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The Legal Dimension of Indigenous Communities Role in Climate Change Mitigation and Adaptation

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Abstract

Indigenous peoples in Indonesia have a system of values and laws that have been attached to them for a long time. The existence of a system of values and laws that have bound indigenous peoples makes them a strong and empowered society. However, the existence of customary law communities is often placed in a position that is considered an obstacle to progress, even though the rights of customary law communities have been enshrined in the Indonesian constitution. As a group that still preserves the values that have always existed, climate change is also a challenge for indigenous peoples. This study focuses on the gap between constitutional norms and the practice of national climate policy and the state's role in responding to climate change. This research uses normative and socio-legal methods using conceptual, statutory, case and sociological approaches that provide space to read the structural and political dynamics behind the neglect of the role of indigenous peoples in climate policy. The absence of indigenous peoples in climate policy architecture reflects the state's failure to integrate the principles of ecological justice into the legal system and environmental governance.
Keywords: *Indigenous Peoples, Mitigation, Climate Change.*

Abstrak

Masyarakat hukum adat di Indonesia memiliki sistem nilai dan hukum yang melekat pada diri mereka sejak lama. Adanya sistem nilai dan hukum yang telah mengikat masyarakat hukum adat menjadikannya sebagai masyarakat yang kuat dan berdaya. Akan tetapi, keberadaan masyarakat hukum adat sering kali ditempatkan pada posisi yang dianggap sebagai penghambat kemajuan, padahal hak-hak masyarkaat hukum adat telah tertuang ke dalam konstitusional Indonesia. Sebagai kelompok yang masih melestarikan nilai yang sejak dulu ada, perubahan iklim juga menjadi tantangan tersendiri bagi masyarakat hukum adat. Menjadi focus kajian terkait kesenjangan yang terjadi antara norma konstitusi dan praktik kebijakan iklim nasional serta negara yang harus merancang peran masyarakat hukum adat dalam merespon perubahan iklim. Penelitian ini menggunakan metode normatif dan socio-legal dengan menggunakan pendekatan konseptual, perundang-undangan, kasus dan sosiologis yang memberi ruang untuk membaca dinamika struktural dan politis di balik pengabaian peran masyarakat adat dalam kebijakan iklim. Ketidakhadiran masyarakat adat dalam arsitektur kebijakan iklim mencerminkan kegagalan negara dalam mengintegrasikan prinsip keadilan ekologis ke dalam sistem hukum dan tata kelola lingkungan.
Kata Kunci: *Masyarakat Hukum Adat, Mitigasi, Perubahan Iklim.*

Introduction

Climate change has become a multidimensional challenge that not only impacts environmental aspects, but also affects social, economic, cultural and even legal order.[1] As a country that is geographically and ecologically very vulnerable to the impacts of climate change, Indonesia is required to not only design comprehensive adaptation and mitigation strategies, but also ensure that these strategies uphold social and constitutional justice . In this context, the role of customary law communities becomes both strategic and problematic.[2] In this context, the role of customary law communities becomes both strategic and problematic.

Indigenous peoples in Indonesia are social groups that have lived for generations in certain geographical areas and have their own value systems, laws and institutions that have been tested in maintaining the balance between humans and nature.[3] They have for centuries acted as custodians of forest, coastal and other natural resource ecosystems, which today are key to the climate change mitigation and adaptation agenda. However, instead of being substantively involved in the process of formulating and implementing national climate policies, indigenous peoples are often placed in a marginalised position, even criminalised, as if they are an obstacle to development .[4]

Constitutionally, the existence and rights of customary law communities have been guaranteed. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia explicitly states that "The State recognises and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia". This provision is the main normative basis for the state to protect indigenous peoples' rights to their territories, cultures and natural resource management systems.[5]

Furthermore, recognition of indigenous peoples was strengthened by Constitutional Court Decision No. 35/PUU-X/2012 filed by the Indigenous Peoples Alliance of the Archipelago (AMAN), together with two indigenous communities, namely Kasepuhan Cisitu and Kenegerian Kuntu.[6] The request for judicial review was directed at several articles in Law No. 41/1999 on Forestry, particularly the definition of customary forest in Article 1 point 6 which states that "customary forest is part of the state forest." In its reasoning, the Court considered that the phrase contradicted the spirit of the Constitution, particularly Article 18B paragraph (2), because equating customary forests with state forests meant negating the rights of indigenous peoples to their own customary lands. The Court's decision states that

[1] Asif Raihan, "A Review Of The Global Climate Change Impacts, Adaptation Strategies, And Mitigation Options In The Socio-Economic And Environmental Sectors," *Journal Of Environmental Science And Economics* 2, No. 3 (2023): 36–58, https://doi.org/10.56556/jescae.v2i3.587.

[2] Jalal, "Keadilan Iklim: Konsep, Konteks, Dan Kerjasama," 2024, https://socialinvestment.id/artikel/keadilan-iklim-konsep-konteks-dan-kerjasama/.

[3] Sukri Tamma dan Timo Duile, "Indigeneity And The State In Indonesia: The Local Turn In The Dialectic Of Recognition," *Journal Of Current Southeast Asian Affairs* 39, No. 2 (2020): 270–89, https://doi.org/10.1177/1868103420905967.

[4] Joice Soraya, *et al*., "Critical Analysis Of Marginalized Communities In Indonesia For Reconstruction Of Social Justice Criminal" 2, No. 10 (2024), https://journal.lsmsharing.com/ijcch/article/view/216.

[5] Relexi Bayo, Andy Usmina Wijaya dan Fikri Hadi, "Pengakuan Masyarakat Adat Dalam Peraturan Perundang-Undangan Di Indonesia," *Jurnal Ilmu Hukum Wijaya Putra* 1, No. 1 (2023): 1–11, https://doi.org/10.38156/jihwp.v1i1.87.

[6] Wahyu Nugroho, "Konstitusionalitas Hak Masyarakat Hukum Adat Dalam Mengelola Hutan Adat: Fakta Empiris Legalisasi Perizinan," *Jurnal Konstitusi* 11, No. 1 (2016): 109, https://doi.org/10.31078/jk1116.

customary forests are no longer part of state forests, but are forests located in the territory of customary law communities and are part of their collective rights. This decision confirms that indigenous peoples are collective legal subjects who have constitutional rights over customary territories, including customary forests that they have managed for generations.[7]

Unfortunately, although the Constitutional Court Decision No. 35/PUU-X/2012 has been in effect since 2013, its implementation in public policy, especially national climate policy, is still very limited.[8] This can be seen from various state strategic documents such as the National Action Plan for Climate Change Adaptation (RAN-API), Presidential Regulation No. 98 of 2021 on the Economic Value of Carbon, and the National Medium-Term Development Plan (RPJMN), which generally do not explicitly mention or involve indigenous peoples. The absence of indigenous peoples in these policies reflects a structural and political legal gap, where the state fails to fulfil its constitutional obligations to protect and empower indigenous peoples, especially in the face of the climate crisis.[9]

In this context, it is important to examine in depth how constitutional guarantees that have been explicitly stipulated in the 1945 Constitution and affirmed by the Constitutional Court are not fully internalised in the national climate policy framework. This paper not only aims to explain the forms of constitutional neglect, but also to examine the root structural issues that have led to the exclusion of indigenous peoples. Furthermore, this paper will offer an alternative legal approach that is able to integrate constitutional norms, customary law values, and ecological justice principles in equitable climate change adaptation and mitigation policies.

Thus, this paper will examine how the constitutional protection of indigenous peoples in the context of climate change is formulated in the Indonesian legal system; why there is a gap between constitutional norms and national climate policy practices; and how the state should design the role of indigenous peoples in a more just, participatory and constitutionally-based manner in responding to the climate crisis nationally and locally.

Research Method

This research uses an interdisciplinary legal approach by combining normative and socio-legal methods. This approach was chosen because the issues raised not only concern the construction of written legal norms-such as constitutional provisions, Constitutional Court decisions, and laws and regulations-but also touch on the empirical reality of how indigenous peoples experience injustice in the practice of national climate change policies. Thus, this research does not only aim to explain legal rules dogmatically, but also evaluate their effectiveness in ensuring ecological and constitutional justice for indigenous peoples.

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[7] Paulus Pora Putra Fajar, Sukardan Aloysius dan Husni Kusuma Dinata, "Implikasi Putusan Mahkamah Konstitusi Nomor 35/PUU-X/2012 Terhadap Pengaturan Hutan Adat Dan Dampaknya Terhadap Hak Masyarakat Adat," *Perkara : Jurnal Ilmu Hukum Dan Politik* 2, no. 2 (2024): 39–61, https://doi.org/10.51903/perkara.v2i2.1844.

[8] Infokom AMAN, "Rilis Pers: Masyarakat Adat, Mitra Strategis Hadapi Perubahan Iklim," 2015, https://aman.or.id/news/read/392.

[9] Raden Ariyo Wicaksono, "MA Diharapkan Beri Putusan Adil Buat Sorbatua Siallagan," 2025, https://betahita.id/news/detail/11087/ma-diharapkan-beri-putusan-adil-buat-sorbatua-siallagan.html?v=1747022164#:~:text=Negara%2C melalui aparat penegak hukum%2C telah gagal,alat kekerasan struktural yang melegitimasi kepentingan korporasi.

Methodologically, several approaches are used, including statute approach, conceptual approach, case approach, and sociological approach. The statutory approach is used to examine positive legal norms such as Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution, Law No. 32 of 2009 on Environmental Protection and Management, and Presidential Regulation No. 98 of 2021 on the Economic Value of Carbon. The conceptual and case approach is used to analyse theories of climate justice, legal pluralism, as well as a study of Constitutional Court Decision No. 35/PUU-X/2012 and a number of actual conflicts involving indigenous peoples.[10] Meanwhile, the sociological approach provides space to read the structural and political dynamics behind the neglect of the role of indigenous peoples in climate policy.

Results and Discussion

Juridical-Constitutional Basis

The Constitution of the Republic of Indonesia explicitly guarantees the existence and rights of customary law communities through Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. The strengthening of these norms is reflected in Constitutional Court Decision No. 35/PUU-X/2012, which states that customary forests are not part of state forests, but are the territory of customary law communities. This decision is binding and changes the position of indigenous peoples from users to owners of rights over their traditional management areas. However, its implementation in the field is very limited due to overlapping sectoral regulations and resistance from various interests.

In addition to constitutional guarantees, recognition of the role of indigenous peoples in environmental management is also contained in Law No. 32/2009 on Environmental Protection and Management.[11] This law requires the government to integrate local wisdom and the rights of indigenous peoples into environmental policies, including in the context of climate change. However, national strategic documents such as the RAN-API, Presidential Regulation No. 98 of 2021 on Carbon Economic Value, and the RPJMN still do not reflect this mandate. The absence of indigenous peoples in these policies reflects the gap between legal norms and implementation practices.

The dominance of technocratic approaches that emphasise efficiency and markets, and the neglect of rights-based approaches, shows the failure of the state to make the constitution the foundation of climate policy. In fact, according to Hans Kelsen, the constitution is the highest basic norm that must be a reference for the entire legal system. Without substantive recognition of indigenous peoples, low-carbon development will lose social legitimacy and fail to realise true ecological justice.

Neglect of Indigenous Peoples' Constitutional Rights: Case Studies

Various national development projects and climate policies driven in the name of climate change mitigation and adaptation have actually caused negative impacts on indigenous peoples. Indigenous communities in various regions, such as Kinipan, Marafenfen

[10] Irwansyah, Legal Research: Choice of Article Writing Methods & Practices, (Yogyakarta: Mirra Buana Media, 2020), 8

[11] Muh. Sabaruddin Sinapoy, "Kearifan Lokal Masyarakat Adat Suku Moronene Dalam Perlindungan Dan Pengelolaan Lingkungan Hidup," *Halu Oleo Law Review* 2, no. 2 (2018): 513, https://doi.org/10.33561/holrev.v2i2.4513.

and Halmahera, experience deprivation of living space, social pressure, and criminalisation when defending their customary territories. Projects such as food estates, nickel mining for green energy, construction of national capitals, and carbon conservation have been implemented without adequate consultation and without formal recognition of indigenous peoples' collective rights to land and natural resources. In fact, the existence of indigenous peoples has been explicitly guaranteed in the constitution and strengthened through Constitutional Court Decision No. 35/PUU-X/2012. When these projects proceed without meaningful participation from indigenous peoples, it is not only a violation of the law, but also a disregard for key actors in maintaining ecosystems and climate resilience.

1. **The State Fails to Carry Out Constitutional Obligations: The Kinipan Case Study**

The Indonesian Constitution affirms the recognition and protection of indigenous peoples through Article 18B(2) of the 1945 Constitution. Constitutional Court Decision No. 35/PUU-X/2012 has also confirmed that customary forests are not part of state forests. However, in practice, this recognition and protection has not yet been realised.

The case of the Laman Kinipan Customary Law Community (MHA) in Lamandau Regency, Central Kalimantan, is a clear example. This Dayak Tomun indigenous community has occupied and managed more than 16,000 hectares of customary forest for generations.[12] However, the local government granted a location permit, environmental feasibility, forest area release and HGU to PT Sawit Mandiri Lestari (PT SML) without the participation or consent of the indigenous community.[13]

The Kinipan community's struggle to defend their rights was met with criminalisation. Effendi Buhing, a Kinipan traditional leader, was arrested for resisting the seizure of customary land. This is despite the fact that the Kinipan area has been certified as customary territory by BRWA. As a result of land clearing, unprecedented environmental damage and flooding occurred.

Juridically, the state neglected to implement constitutional principles and principles of good governance. The licensing process did not take into account the principles of participation, transparency and justice. Weaknesses in the administrative recognition system are a major obstacle to the protection of indigenous peoples.

The state must not stop at the symbolism and rhetoric of adat, but must ensure real protection of the rights of indigenous peoples. The Kinipan case reflects structural failures that must be addressed if Indonesia is to realise ecological justice and respect constitutional values.[14]

2. **The Marafenfen Case Study and the Failure to Integrate Constitutional Rights in Indonesia's Climate Policy**

The eviction of the Marafenfen indigenous community in the Aru Islands, Maluku, in 2022, is one clear example of how the constitutional rights of indigenous peoples are ignored

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[12] Dionisius Reynaldo Triwibowo, "Indigenous Forest in Seruyan Disappears, Lives Are Lost," 2023, https://rainforestjournalismfund.org/stories/indigenous-forest-seruyan-disappears-lives-are-lost-bahasa-indonesia.

[13] Irwan Setyabudi, "Land Grabbing and Criminalisation of Indigenous Peoples in Kinipan, Central Kalimantan." 2020, https://tirto.id/perampasan-lahan-dan-kriminalisasi-warga-adat-di-kinipan-kalteng-f1Jx.

[14] Apriska Widiangela, Ika Putri Rahayu, and Lailatul Komaria, "Juridical Analysis of the Problems of Recognition of the Laman Kinipan Indigenous People," *Journal of Law Lex Generalis* 2, no. 3 (2021): 213-35, https://saveourborneo.org/wilayah-adat-terus-digarap-kinipan-tetap-berjuang/,%0Ahttps://ojs.rewangrencang.com/index.php/JHLG/article/view/44%0Ahttps://doi.org/10.56370/jhlg.v2i3.44.

in national development practices. The military complex development project carried out on customary land without free, prior and informed consent (FPIC) procedures not only reflects the marginalisation of indigenous peoples in the state's strategic policies, but also marks a systemic constitutional defiance by the state against the mandate of Article 18B paragraph (2) of the 1945 Constitution.[15]

In the Indonesian constitutional context, recognition of indigenous peoples is not an optional policy, but a binding constitutional mandate that requires integration into every development policy. Unfortunately, in the Marafenfen case, there is no documentation of the involvement of indigenous communities in the development planning or consultation process.[16] In fact, Law Number 32 of 2009 concerning Environmental Protection and Management explicitly mandates the involvement of indigenous peoples in the formulation of environmental policies and establishes local wisdom as a basic principle of environmental protection. This non-involvement also shows the neglect of the precautionary principle, participatory principle, and non-discrimination principle in national development planning.[17]

The Marafenfen case confirms the structural bias in national policy, where the logic of security and development is prioritised over the protection of the constitutional rights of indigenous peoples. This cannot be separated from the tendency of the state to carry out a centralised and technocratic approach to development, including in the issue of climate change. When indigenous territories that have been guarded by the community are converted in the name of strategic projects without adequate ecological and social calculations, the state is actually digging a hole for ecosystem damage as well as a prolonged social crisis.[18]

Furthermore, the eviction of indigenous peoples in projects such as Marafenfen not only damages the social and cultural systems of indigenous peoples, but also destroys the ecological order that has been built based on the principles of balance and sustainability. In the context of climate change, this is very contradictory. Indigenous peoples have proven to be the guardians of forests, coastal areas and other natural resources that play a central role in carbon stability and adaptation to the climate crisis. When they are forcibly removed, the state is not only losing a strategic ally in climate change mitigation, but is also undermining the potential success of an equity-based low-carbon development agenda.[19]

Thus, the Marafenfen case underscores the importance of reformulating Indonesia's climate policy so that it is not only orientated towards numerical targets of emission reduction or market-based conservation expansion, but also upholds human rights, ecological constitutionalism, and principles of distributive and participatory justice. The principle of FPIC must be internalised into all national policies targeting indigenous territories. In

[15] Social-ecological Aru Islands and Ari Wibowo, "Policy Paper on the Range of Struggles of the Marafenfen Indigenous People and the Various Problems of the Social-Ecological Crisis in the Aru Islands," no. January 2021 (2023).

[16] Teguh Ilham et al., "Measuring Media Affirmation towards Marginalised Groups: A News Analysis of Indigenous Peoples in Indonesia," *Journal of Dialectics: Journal of Social Sciences* 20, no. 1 (2022): 1–16, https://doi.org/10.54783/dialektika.v20i1.28.

[17] Saifullah Anwar et al., "Implementation of Sustainable Environmental Development Policies Through the Local Wisdom Approach of the Communities of the Wio / Mukoko Traditional Areas of T," *Journal of Education, Administration, Science, Economics and Government.* 2 (2022): 27–36.

[18] AMAN, "Press Release: Indigenous Peoples, Strategic Partners in the Face of Climate Change."

[19] Civil Society Coalition, "Climate Justice Coalition Position Paper Urging the State to Immediately Draft a Climate Justice Law" (Jakarta, 2023), https://www.walhi.or.id/uploads/buku/Kertas Climate Justice Coalition Position_Rev5.pdf.

addition, legal mechanisms should be established to ensure that any development project affecting indigenous peoples cannot proceed without legal recognition of indigenous territories and substantial participation of affected communities.[20]

3. Halmahera Case: The Energy Transition Project and the Disregard of Indigenous Peoples' Constitutional Rights

Halmahera Island, particularly the regions of Central Halmahera and East Halmahera in North Maluku Province, has been the site of large-scale expansion of the nickel mining industry in recent years. This mining activity has been fuelled by growing global demand for raw materials for electric vehicle batteries, which are a key part of Indonesia's green energy transition and low-carbon economic development project. The project is being driven under the national strategic investment framework and supported by regulations that prioritise the accelerated development of the renewable energy sector. However, one of the most affected areas is the indigenous territories inhabited by the indigenous people of Tobelo Dalam, Sawai and other coastal communities, who were not involved in the planning or decision-making process from the beginning. There has been no thorough mapping of indigenous territories, and mining concessions overlap with indigenous communities' living areas.[21]

For Halmahera's indigenous peoples, land and natural resources are not just economic assets, but living spaces that are integrated with cultural identity, spiritual values and traditional social systems. Opposition to mining activities is not only based on concerns over environmental damage, but also because the project threatens the sustainability of the community's social and cultural existence. Some communities have pursued claims to their customary territories, but these efforts have reached a dead end due to the absence of a formal response from the local government and the strong pressure of mining corporations' interests.[22] The imbalance in power relations between indigenous peoples and the state, in this case the government and mining companies, is striking.

The state's response in this case reflects favouritism towards investment interests. The central and local governments granted mining licences without consultation mechanisms that fulfil the principles of indigenous peoples' rights. Indigenous peoples' participation in the process of preparing environmental impact assessments (AMDALs) is almost non-existent. In a number of cases, communities who tried to voice rejection experienced criminalisation, intimidation and repressive pressure. The development approach ignores the principles of ecological justice and local community involvement as promised in various national climate policy documents, such as Presidential Regulation No. 98 of 2021 on the Value of Carbon Economy and the National Medium-Term Development Plan (RPJMN).

From a legal perspective, the situation in Halmahera reflects a disregard for various basic norms in the Indonesian legal system. Article 18B paragraph (2) of the 1945 Constitution explicitly recognises and respects the existence of customary law communities and their traditional rights. This provision is reinforced by Article 28I paragraph (3) which guarantees the right to cultural identity and traditional communities. In addition, Law No. 32/2009 on Environmental Protection and Management requires the participation of communities,

[20] Muazzin, "Protection of the Rights of Indigenous Peoples in REDD+ Activities," *Kanun Jurnal Ilmu Hukum* 17, no. 2 (2015): 277-302, https://jurnal.unsyiah.ac.id/kanun/article/view/6064/0.

[21] Muhammad Dahlan, "Recognising the Rights of Indigenous Peoples in the Constitution," *Undang: Journal of Law* 1, no. 2 (2019): 187–217, https://doi.org/10.22437/ujh.1.2.187-217.

[22] Tri Wahyuni and Ivan Batara, "Indigenous People of O'Hongana Manyawa Increasingly Squeezed by Nickel Mine," 2024, https://www.bbc.com/indonesia/articles/c1vdw94kkgyo.

especially customary law communities, in every policy and project that impacts their environment. In practice, all of these principles have been ignored in the Halmahera case, demonstrating the state's strong tendency to favour an approach of exploitation and extraction over participation and protection.

Ironically, the nickel mining project in Halmahera, which claims to support a green energy transition, is creating massive deforestation, ecosystem degradation, water pollution, and loss of community access to the natural resources that are the basis of their livelihoods.[23] This project shows how climate mitigation policies that are not based on principles of justice and participation of indigenous peoples, risk becoming tools of environmental destruction and human rights violations. The state is not taking a rights-based approach as advocated in the principles of sustainable development and international law that Indonesia has adopted.

The Halmahera case is thus an important example of the state's failure to align low-carbon development policies with constitutional mandates and principles of ecological justice. Instead of being strategic partners in maintaining ecosystem balance, indigenous peoples are marginalised and victimised by a centralised and technocratic development model.[24] Indonesia's climate policy therefore requires not only technical and administrative evaluations, but also structural corrections that ensure that indigenous peoples' constitutional rights are not only normatively recognised, but also substantively protected in all development and climate decision-making processes.[25]

Empirical Analysis and Policy Critique

Although constitutional and normative guarantees have been explicitly provided through Article 18B paragraph (2) of the 1945 Constitution, Constitutional Court Decision No. 35/PUU-X/2012, as well as provisions in Law No. 32/2009 on Environmental Protection and Management, in practice indigenous peoples still do not receive full protection and meaningful participation in national climate change policies. This gap between norm and practice reflects the state's systemic failure to internalise the spirit of ecological justice and rights-based legal principles into the climate policy architecture.[26]

One of the most obvious manifestations of this neglect can be seen in the strategic document National Action Plan for Climate Change Adaptation (RAN-API) prepared by the Ministry of Environment and Forestry. RAN-API, which is supposed to be the main guideline for adaptation at the national and regional levels, barely mentions explicitly the role or mechanism of indigenous peoples' participation. When mentioned, the position of indigenous peoples is often equated with "local communities" in general, without regard to the legal

[23] Haekal and Suci, "REDD+ Power and Exclusion as 'Climate Leviathan' and Land Conversion in Indonesia."
[24] Heri Sulaiman, Ramzi Durin, and Desi Purnama, "The Right to a Just Life: A Philosophical Analysis of the Fifth Precept of Pancasila," *Dame Journal of Law* 1, no. 1 (2025): 25-44, https://journals.yapilin.com/index.php/djh/article/view/5/6.
[25] Joni Adamson and Michael Davis, "Humanities for the Environment: Integrating Knowledge, Forging New Constellations of Practice," *Humanities for the Environment: Integrating Knowledge, Forging New Constellations of Practice*, 2016, 1-266, https://doi.org/10.4324/9781315642659.
[26] Irwan Kurniawan Soetijono, Andin Martiasari, and Veri Kurniawan, "Strategi Adaptasi Nelayan Dalam Menghadapi Perubahan Ekologis Di Pantai Cemara Banyuwangi," in *Covid-19, Perubahan Iklim Dan Akses Rakyat Terhadap Keadilan*, ed. A Myrna Safitri, Asep Yunan Firdaus, and Agung Wibowo (Bandung: CV. Media Sains Indonesia, 2020), 393–424.

dimension and collectivity of indigenous peoples' identity as constitutionally recognised subjects.[27]

Something similar can also be found in Presidential Regulation No. 98 of 2021 on the Implementation of Carbon Economic Value for Achieving National Contributions and Controlling Greenhouse Gas Emissions. In this Presidential Regulation, the state states that the right to carbon is attached to control over the territory determined through laws and regulations. However, this regulation does not provide an adequate mechanism to recognise the rights of indigenous peoples over territories that they have de facto managed for generations, especially in the context of customary forests that have been ruled by the Constitutional Court as not part of state forests. As a result, indigenous peoples not only lose the right to benefit from carbon ecosystem services, but also potentially become victims of unilateral claims by governments and corporations to their customary territories in the name of carbon trading or conservation projects.[28]

The absence of indigenous peoples explicitly in this policy document shows that the state still views them in a marginalised framework, not as the main actors in environmental management and climate crisis mitigation.[29] In many cases, indigenous peoples are direct victims of development projects and national climate policies. Cases such as the criminalisation of the Kinipan indigenous community in Central Kalimantan, the eviction of the Marafenfen indigenous community in the Aru Islands, land conflicts in Toruakat, North Sulawesi, and the seizure of indigenous peoples' living space in Halmahera for nickel mining[30], illustrate that low-carbon development does not always mean socially just.[31]

Projects such as food estates, the construction of the National Capital City (IKN), the expansion of nickel mines for energy transition, to REDD+ schemes and forest conservation show great irony. On the one hand, the state appears in international forums as a leader in green transition and sustainable development, while on the other hand, indigenous peoples experience dislocation, loss of living space, and are marginalised from the decision-making process. This phenomenon is referred to by scientists as a form of "green grabbing" or the seizure of living space in the name of conservation and climate.[32]

A number of academics and civil society organisations have also criticised the technocratic approach to climate policy. In the Indonesia Ocean Justice Initiative report, it is stated that the government's approach to climate policy is still very elitist and lacks participation. Indigenous peoples and coastal communities are often not involved in the programme design process or in the formulation of regulations that will have a direct impact on the sustainability of their lives. This is contrary to the principle of Free, Prior and Informed Consent (FPIC) as stipulated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Indonesia has ratified in principle through various official statements in international forums.[33]

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[27] Marah, *Op.cit*, 18

[28] Khoirul Amin, *et al*., "Menakar Koherensi Tata Kelola Perubahan Iklim Atas Hak Masyarakat Adat Dalam Program Perdagangan Karbon Di Kalimantan Timur," *Jurnal Dinamika Global* 9, no. 2 (2024): 335–50.

[29] AMAN, "Tangguh Di Tengah Krisis," *Catatan Akhir Tahun 2021*, 2021, 16.

[30] Keadilan Iklim and Masyarakat Adat, "Keadilan Iklim," n.d.

[31] Infokom AMAN, "Potret Masyarakat Adat Dalam Himpitan Krisis," 2022, https://aman.or.id/news/read/1368.

[32] Luthfian Haekal dan Pungky Erfika Suci, "Kuasa Dan Eksklusi REDD+ Sebagai 'Climate Leviathan' dan Alih Fungsi Lahan Di Indonesia," *Balairung: Jurnal Multidisipliner Mahasiswa* 1 no.1 (2018).

[33] Jeane Neltje Saly *et al.*, "Informed Consent (FPIC) Bagi Masyarakat Adat," *Yustitiabelen* 10, no. 1 (2024): 15–16.

This policy critique becomes even more relevant when linked to the constitutional rights approach. In a state of law, the implementation of public policies must not be discretionary and discriminatory, but must be subject to a democratically agreed legal framework, namely the constitution. Therefore, when the state issues climate policies without considering and involving indigenous peoples equally, the state not only violates the principle of ecological justice, but also denies its constitutional obligations. Given this reality, this empirical analysis shows that the state tends to utilise the climate change framework as a political and economic tool, rather than as an instrument to realise social and ecological justice transformation. Indigenous peoples, who are supposed to be partners in development, are instead the objects of sufferers of a development model that is in the name of climate but ignores rights.

This situation demands a paradigm shift. Climate change cannot be addressed solely by technological and market approaches, but requires structural changes in legal governance, power distribution, and relations between the state and indigenous communities. Without this, climate change adaptation and mitigation will only become empty slogans that do not touch the root causes of ecological inequality and constitutional injustice.

An Alternative Legal Model

The gap between constitutional guarantees and climate policy practices towards indigenous peoples shows that the current national legal and policy framework has not been able to accommodate the principles of ecological justice and recognition of customary rights. Therefore, it is necessary to reconstruct a legal model that is not only responsive to the challenges of climate change, but also transformative of the historical inequality experienced by indigenous peoples. This alternative legal model is not intended to replace the national legal system, but to propose a fair integration between state law, customary law and human rights principles.

First, the future legal model must rely on the principle of substantive constitutionalism. In classical constitutionalism thought, as proposed by Carl Schmitt and later developed by Lon L. Fuller, the law does not only regulate procedures, but also contains the value of substantive justice that must guide policy formulation.[34] In this context, it is not enough for recognition of customary law communities to be stated in the constitution and court decisions, but it must be consistently operationalised in all national climate policy documents. This requires the state to develop derivative norms, such as implementing regulations, technical guidelines, and budget mechanisms that explicitly recognise the role of indigenous peoples in climate change adaptation and mitigation.

Second, it is necessary to develop a mechanism for recognising the collective rights of indigenous peoples based on living customary law. Customary law is not just a legacy of the past, but a legal system that continues to live and develop in accordance with the social and ecological dynamics of indigenous communities.[35] Therefore, the legal model developed must accommodate the principles of legal pluralism, where indigenous peoples are authorised to manage their customary territories autonomously, including in the context of forest, water, carbon and other resource management. This mechanism can be pursued through the

[34] Dharma Setiawan dan Erwin Susilo, "Independensi Kekuasaan Kehakiman Dalam Menjatuhkan Putusan Ditinjau Dari Perspektif Undang-Undang Sebagai Perjanjian," *Jurnal Mimbar Hukum* 37, no. 1 (2025): 83–106, https://journal.ugm.ac.id/v3/MH/article/view/18891/5812.

[35] Muhammad Erfan, Nor Fadillah dan Fitria, "Hukum Adat Di Indonesia: Aspek, Teori, Dan Penerapan," *Maqashiduna: Jurnal Hukum Keluarga Islam* 2, no. 2 (2024): xx–xx.

establishment of customary institutions that are legally recognised and have decision-making, mediation and oversight functions over economic and ecological activities in customary territories.[36]

Third, strengthening the principle of Free, Prior and Informed Consent (FPIC) must be an integral part of every climate change policy and project that targets indigenous territories. FPIC is not just an administrative procedure, but an instrument to protect the rights to identity, land and existence of indigenous peoples. In the context of Indonesian law, this principle can be internalised in derivative regulations such as Ministerial Regulations, Regional Regulations, or Presidential Regulations, which stipulate that any adaptation or mitigation programmes must first obtain free, prior and informed consent from affected indigenous peoples. Without this principle, the participation of indigenous peoples will only be a complementary formality without substantive meaning.[37]

Fourth, states need to develop incentive systems and benefit sharing schemes that are fair to indigenous peoples. In many climate change projects such as REDD+, carbon trading and conservation programmes, indigenous peoples are often positioned as implementers without receiving proportional economic benefits. The new legal model should ensure that indigenous peoples' contributions to maintaining ecosystems are fairly rewarded, whether in the form of fiscal incentives, ecologically-based village fund allocations, or revenues from environmental services schemes. This is not only a form of economic redistribution, but also recognition of indigenous peoples' ecological contributions to national climate resilience.

Fifth, alternative legal models must be accompanied by institutional transformation that enables the active involvement of indigenous peoples in the climate policy formulation process. This includes participation in national and regional forums, climate committees, regulation drafting, and monitoring and evaluation mechanisms. The state can no longer monopolise knowledge and authority in policy-making, but must open an equal deliberative space with indigenous communities as key stakeholders.

This six-point framework is not intended as a final formula, but as a direction for a legal paradigm shift towards a holistic, participatory and equitable approach. Legal reform in the context of climate change is not just a matter of administrative technicalities, but an effort to reconfigure power relations between the state and communities, between markets and nature, between modernity and tradition. In a global climate emergency, the recognition of indigenous peoples is not just a matter of domestic or cultural identity, but a key prerequisite for the success of equitable and sustainable climate change adaptation and mitigation.

Conclusion

The Indonesian Constitution, Constitutional Court Decision No. 35/PUU-X/2012, and Law No. 32/2009 formally recognise customary law communities and their rights. Yet, national climate policies like RAN-API and Presidential Regulation No. 98 of 2021 largely overlook indigenous peoples, who often become victims of conservation, adaptation, and energy transition projects without meaningful participation or respect for Free, Prior and Informed Consent.

[36] Bayo, Wijaya dan Hadi, "Pengakuan Masyarakat Adat Dalam Peraturan Perundang-Undangan Di Indonesia."
[37] Muazzin, "Perlindungan Hak Masyarakat Hukum Adat Dalam Kegiatan REDD+," *Kanun Jurnal Ilmu Hukum* 17, no. 2 (2015): 277–302, https://jurnal.unsyiah.ac.id/kanun/article/view/6064/0.

Indonesia's climate change policies remain far from fulfilling constitutional mandates and principles of environmental justice. The state has yet to fully recognise and empower indigenous peoples, making it urgent for central and local governments to operationalise Constitutional Court Decision No. 35/PUU-X/2012, particularly regarding customary forests. Policies like RAN-API, the Presidential Regulation on Carbon Economic Value, and the RPJMN must be revised to explicitly include indigenous peoples as key stakeholders, with FPIC as a mandatory safeguard in all climate and development projects.

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