adat* law community without any requirements.<sup>55</sup> He stated that having formal requirements to be acknowledged was contradicting with the spirit of the constitution.<sup>56</sup>

### C. Indigenous Peoples' Recognition and Protection under Brazil Constitution

The promulgation of the modern Brazilian Constitution started in the mid-1980s, at the end of Brazil's 20-year military dictatorship.<sup>57</sup> After losing support from the citizens and due to internal conflicts in the military, the urgency of restoring democracy increased.<sup>58</sup> In 1985, a National Constituent Assembly was assembled to discuss the new constitution.<sup>59</sup> After almost two years of discussion, Brazil's 1988 Constitution was promulgated on October 5<sup>th</sup> of 1988. The Constitution consisted of 245 articles and 70 transitory provisions with 77 listed fundamental rights and 34 social rights with an immediate application clause.<sup>60</sup>

The established rights of the indigenous peoples are mentioned in Article 231 Section II: Culture, Chapter VIII: Indians of Brazil's 1988 Constitution. This arrangement highlights two innovative and significant ideas comparable to earlier Constitutions and the purported Indian Statute:

- a. The dismissal of the abandonment perspective, which consider the indigenous peoples as a brief social classification, bound to vanish; and
- b. The indigenous peoples' territorial privileges are characterized in the idea of unique rights that existed before the formation of the State itself.<sup>61</sup>

This is a consequence of the accepted acknowledgment that the indigenous peoples are already inhabitants of Brazil before the creation of the State itself.<sup>62</sup> With the new provisions, the indigenous peoples are guaranteed their "social organization,

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<sup>55</sup> Leo, "Pengakuan Terhadap Masyarakat Adat Tak Perlu Melalui Hukum Positif", last modified 20 June, 2005, accessed 12 December, 2020, <https://www.hukumonline.com/berita/baca/hol13028/pengakuan-terhadap-masyarakat-adat-tak-perlu-melalui-hukum-positif?page=2>.

<sup>56</sup> *Ibid.*

<sup>57</sup> Vanice Regina Lirio Do Valle, "The Brazilian Constitution: Context, Structure and Current Challenges." *British Journal of American Legal Studies* 9, no. 3 (2020), 425.

<sup>58</sup> *Ibid.*, 425-426.

<sup>59</sup> "Constitutional History of Brazil", *Constitutionnet*, accessed 29 September 2021, <https://constitutionnet.org/country/constitutional-history-brazil>.

<sup>60</sup> "Brazil, Constitution", *Encyclopaedia.com*, accessed 29 September 2021, <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/brazil-constitutions>.

<sup>61</sup> "Constitutional Rights of the Indigenous Peoples." *Provos Indigenas no Brasil*. Accessed 15 December, 2020. <https://pib.socioambiental.org/en/Constitution>.

<sup>62</sup> *Ibid.*

customs, languages, beliefs and traditions.”<sup>63</sup> This enables the indigenous peoples of Brazil to have the right to be different as indigenous peoples indefinitely.<sup>64</sup>

This is expressed in the head of Article 231 of Brazil’s 1988 Constitution:

“It is recognized that the indigenous peoples have the right to their social organization, customs, languages, beliefs and traditions, and their original rights over the lands that they have traditionally occupied, it being the duty of the federal government to demarcate these lands, protect them and ensure that all their properties and assets are respected.”

In this article, the right to be different does not refer to fewer rights or privileges claimed by the indigenous peoples, but to use their own languages and way to process their education.<sup>65</sup> Brazil’s 1988 Constitution also allows indigenous people to file a lawsuit in court to defend their rights and interests.<sup>66</sup> The demarcation is also a part of the indigenous peoples’ rights, where any land which has been demarcated (established as the indigenous peoples’ possession) is protected.<sup>67</sup> This right is also connected to the right to self-determination in Article 1 of International Covenant of Civil and Political Rights. In the context of indigenous right, it is inseparable with indigenous’ right to lands, territories, and natural resources.<sup>68</sup> When the right to be different is applied well, then the right to self-determination may also be fulfilled.

Brazil’s 1988 Constitution also regulates indigenous peoples’ land rights under Article 231 (1), (2), (3) and (5).<sup>69</sup> In Article 231(2) of Brazil’s 1988 Constitution, it stated that:

“Lands traditionally occupied by the Indians are those that they have inhabited permanently, used for their productive activity, their welfare and necessary for their cultural and physical activity, their welfare and necessary for their cultural and physical reproduction, according to their uses, customs and traditions.”

This paragraph defines the characteristics of what can be called indigenous land.<sup>70</sup> This characterisation and acknowledgement by the State are utilised to guarantee the total sufficiency of the constitutional ruling and the State has the obligation to ensure these indigenous lands.<sup>71</sup>

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<sup>63</sup> Márcia Dieguez Leuzinger and Kylie Lyngard, " The land rights of indigenous and traditional peoples in Brazil and Australia", *Revista de Direito Internacional* 13, no. 1 (2016); 421.

<sup>64</sup> *Ibid.*

<sup>65</sup> 1988 Constitution, Article 231.

<sup>66</sup> 1988 Constitution, Article 231.

<sup>67</sup> "Demarcation", *Provos Indigenas no Brasil*, accessed 15 December, 2020, <https://pib.socioambiental.org/en/Demarcation>.

<sup>68</sup> Erica-Irene A. Daes, "An overview of the history of indigenous peoples: self-determination and the United Nations". *Cambridge Review of International Affairs* 21, no. 1 (March, 2008): 8.

<sup>69</sup> Cats-Baril, *Indigenous Peoples’ Rights in Constitutions Assessment Tool*, 118-119.

<sup>70</sup> "Demarcation", *Provos Indigenas no Brasil*.

<sup>71</sup> *Ibid.*

Other points regarding indigenous lands that are regulated in Brazil's 1988 Constitution are regarding different aspects such as:<sup>72</sup> a) being a part of union assets; b) creating a permanent title for the indigenous peoples; c) the nullification of all juridical acts that affect the ownership and title, with the exemption of being related to public interest of the federal government;<sup>73</sup> d) limited utilization;<sup>74</sup> e) allowed utilization related to water power resources, energy potential, research, and mining with the authorization of the Congress after hearing with the affected community and if the community being involved;<sup>75</sup> f) mineral exploration and use of water resources need to be specified in laws and regulations;<sup>76</sup> g) the prohibition of selling or mortgaging indigenous land; and h) prohibited removal of Indians from their land, except under special circumstances as regulated under Article 231(6) of Brazil's 1988 Constitution.<sup>77</sup>

The land rights for indigenous peoples faced a major challenge since 2018 after the election of President Jair Bolsonaro.<sup>78</sup> At the time, President Jair Bolsonaro has an agenda that would have threatened the indigenous peoples, taking form through his unconstitutional revocation on the indigenous lands' demarcation legal process.<sup>79</sup> This revocation enabled the State to review and revoke any indigenous land permission, which used to be permanent.<sup>80</sup> The federal body, which manages demarcation, the National Foundation for Indians (FUNAI) was also dismantled as an extension to his policy.<sup>81</sup>

#### **D. Comparison Between Indigenous Peoples' Recognition and Protection under the Indonesian and Brazil Constitution**

Based on the description in the previous chapter, it can be concluded that the difference between the Indonesian and Brazil Constitutions in their approaches on indigenous peoples' recognition and protection are:

**Table 1. Different Approach on Indigenous People Recognition and Protection Based on Amended 1945 Constitution and 1988 Constitution**

<b>Indicators</b>	<b>Indonesia (Amended 1945 Constitution)</b>	<b>Brazil (1988 Constitution)</b>
Characteristic of protection	More general	More specific

<sup>72</sup> Gabrielle Kissinger, *Federalism and the Recognition of Indigenous Rights to Land and Natural Resources in Myanmar: Case Studies from Canada, Ethiopia, and Brazil* (Washington: Forest Trends, 2020), 28.

<sup>73</sup> 1988 Constitution, Article 231(6).

<sup>74</sup> 1988 Constitution, Article 231(2).

<sup>75</sup> 1988 Constitution, Article 231(3).

<sup>76</sup> 1988 Constitution, Article 231(6).

<sup>77</sup> "Demarcation", *Provos Indigenas no Brasil*.

<sup>78</sup> International Work Group for Indigenous Affairs, "Indigenous Peoples in Brazil".

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

Coverage	<ol style="list-style-type: none"> <li>1. State recognizes and respects the <i>adat</i> law community</li> <li>2. Criteria to be recognized as the <i>adat</i> law community</li> </ol>	<ol style="list-style-type: none"> <li>1. State recognizes and respects indigenous people</li> <li>2. Right to be different</li> <li>3. Ability to file lawsuit</li> <li>4. Land rights provisions</li> </ol>
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The Amended 1945 Constitution covers the *adat* law community’s recognition and protection in a more general manner since there are only two articles consisting of one paragraph, each which directly regulate the *adat* law community. The main idea of the Amended 1945 Constitution is to define the *adat* law community, acknowledge them generally, and regulate more specific provisions in the statutory laws. However, those articles are too broad and vague and the *adat* community rights are not regulated therein.

The Amended 1945 Indonesian Constitution ended up having a broad and vague approach due to the shifting views of the Indonesian Government towards the *adat* law community. During Soeharto’s era, the view of the *adat* law community’s rights were “gifts” from the State to give conditionally.<sup>82</sup> This was caused by the wish of this Government to exploit the natural resource controlled by the *adat* law community.<sup>83</sup> It is reflected in Law No. 11 of 1967 on Mining, Law No. 14 of 1970 regarding Basic Power of Judiciary, and Law No. 5 on Village Government, where the land can be used as a mining area as long as they have a permit, not to mention *adat* law and court, and homogenises villages resulted to destroying the indigenous system.<sup>84</sup> This extends to the Amended 1945 Constitution, where the broad and vague articles were made to control the existence and influence of the *adat* law community over the natural resources.<sup>85</sup>

As a comparison, the 1988 Brazil Constitution has more detailed provisions in the concerning indigenous people. The drafting of the 1988 Brazilian Constitution was done by making 24 *ad hoc* committees that drafted their assigned part of the Constitution from scratch.<sup>86</sup> Each committee needed to sit in five to eight sessions of hearings with institutions that represent different parts of Brazil’s society.<sup>87</sup> As a result, they were able to draft a very comprehensive Constitution, even draft provisions

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<sup>82</sup> John Bamba, “Recognition In Kind Indonesia Indigenous Peoples and State Legislation” in Christian Erni (Ed.), *the Concept of Indigenous Peoples in Asia A Resource Book* (Copenhagen and Chiang Mai, International Work Group for Indigenous Affairs (IWGIA), 2008), 263.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 246.

<sup>85</sup> *Ibid.*, 266

<sup>86</sup> Javier Martinez-Lara, *The Politics of Constitutional Change, 1985-95* (London: Macmillan Press, 1996), 91.

<sup>87</sup> Keith S. Rosenn, “Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society”, *The American Journal of Comparative Law* 38, (1990): 777.

that would be at the level of statutory law.<sup>88</sup> However, due to the many drafts, some articles became too long and became redundant.<sup>89</sup>

The Amended 1945 Indonesian Constitution also has not covered the fundamental traditional rights of the *adat* law community, such as land rights. In comparison, Brazil's 1988 Constitution covers more detailed provisions on traditional rights—not just the explicit statement of recognition and respect, but also rights which regulate the privileges of indigenous peoples. These include the right to be different, the ability to file a lawsuit, and provision on land rights. The right to be different is the direct manifestation of the State respecting the existence and uniqueness of indigenous peoples. The ability to file a lawsuit is a form of the State's recognition to indigenous people as citizens to defend themselves. Provisions related to land rights were also stipulated in the 1988 Constitution, such as demarcation, judicial acts related to indigenous land ownership, exploitation of natural resources in indigenous lands, and land procurement for public interest. These fundamental provisions leave more certainty on indigenous rights, especially on the enforcement and utilisation related to indigenous land that should pay attention to their rights.

Today, the *adat* law community still struggle to justify their land rights due to overlapping regulations.<sup>90</sup> As entities whose existence are recognised and respected by the Constitution, this should not be the case. This condition hinders the legal effort and measures to protect the *adat* law community's land rights, which may potentially result to the inability to fulfil a collective aspects of their human rights.<sup>91</sup>

Based on the comparative analysis, it is clear that the Brazilian Constitution serves as a good example of a constitution respecting and acknowledging indigenous peoples. This is exemplified by its clear provisions on the recognition of *adat* law communities. In Indonesia's case, since statutory laws have not made a significant regulatory milestone in such matters, the Constitution may be an option to provide protection to an entity which its existence is recognized and respected by the Constitution.

## **E. Conclusion**

In conclusion, despite the lack of sources on analysing the Brazil Constitution, the author still able to grasp the different concept of both Indonesia and Brazil's Constitution and things that Indonesian Constitution can learn from Brazil. The approach used by the 1988 Brazilian Constitution on regulating the indigenous peoples' recognition and protection are more specific than the approach used by the

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<sup>88</sup> Javier Martinez-Lara, *The Politics of Constitutional Change*, 91.

<sup>89</sup> Keith S. Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society", 780.

<sup>90</sup> *Adat* law community's land related provisions are currently regulated in different regulations such as Basic Agrarian Law, as "*hak ulayat*", and Law No. 41 of 1999 regarding Forestry, as "*hutan adat*" (indigenous forest).

<sup>91</sup> Sartika Intaning Pradhani, "Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation", *Jambe Law Journal* 1, no. 2 (2018): 184.

Amended 1945 Indonesian Constitution. The Brazilian Constitution regulates indigenous peoples' rights to be different, the ability to file a lawsuit, and provisions related to indigenous land rights. On the other hand, the Amended 1945 Indonesian Constitution only stated the State's recognition and respect to the *adat* law community, their definition, and leaves the rest of the provisions to be regulated by statutory law. Indonesian Constitution may consider adopting similar approach to provide better protection for *adat* law societies. However, the possibility of such adoption still needs further research and discussion.

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