



## Comparative Recognition of Customary Land Rights Based on Legal Systems in Indonesia and Australia: Codification and Jurisprudence

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### ABSTRACT

This article examines the law systems that recognize indigenous land rights within the legal frameworks of Indonesia and Australia by comparing the civil law model based on codified legislation with the common law system grounded in jurisprudence. Indonesia, which adheres to the civil law tradition, recognizes indigenous land rights through written regulations such as the Basic Agrarian Law (UUPA) and the Constitution. However, its implementation is hindered by structural, administrative, and procedural challenges. In contrast, Australia recognizes indigenous land through the Native Title Act 1993, utilizing a case law-based approach that allows for judicial recognition and legal adaptation over time. This study employs a normative legal research method with a descriptive-analytical approach, drawing on Friedman's theory of legal systems, the theory of collective rights, and legal pluralism. The findings reveal that differences in legal systems significantly influence the recognition and protection of indigenous land rights. Indonesia's reliance on rigid codification may obstruct the recognition of untitled communal lands, whereas Australia's jurisprudential model enables more flexible responses through precedent (setting court rulings) despite facing tensions between indigenous claims and economic development interests. The study recommends enhancing Indonesia's administrative recognition system and adopting a more pluralistic legal approach to ensure substantive justice and cultural preservation for indigenous communities.

Keyword: Comparison of Legal Systems, Customary Land, Codification, Jurisprudence

### 1. Introduction

Indigenous peoples are entities protected by the state as part of the nation's society. In Indonesia, there are various indigenous peoples, which, according to the Aliansi Masyarakat Adat Nusantara (AMAN),<sup>1</sup> are 2,449 indigenous communities. Of these indigenous communities, it is estimated that there are around 40 million people or up to 70 million people.<sup>2</sup> Australia, a neighbouring country that also historically has the same situation as Indonesia, also has a history of people occupying the territory long before the country was built, before people from another place or continent came to Australia. Indigenous peoples in Australia itself are divided into 2 two, namely indigenous Australians

<sup>1</sup> AMAN. (2020) Catatan Akhir Tahun 2020 Aliansi Masyarakat Adat Nusantara Resiliensi Masyarakat Adat Di Tengah Pandemi Covid-19: Agresi Pembangunan Dan Krisis Hak Asasi Manusia (HAM).

<sup>2</sup>Alboin Samosir, Memahami Pentingnya Menjaga Keberadaan Masyarakat Adat, <https://aman.or.id/news/read/1455>, accessed May 30, 2025

or First Peoples and indigenous Torres Islanders. Indigenous Australians are the Aboriginal Australians who have various tribes of indigenous peoples under them.

With their respective histories, both Indonesia and Australia recognise their indigenous peoples in their state laws. Recognition is not only of the entity or culture but also of the land controlled by indigenous peoples. Indonesia regulates and recognises the protection of customary land rights in legislation. Article 18B, paragraph 2 of the 1945 Constitution (Pasal 18 B ayat 2 Undang-Undang Dasar Negara Republik Indonesia) recognises the existence of customary territories and customary law. Not only on Constitution Law, but also in the Act as the derivative and norm regulation from Constitution Law, Act Law Number 5 of 1960 (Undang-Undang Negara Republik Indonesia Nomor 5 Tahun 1960) concerning Basic Regulations on Agrarian Principles (UUPA). Meanwhile, Australia regulates in the Native Title Act 1993 (Cth) issued by the Commonwealth Federal Authority (Cth) of Australia as a federal parliament (Commonwealth Parliament). The enactment of these regulations indicates the protection as well as regulation of the rights of indigenous peoples who naturally have rights over and use their land according to their own laws and customs. In line with the federal parliament, the New South Wales state parliament also enacted the Native Title Act 1994 (NSW). The legislation the Native Title Act 1993 (Cth) was a response to a ruling by the High Court of Australia that abolished the *terra nullius* (unoccupied land) doctrine previously used by colonial governments to claim Australia was legally uninhabited when colonised. This ruling recognised the existence of Aboriginal customary law.<sup>3</sup>

In Indonesia, customary land disputes still frequently arise, both regarding the recognition of rights in administrative law and/or civil disputes due to losses. It also raises land rights violations such as illegal transfer or transaction of land rights, trespassing land, and intimidation for land tenure with no legitimacy. The role of court judgements as a source of law to both Indonesia and Australia. However, the role is different; in Australia, the judge's decision (jurisprudence) becomes a decision that can be directly followed in the same dispute, but in Indonesia, the judge in the same dispute does not have to follow the previous judge's decision automatically, because Indonesia emphasis codification first to decide the case or dispute.

There are various types of jurisprudence in the legal system, including permanent jurisprudence, which is a judge's decision that arises from a series of similar decisions and is used as a reference by the court in deciding similar cases in the future. Judicial decisions that do not use previous judicial decisions as a basis for decision-making are called non-permanent jurisprudence. Semi-judicial jurisprudence is a court decision that is issued at the request of an individual and applies only to that applicant, for example, in determining the status of a child. Administrative jurisprudence refers to the Surat Edaran Mahkamah Agung (SEMA), which is administrative in nature and is only internally binding within the judiciary (<https://pa-cimahi.go.id/hubungi-kami/peraturan-dan-kebijakan/yurisprudensi>).

The different application of jurisprudence is a characteristic difference between civil law and common law systems. The application of these legal systems affects the position of codification and jurisprudence in decision-making in the countries that adopt them. Both in Indonesia and Australia, several judicial decisions have decided cases on the recognition of customary land rights. The different characteristics of legal systems show that each legal system has different regulatory mechanisms, although the main goal of each legal system is justice. The importance of studying and understanding the country's legal system lies in knowing the character of the law, including the mechanism for implementing the law. From a pragmatic point of view, the purpose of comparative law is not only to look for similarities and differences, but it is precisely with the differences and similarities that the results of the study can find legal reforms and millions can find answers to the legal problems faced.<sup>4</sup>

Similarities in the legal systems of various countries at the global level can be caused by a number of factors, including the universal needs of society for order and justice, similarities in political and

<sup>3</sup> ABC Australia, ELL: Makna Frasa 'Terra Nullius' dan 'Native Title', <https://www.tribunnews.com/australia-plus/2017/06/05/ell-makna-frasa-terra-nullius-dan-native-title>, diakses 1 Juni 2025

<sup>4</sup> Atmasasmita, Romli. (1989) Asas-Asas Perbandingan Hukum Pidana, Yayasan LBHI, Jakarta

cultural patterns, and the exchange or transfer of legal values between countries. Other contributing factors include similarities in the history of legal development, the infiltration of legal norms from one system to another, and historical links that form the foundation of law in different regions. Meanwhile, differences arise due to variations in land conditions, weather, and atmosphere, ways of thinking, perspectives on life, and the character of a nation, history, and evolution, political and cultural patterns.<sup>5</sup>

In the civil law system, aspects of life and disputes have been regulated in written laws and regulations. However, the law continues to move and develop due to the rapid changes of the times, including changes in society. The need for legal regulation always needs to be improved, while the law is always lagging behind with changes. So that the potential absence or incompleteness of laws and regulations in a case arising from changes in the times and society will result in what is called a regulatory vacuum or incompleteness of a regulation. In the civil law system, the role of the judge is passive and limited to the interpretation of the text of the law.

The Common Law legal system applies fixed jurisprudence, where previous judicial decisions are used as guidelines in resolving similar cases in the future. Judges follow the decisions of previous judges in similar cases or disputes. This system also emphasises customary law that grows and develops dynamically along with changes in society. The law is formed through the judiciary in addition to existing laws. The judiciary is considered more adaptive because it allows the law to always reflect a sense of justice and the real needs of society. The application of common law can make the legal system more flexible and responsive to social developments, both in local and global contexts, thus opening up space for legal development that goes beyond the limitations of written law. In contrast, the civil law system emphasises the importance of legal certainty through systematic written rules. Legal certainty is considered easier to follow by the community.

To examine how Indonesia and Australia apply their legal systems and their influence on the purpose of securing existing land rights and also by exploring the comparison of legal systems, a study can be produced on how the influence of the legal systems of Indonesia and Australia on the law of land recognition of indigenous peoples.

Based on the above, this research is based on the main issues relating to the legal protection of customary land rights. how the influence of the legal system on the codification and jurisprudence of Indonesia and Australia. and how it affects the regulation of the recognition of indigenous peoples' land rights in Indonesia and Australia in terms of the approach of legal codification in Indonesia and jurisprudence in Australia. It is hoped that the results of this study can create opportunities to increase the utilisation of the legal system to improve the quality of regulation and enforcement.

## 2. Research Method

Article with descriptive, analytical, normative research that aims to provide a clear, systematic, real, and precise study of the issue of recognition of land rights in indigenous peoples from the perspective of national land law and comparison based on the legal system. The research uses legal materials of legislation, books, and sources in the form of research results related to the subject matter of the research. The research uses legal theory to find the influence of each legal system, which is then also discussed in the realm of land recognition of indigenous peoples in Indonesia and Australia, who have different legal systems but have in common that there are indigenous peoples who have occupied the territory before the state existed or was formed. The legal system in Indonesia applies civil law, and the Australian legal system applies common law, although currently Indonesia is said to no longer purely adhere to civil law, leading to a mixed legal system between civil law, Islamic law, and customary law.<sup>6</sup> By studying from the side of the comparison of legal systems, it is hoped that the

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<sup>5</sup> Gozali, Djoni Sumardi. (2018). *Pengantar Perbandingan Sistem Hukum (Civil Law, Common Law, dan Hukum Adat*. Bandung: Penerbit Nusa Pedia

<sup>6</sup> Sinaga, Masyitoh Yahya, Rosdiana Saleh. (2023). *Perbandingan Sistem Hukum Indonesia Dan Australia Terkait Kewenangan Pemeriksaan Keuangan Negara*, *Citra Justicia Majalah Hukum dan Dinamika Masyarakat* 24 (1): 28-42, <https://doi.org/10.36294/cj.v24i1.3140>

study/analysis can find the influence and impact of the regulation, so that Indonesia can strengthen the legal regulation of indigenous peoples' land recognition.

This research analyses aspects based on the theory put forward by Friedman, which will look at three components, structure (legal structure), substance (legal substance), and culture (legal culture). From the theory of Friedman's legal system components, then this research will also examine from the point of view of collective rights theory or legal pluralism theory which is very important in the study of indigenous peoples.

By examining comparative legal systems, it will be possible to identify the similarities and differences between the two legal systems and their arrangements. The differences in the legal systems of these two countries have an impact and influence on the recognition of rights in each of these countries, and the law is implemented in different ways. This means that there is an influence on the application of civil law and common law in both countries, so it is necessary to study the similarities and differences in legal systems and their effects so as to find regulatory solutions in Indonesia in order to achieve full, fair legal protection of indigenous peoples while still upholding the principles for the benefit of the state.

### 3. Results and Discussion

In explaining the meaning of the legal system, the opinions of legal experts vary and have different meanings. Although different, the notions are mutually supportive and complementary. Sudikno stated that the law is a system. The legal system is a normative system because it also includes rules or statements about what should be. In the legal system, elements and various components have a certain relationship that forms a special order called structure.<sup>7</sup> There are several opinions about comparative law, both comparisons between fields of law and comparisons in terms of comparing legal systems. However, the point is the same, namely that the comparison of legal systems is used to produce legal system data which will be useful as material for analysing positive law.<sup>8</sup>

#### 3.1. Civil Law Legal System in Indonesia of Dutch influence and Common Law Legal System in Australia of British influence

The Civil Law System, developed in mainland Europe, has historical roots in the rules enacted in the Roman Empire in the 6th century AD. The Common Law System, also known as the Anglo-Saxon or Anglo-American System, originated in England and spread to the United States and various former British colonies. Historically, this system originated from an effort to maintain the customary law of the local English community, which was then enriched with legal elements from the Continental European tradition.<sup>9</sup> The history of foreign/foreign occupation has an impact on the application of the legal system in the territory controlled. Indonesia, which was colonised by the Dutch, was influenced by the regulation of Indonesian law, which led to Civil Law as applied in the Netherlands. During the Dutch occupation, the law was formed in the colony (Indonesia) to implement the Dutch government in Indonesia, which regulated all aspects of government and society. During the time of independence, the influence of Dutch law was still felt, and the NRI Government was still trying to replace the Dutch law that was still in force because it was considered necessary to adjust to the conditions of society in Indonesia. In civil law, the main source of law is promulgated legislation or written law. This is to ensure legal certainty that what the judge decides must be based on written regulations, and the judge decides more based on regulations that have been written only, cannot interpret too far from what has been written.

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<sup>7</sup> Ulfah, Maria, *Perbandingan Sistem Hukum*. (2022). Banjarmasin: Universitas Islam Kalimantan Muhammad Arsyad Al-Banjari, 2022

<sup>8</sup> *Ibid*, Atmasasmita, 1989

<sup>9</sup> *Ibid*

Common law in Australia is applied because Australia is a British commonwealth, given Australia's historical background as a former British colony. This legal system relies on the principle of precedent or jurisprudence, where judicial decisions in previous cases become the main reference in resolving similar cases in the future. In this framework, written legislation does not act as the main source of law, but rather serves as a complementary tool to consolidate or clarify legal principles that have been formed through judicial practice. A distinctive feature of the Common Law system is the use of inductive thinking and analogy, and it is based on the principle of the Rule of Law. The sources of law in this system include court decisions, legal customs living in the community, as well as written laws and administrative regulations.<sup>10</sup>

In the Civil Law System, there are three characteristics, namely: codification (written) so that judges are not bound by precedent, this system cannot be separated from the principle of separation of powers, and this system applies an inquisitorial system in the judicial process. First, through codification, judges apply only positive law, are not bound by precedent, so that positive law becomes the main source of law, and the judicial system is inquisitorial. Under this system, the law has binding force because it is written in the form of statutes, systematically arranged in codification, and also publicly announced, because the goal of legal certainty is the main target in this system. This system regulates human legal actions through written regulations, so judges are not bound to create laws that must be followed by subsequent judges. Here, the judge only establishes and interprets the rules, resulting in the Doctrine of *Res Ajudicata*, which states that the judge's decision in a case is only binding on the parties involved. In the same way, in making decisions, the Civil Law system gives judges a lot of freedom to decide cases without having to follow the decisions of previous judges. The basis that judges rely on is the provisions laid down by the legislature. Secondly, in its civil context, it is modelled on the theory of the division of powers, which includes the legislature, executive, and judiciary. The arrangement in Dutch law includes a separation between the legislature, the judiciary and the cassation system, so that the judiciary cannot interfere with the legislature. In this context, civil law gives judges discretion without being bound by previous decisions. Third characteristic, the application of the Inquisitorial system in civil law, judges play an important role in directing and deciding cases; judges play an active role in finding facts and carefully assessing the evidence of a case. Therefore, the civil law system relies on the professionalism and integrity of judges.<sup>11</sup>

In the Common Law legal system, this legal system is based on jurisprudence, where decisions made by previous judges become the basis for judges' decisions in future decisions. So that judges in making decisions are bound by the decisions of previous judges. This is because this system prioritises customary law, where it is considered that the judge's decision will take into account the current conditions as customary law. Thus, the application of law runs more dynamically in line with the dynamics that occur in an ever-changing society. So that in a law enforcement, legal discovery can be obtained by judges and legal formation can occur through judicial institutions in the form of jurisprudence applied by subsequent judges.

George Winterton compiled the differences as a comparison material between the Civil Law and Common Law Legal Systems in terms of character, characteristics, or nature. The Civil Law legal system, or Continental European legal system, has a number of characteristics that distinguish it from the Common Law or Anglo-Saxon legal system. In Civil Law, there is an administrative court system that specialises in certain types of cases, whereas in Common Law, there is only one type of court that handles all cases without separation. Civil Law also emphasises legal studies conducted by experts as the basis for the formation of law, while Common Law is more developed through practices and procedures that take place in court. In terms of the view of law, Civil Law sees law as something ideal or should be (*sollen*), while Common Law sees law as something real and applied in society (*sein*). In civil law, the discovery of legal rules is conceptual and abstract, and they are used as guidelines in

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<sup>10</sup> Siregar, Praise Junta W.S. (2022) *Perbandingan Sistem Hukum Civil L Perbandingan Sistem Hukum Civil Law Dan Common Law Dalam Penerapan Yurisprudensi Ditinjau Dari Politik Hukum*, Jurnal Dharmasiswa, Volume 22, 1027-1036. <https://scholarhub.ui.ac.id/dharmasiswa/vol2/iss2/37/>

<sup>11</sup> Sulistiani, Siska Lis. (2021). *Hukum Adat Di Indonesia*, Jakarta: Sinar Grafika

resolving cases. In contrast, in Common Law, legal rules are found concretely and directly applied in case settlement. In addition, in the Civil Law system, no special institution is needed to correct or reinterpret the rule of law. However, in Common Law, there is a special institution that plays a role in elaborating or developing existing legal rules. Legal codification is an important feature in Civil Law, where the law is systematically codified, whereas in Common Law, there is no such legal codification. In terms of jurisprudence, the Civil Law system does not consider previous judicial decisions as a binding source of law, whereas in Common Law, previous decisions must be followed in similar cases. Judges' views in Civil Law tend to be less technical and not limited to specific cases, while judges in Common Law have a more technical approach and are focused on resolving specific cases. Lastly, the structure of the legal system in Civil Law is based on the law of obligations and is open to change. Meanwhile, in Common Law, there is no such fundamental categorisation, and the legal structure is based on concrete and practical legal rules.<sup>12</sup>

The role of each legal system in the application of law has both positive and negative aspects. The positive aspect of the civil law system is that aspects of life and disputes have been regulated in written laws and regulations. The negative side of the civil law system is that the law continues to move and develop due to the rapid changes of the times, including changes in society. The need for legal regulation always needs to be improved, while the law is always lagging behind with changes. So that the result is the potential for the absence or incompleteness of laws and regulations, in this case, the judge is only a tool of the law. The positive aspect of the common law system is that it is more flexible in adjusting to regulatory needs that are not yet clear or do not exist. The negative side requires caution in making decisions because the rules are more based on the consideration and judgment of judges. If the judge's professionalism is not carried out, it will threaten legal certainty.

### 3.2. Recognition of Indigenous Peoples' Land Rights and Case Studies: Key Court Decisions

In general, Article 18B paragraph (2) of the 1945 Constitution states that there is recognition and respect for customary law communities and their traditional rights, provided that as long as the customary community and rights are still alive, in accordance with the development of society and the principles of the state, and further regulated by law. Then in the land sector, the provisions of customary law are regulated in a special law, namely UUPA (Sulistiani, 2021). Article 3 of UUPA stipulates that overall land is controlled by the state, but UUPA recognizes the existence of customary law as long as customary rights, and the rights of customary law communities, are still recognized if they still exist in reality and do not conflict with national interests and applicable laws and regulations. The existence of customary rights is not automatic and must be proven factually. Thus, although customary rights are recognized, such recognition remains subject to the limitations of public interest and national development. UUPA places customary law as part of national agrarian law, but it is still adjusted to the needs of modern society and the direction of the country's development.

Despite their recognition, these rights must be proven in the event of a dispute and to ensure customary land tenure by indigenous peoples. If there is a dispute between indigenous peoples and other parties, such as the Government or other private parties/individuals, a legal settlement mechanism through the courts can be pursued to provide a decision on land rights and compensation. This means that even though there is a written guarantee of protection of customary land rights, if there is a dispute, there still needs to be proof.

In Indonesia, in relation to customary land disputes resolved through the courts, judges' decisions are not necessarily followed by other judges. Some of the judges' decisions related to customary land rights include MARI Decision No. 1704/K/Sip/1981 dated 11 March, which contains the rule of law, customary law with the opening of land by indigenous people, then cultivating it (right of use). With a process of implementation that takes time, energy, and capital, the land becomes the property of the person concerned. Also, in MARI Decision No. 3648 K/Pdt/1985 dated 19 August 1987, which contains the rule of law, to determine land ownership, additional evidence is needed, namely the grave

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<sup>12</sup> Nurhadianto, Fajar. (2015) Sistem Hukum dan Posisi, Jurnal TAPIs Vol. 11 No. 1, 34-45. <https://doi.org/10.24042/tps.v11i1.840>

of the person who made the land on the land, which shows the determinant of the person who first controlled the land.

In addition to the two MARI decisions, there are also MARI decisions on certain tribes/customs that have different customary cultures, for example in the Manggarai area, it is determined by the traditional farmland party which is the legitimization of a person's right to a piece of land. There is also in Blang Mameh Lhokseumawe, which determines that there must be a legal relationship between the person and the land, namely that the land must be worked/cultivated or at least given a boundary/fence.

SEMA No. 1704/K/Sip/1981, which held that customary land belongs to the individual who opened and cultivated it, shows recognition of the customary land tenure system. However, the enforceability of this decision has not set a strong precedent in similar cases, as there is no obligation for other judges to follow suit. This inconsistency reflects the weakness of the civil law system, which is not based on jurisprudence, and ultimately makes indigenous peoples dependent on the approach of judges on a casuistic basis. This is a serious obstacle to the establishment of legal certainty over customary land rights.

What happens in the civil law system is that each judge's decision does not become jurisprudence between future judges, this is because there are various customary conditions / peculiarities in each customary dispute, so that judges are required to be more able to see each peculiarity of the dispute that will be decided. This does not mean that previous judges' decisions cannot be used as consideration for later judges.

Just like in Indonesia, there are indigenous peoples in Australia. The British who came to Australia at that time were already indigenous Australian tribes, such as the Maori tribe in New Zealand and the Aborigines in Australia. The occupation of the British made Australia a British colony, so the legal system used in Australia is the same Common Law system as applied by the British state.

Although there are disputes over customary recognition in constitutional rights, customary land is recognized by Australia. In particular, the land registration system in Australia has been well computerized through the Torrens Title system introduced in the 19th century. However, there are still challenges associated with recognizing indigenous peoples' rights to their land. The main contents of the Native Title Act include the recognition that native title is a valid legal right; the establishment of legal mechanisms through the Federal Court and the National Native Title Tribunal to lodge and administer native title claims; and the regulation of mediation and dispute resolution processes that may arise between indigenous peoples, governments and third parties, such as mining companies or commercial landowners. It also provides protection for customary land from actions that could extinguish the right, except through a process strictly defined in the regulations, and provides opportunities for compensation where customary land rights are used or occupied by the state. Through this legal framework, the Australian government seeks to bring justice and reconciliation to indigenous peoples who have experienced historical and structural marginalization. The Native Title Act 1993 has formally recognized Aboriginal peoples' rights to their traditional lands. However, the implementation of the law has often been met with obstacles and conflicts with economic interests and infrastructure development.

In Australia, although the land administration system is very good and uses advanced technology and has been computerized, and also the indigenous people in Australia are not as many as in Indonesia, customary land disputes in Australia still have challenges, especially related to land disputes in the country's economic and industrial development. Therefore, a dispute resolution mechanism through the courts is used so that a judge can decide it.

One example of a dispute was a land dispute at a Western Australian mine in 2018. This dispute even led to internal disputes between indigenous peoples. In this dispute, a Fortescue Metals Group (FMG) mining company controlled mining land in the Pilbara region. Then, the indigenous people sued and claimed that the land was customary land. Besides that, they also demanded payment of royalties generated by FMG projects while controlling and utilizing the mining land. This customary claim occurred because of exclusive customary rights and interests. This dispute also occurred because all British Crown land in Australia has not been allocated to the Yandera Conservation Area. This is because there is British Crown land that has not been allocated. In the dispute, the judge ruled to give

the Yindjibarndi people native title to the land that includes FMG's Solomon Hub mine. This ruling may set a precedent/jurisprudence in future land disputes between indigenous peoples and private/industrial organizations, especially as all British Crown land in Australia has not been mapped.

### 3.3. Theoretical Analysis, System Comparison, and Impacts

With Friedman's theory of the components of the legal system, the basis of the legal problem of disputes over customary land rights needs to be seen from its structure, where there is the role of the central government in drafting regulations and regulating land as the livelihood of many people. There is also the role of the local government to map the customary areas of the community in its territory, there is also the role of the National Land Agency as an agency given attribution authority in land administration, and also the role of judicial institutions in resolving customary land disputes. Looking at the legal structure, there is also the role of judges in deciding cases or disputes related to customary land. Judges, as part of the written law enforcers, also need to fairly prove the requirements for customary land rights as stipulated in the UUPA. That is, if customary law is still alive and the rights do not conflict with national interests and laws and regulations. In this case, it can also be said that the judge is the arbiter in the decision. Interpreting the national interest will clash between the rights of indigenous peoples and the rights of the state in regulating national land for the welfare of the country. As much land as possible is used for welfare. What is seen and what is aimed at, which is more important, is not enough to decide customary land disputes. There is an element of sustainability for indigenous peoples. Whether development on indigenous peoples' land does not interfere with the preservation of indigenous peoples. Therefore, although the judge must still implement the written law, the judge must also consider justice as fair as possible.

In terms of legal substance, the civil law concept continues to demand that what is regulated by written law must continue to be adjusted to changes in society. In the concept of civil law, what is written is the guide in deciding related disputes. Whereas in common law, because the law continues to develop, the substance of written law allows judges to act based on their interpretation, and the judge's decision is a new law followed by subsequent judges in similar cases.

From the cultural aspect, the application or practice of protection of customary land rights is a consideration for judges in giving their decisions. In addition to the state guaranteeing land rights, it is also necessary to protect the preservation of indigenous peoples. Land disputes also need to detect losses experienced by indigenous peoples. The role of the central government and local governments towards the preservation and protection of indigenous peoples' rights needs to continue to provide a forum for protection in the form of customary law registration.

In addition to Friedman's theory, the issue of indigenous peoples' rights also uses the perspective of collective rights theory and legal pluralism theory. Both theories are very relevant and play an important role in the study of indigenous peoples.

Collective rights theory emerged in response to the weakness of the individual rights approach in providing protection to minority groups, particularly indigenous peoples and ethnic communities. Will Kymlicka states that collective rights are rights that are owned by groups, not by individuals, and aim to maintain a community's cultural identity, language, traditions, and social practices. These rights are crucial in multicultural societies to prevent the domination of a more generalized culture. Three categories of collective rights according to Kymlicka: Self-government rights (the right to manage political affairs), Polyethnic rights (the right to maintain cultural identity), Special representation rights (guarantee of participation in the political system).<sup>13</sup> From this theory, we can see that communities have a political position in defending their customary rights, including their customary land rights. Land rights are an indigenous cultural identity, not just a place to live or a place to get food. The loss of indigenous peoples' land rights will also eliminate their indigenous identity. And the collective right of representation is that the state guarantees the right to opinion and regional representation that can raise indigenous aspirations in the region.

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<sup>13</sup> Kymlicka, Will. (1995). *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford University Press

The theory of legal pluralism refers to the existence and interaction between two or more legal systems within a single geographical area. According to John Griffiths,<sup>14</sup> legal pluralism occurs when social behavior is governed by more than one normative system. Griffiths distinguishes between strong legal pluralism (a fully functioning non-state legal system) and weak legal pluralism (state law that allows other systems to exist). With the theory of legal pluralism, it appears that each indigenous community also has its own internal legal system, such as its land utilization rights, which has a predetermined management structure, including the future of sustainable management from generation to generation. In terms of weak legal pluralism, the existence of customary legal systems in each community can weaken the state legal system if there is no tolerance or provision of fair justice.

Sally Falk Moore proposed the concept of semi-autonomous social spheres, which are groups that create and apply their own rules even though they are located within the legal framework of the state.<sup>15</sup> The theory goes that although the state regulates the law and the state courts can give judgments against indigenous peoples, the potential for protest and rejection by indigenous peoples can occur. The sense of injustice received by indigenous peoples will continue to be voiced in various ways because the sense of ownership by indigenous peoples of the land has been inherent and has become their identity from generation to generation. This sense of ownership and identity indicates the existence of a separate law in the community. It is a challenge for the state to protect these rights as fairly as possible.

The NRI is made up of many indigenous peoples, but faces the obstacle that the recognition of community land rights is not all in writing, given the large number of indigenous peoples, the vast territory of the NRI and the authority given to the center and to the regions to regulate indigenous territories in their territories is still difficult to meet the demands of all arrangements in writing. Not all indigenous peoples' lands have been determined in writing. The factor of land control for the benefit of the state to land disputes that indicate customary land is still a problem that must be resolved, so that a court mechanism is used to get a judge's decision on customary land disputes. The legal structure needs to ensure that the central and local governments and judges exercise their authority in guaranteeing indigenous peoples' land rights. In terms of legal substance, although the guarantee of customary rights is provided by the state, the substantive arrangements are not yet complete. The process of planning and drafting the Indigenous Peoples Bill is still in process to become a law.

Other challenges relate to the complexity of customary law and bureaucracy that still require refinement. The complexity of the land system in Indonesia is inseparable from a long history involving customary law, Dutch colonial heritage, and post-independence socio-political dynamics. This has resulted in various problems such as overlapping ownership, land disputes, and not achieving the target of comprehensive land registration.<sup>16</sup>

Basically, the Australian Government emphasizes that Indigenous people and immigrants are able to assimilate within the framework of multiculturalism policies, by trying to accept Australian core values. However, on 15 October 2023, a referendum on Aboriginal constitutional rights was held, with almost 60 per cent of the community rejecting their constitutional rights. In other words, the existence of aborigines as indigenous people was not recognized by the new settlers who came and settled on the continent. This controversy led to Indigenous leaders flying flags at half-mast and a week of reflection as a symbol of mourning. The referendum result signaled a significant setback in efforts to

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<sup>14</sup> Tamanaha, Brian Z., Understanding Legal Pluralism: Past to Present, Local to Global. *Sydney Law Review*, Vol. 29, 2007, St. John's Legal Studies Research Paper No. 07-0080, Available at SSRN: <https://ssrn.com/abstract=1010105>

<sup>15</sup> Moore, Sally Falk. (1978). *Law as Process: An Anthropological Approach*. Routledge, 1978.

<sup>16</sup> Mahardhika, Zerlina Mendy, et al. (2024). Studi Perbandingan Kebijakan Pendaftaran Tanah Di Indonesia Dan Australia Dalam Mengelola Sumber Daya Tanah, *Jurnal Hukum Dan Kewarganegaraan*, 10(1), 81–90. <https://doi.org/10.3783/causa.v10i1.9530>

reconcile with Indigenous communities and damaged Australia's reputation in the eyes of the world regarding the country's treatment of First Nations people (Sumpena, 2024).

#### 4. Conclusion

A comparison of the Indonesian and Australian legal systems shows that the difference in legal structure between civil law based on written codification and common law based on jurisprudence has a direct effect on the mechanism and effectiveness of recognition of customary land rights. In Indonesia, although customary land rights have been normatively recognized through the UUPA and the 1945 Constitution, their implementation still faces obstacles in the form of data limitations, overlapping sectoral regulations, and suboptimal involvement of indigenous peoples in the process of legalizing their land. The recognition of customary law tends to be administrative and requires additional regulations, which are often constrained in responding to the dynamics in the field. Meanwhile, Australia, through the Native Title Act 1993, uses a precedent-based approach that allows the recognition of customary land rights through court decisions. This system is more flexible in responding to indigenous peoples' demands for justice, although it still faces challenges in implementation, especially when it intersects with economic and industrial interests. These different legal systems show that not only the form of rules, but also the role of judges, the political alignment of law, and recognition of the plurality of customary laws are key in ensuring substantive justice for indigenous peoples.

Based on the findings of this study, it is recommended that the Government of Indonesia accelerate the process of identification and legalization of customary land through a more participatory and accommodating land administration system for indigenous peoples. This step is important to ensure symbolic recognition and concrete legal protection. Land regulatory reform needs to be geared towards explicitly recognizing legal pluralism by opening more space for customary law in the national legal system. In addition, the judiciary's role in Indonesia should be strengthened to be more progressive and contextual in interpreting legal norms, including by considering the socio-cultural dimensions and history of land tenure by indigenous peoples. The Australian practice of recognizing customary land rights through jurisprudence and allowing compensation for disturbed rights could be an alternative model worthy of further study in Indonesia. Synergy with a clear division of tasks between the central government, local governments, and indigenous peoples is needed to build a system of customary land rights recognition that is equitable, sustainable, and in line with the principle of respect for local legal and cultural diversity.

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