Abstract

Indigenous peoples’ existence is intrinsically linked to their customary rights, with significant disputes arising over the formal recognition of these rights. However, conditional or partial legal recognition frequently disadvantages indigenous communities. The state has a responsibility to uphold the rights of indigenous peoples, necessitating regulations that effectively safeguard their land rights. This article examines the recognition and fulfilment of indigenous peoples’ rights to natural resources through legal analysis, conceptual frameworks, and case studies. The findings indicate that since 1998, there has been a governmental intent to formally recognize indigenous rights to natural resources, as reflected in various laws and regulations. However, the implementation of these rights has been challenging due to ambiguities in the 1945 Constitution and the related regulations. Effective fulfilment of Indigenous land rights must adhere to key principles, including recognition of jurisdictional areas, the right to self-determination, Indigenous consent, community involvement, and the provision of fair compensation.

Keywords: Indigenous People’s Rights, Natural Resources, Justice

A. Introduction

Indigenous peoples are spread across 90 different countries. Among
them, 70% of all indigenous peoples live in Asia-Pacific, 16.3% in Africa, 11.5% in Latin America, and 0.1% in Europe and Central Asia.\(^1\)

Indigenous peoples currently occupy about 22% of the world’s land area and contribute to most of the world’s cultural diversity, including speaking most of the world’s 7000 languages. There is no universally accepted definition of indigenous peoples.\(^2\)

Indigenous peoples have existed in Indonesia since long ago until today. According to many scholars, indigenous peoples and communities governed by customary law are two different concepts. Indigenous people’s is a general term for certain groups that share a common culture and history. On the other hand, a customary law society is defined by a set of rules and regulations set by a legal entity. Indigenous peoples have a special relationship with the land on which they have lived for generations and have knowledge regarding the sustainable management and protection of the natural resources around them.\(^3\)

Indonesia cannot be separated from customary rights as an Indonesian identity. The regulation of customary rights, which contains diversity and uniqueness, is a challenge for the government to achieve equality.\(^4\) In this regard, indigenous rights still do not have a place as the main concern as a subject of understanding in the political, economic, social and cultural fields. The rights and protection of indigenous peoples are regulated in the second amendment of the 1945 Constitution. The state recognizes and respects Indigenous Peoples in various regions along with their customary and traditional rights as stated in the 1945 Constitution Article 18B Paragraph (2), subject to certain conditions. The Constitution states that “The State recognizes and respects the unity of indigenous peoples and their

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3 Intania.
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”.

In customary rights, land has two important reasons; it is the only object of permanent wealth and as the residence of indigenous people as well as the burial place of deceased clan members. Land is a human right of every person whose existence is guaranteed according to Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, which states that “On the basis of the right to rule is the State, as mentioned in Article 2, it is determined that there are many types of rights over the surface of the earth called land, which can be given and owned by a person, either alone or together with other people and legal entities”.

Land disputes in Indonesia have been a source of contention. The existence of customary land rights and customary rights related to the ownership and management of customary land is one of the causes of conflict. Customary land conflicts are always large-scale and structural in nature. Indigenous peoples are often confronted with State-Owned Enterprises (BUMN) and Regional-Owned Enterprises (BUMD), which are closely related to agricultural resources such as forestry, mining, and plantations, as well as in other fields, in the context of land acquisition for development in the public interest.

The procedure for determining the existence of customary rights is regulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency (BPN) Number 5 of 1999

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8 Sri Hajati et al., Buku Ajar Politik Hukum Pertanahan (Surabaya: Airlangga University Press, 2023).
concerning Guidelines for Settlement of the Rights of Indigenous Peoples. The issue was issued on June 24, 1999. The requirements of Article 5 stipulate that customary rights are still recognized if the following conditions are met: there is a group of people who still feel bound by their customary legal order as citizens of a particular legal community and who recognize and apply the provisions of the community in their daily lives; there is certain customary land which becomes the living environment and residence of the members of the legal community; and there is a customary legal order that regulates the management, control, and utilization of customary land that must be obeyed by members of the legal community.

Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency (BPN) Number 5 of 1999 has been revoked by Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency (BPN) Number 9 of 2015 on Procedures for Determining Customary Rights to Land of Customary Laws and Communities Located in Certain Areas issued on May 12, 2015. A year later, ATR/BPN Regulation No. 10/2016 canceled ATR/BPN Regulation No. 9/2015. Because the ATR/BPN Regulation regulates community rights that are conceptually different from customary rights, the mention of customary rights is ambiguous. The ATR/BPN Regulation even equates community rights and customary rights.

The conflict stems from misaligned perceptions between indigenous peoples and the government. The government considers that they have the right to control the land based on Law No. 5/1960 on Basic Agrarian Principles Article 2. On the other hand, indigenous peoples consider land and natural resources to be their property. Because they contain an entire value system covering various aspects, such as politics, economics, socio-culture, ecology and religion, they believe that the relationship between humans and the earth, water, space and natural resources is a legal relationship controlled by prop-

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Indigenous peoples and the government have different perceptions because the government does not explicitly define and determine the position of customary land in the national legal system, particularly in Law No. 5/1960 on Basic Agrarian Principles. The government even rejects or limits the application and implementation of customary rights of indigenous peoples. According to Maria SW Sumardjono, land issues are a serious situation so that there needs to be a common understanding so that there is a common view so that it can produce substantial and fair decisions for justice seekers. The following issues require such a perception: (1) Customary rights, such as conception, qualification conditions, and compensation (2) Land acquisition for public interest, including the definition of public interest, scope of activities, discussion methods, and compensation options (3) Land certificate information, including the location of certificates, any legal defects, and how to revoke or resolve them (4) State land, (4) State land, including the definition, scope, and procedures for its existence (5) People’s land management, including the status of cultivated land, de facto control by the people, and the principles of settlement and (6) Sale and purchase of land and its transfer rights, including the validity of sale and purchase, the function of registration, and the protection of third parties in good faith.

These fundamental issues are related to the very limited recognition of customary law, customary law communities, and their customary lands, as stipulated in Law (UU) No. 5/1960 on the Basic Regulation of Agrarian Principles Article 5 states that customary law as long as it does not conflict with national law and the interests of the state relating to customary recognition as stipulated in Law (UU) No. 5/1960 on the Basic Regulation of Agrarian Principles Article 56 UUPA. Article 3 of the UUPA recognizes adat rights but prohibits their registration. Based on the problems mentioned above, the

10 Ibid
The author is interested in conducting further research on the rights of indigenous peoples. Justifiable legal arrangements to protect indigenous peoples’ rights to customary land and natural resources are needed in this regard.\(^\text{12}\)

Sefa Martinesya’s study focuses on the government’s role in fulfilling the unfulfilled rights of indigenous peoples. Many people have had their rights taken away unfairly. This assertion violates Article 18 paragraph 2 of the 1945 Constitution.\(^\text{13}\) However, the author’s research has its own uniqueness and significance because there is no research that explicitly seeks to evaluate the state’s responsibility in recognizing and fulfilling the rights of indigenous peoples based on the idea of justice.

**B. Legal Dysfunction in a Multicultural Society**

The law does not always fulfill its social function.\(^\text{14}\) Therefore, it does not provide significant benefits to society. Legal dysfunction occurs when its social functions are not successfully realized in formal and informal group structures. The analysis of legal function is related to the theory of “law and inequality”. The concept of inequality relates to the treatment of certain social classes that are interwoven within it, concerning race and ethnicity, including the state’s treatment of indigenous peoples. Therefore, the correspondence between *adat* and nationalism in the structure of the *adat* village as a unit of modern governance signifies equal treatment and inequality between *adat* villages, indigenous peoples, and other types of governance implementing modern governance.\(^\text{15}\)

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15 Hari Purwadi, Arief Suryono, and Siti Muslimah, “The Failure in the Coincidence of Indigenism and Nationalism in the Recognition of Indigenous
As a pluralistic country with a complex legal system, Indonesia must adopt legal policies that reflect the nuances of legal diversity. The government must reorient and reform the paradigm of legal development by prioritizing state legal regulations that explicitly provide true recognition and protection to legal systems other than state law, customary law, and religious law, as well as mechanisms of inner order that exist and function better and effectively in society. Therefore, values, legal principles, legal institutions, and folk legal traditions must be addressed, accommodated, and integrated into the national legal system in the form of laws.

Recognition of Indigenous Peoples’ rights to natural resources in the future requires legal unification in the formulation of laws as well as the development of legal pluralism, which will protect Indigenous Peoples’ rights to natural resources and can mutually avoid conflict or confrontation, as well as provide a basis for adaptation of various conflicts of interest, especially mutual adaptation and to avoid conflicts between Indigenous Peoples and the state or other companies that have an interest in these resources.

C. Legal Status and Eligibility Criteria of Indigenous Peoples

Indigenous peoples have a certain legal status that is recognized by laws and regulations, including the 1945 Constitution and other regulations. The existence of Indigenous Peoples must be legally assessed, whether their rights are classified as objects of public law, subjects of civil law, or a combination of both. If Indigenous Peoples are subjects of public law, then they become one of the components of pub-

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lic legal entities and are authorized to exercise public authority by
the government. If Indigenous Peoples are private legal entities, then
their rights are not part of the government but are considered the
same as the rights of other individuals. Historically, the existence of
Indigenous Peoples in the form of local power units was not a com-
ponent of the Dutch colonial government, nor were Nagari, Huta,
Marga, Winua, Mukim/Gampong, and others. During President
Soekarno’s tenure, the Government of the Republic of Indonesia
took various steps, especially during the democratic period, to estab-
lish the rights of Indigenous Peoples as a legal community unit that
has certain territorial boundaries, the right to organize households,
elect rulers, and own property (desapraja). These efforts are reflected
in Law No. 1 of 1957 on the Principles of Regional Government and
Law No. 19 of 1965 on Villages as a Transitional Form to Realize
Level III Regions throughout the Unitary State of the Republic of
Indonesia. However, political turmoil and administrative changes oc-
curred prior to these efforts. Therefore, the Desapraja Law was not
implemented as intended.

In contrast, the New Order government issued Law No. 5/1974
on the Principles of Regional Government and Law No. 5/1979 on
Village Government. The village government, whose institutions
and authorities were uniformly defined by the central government,
was responsible for all types of governance in the village under these
laws. As a result, the government included Indigenous Peoples in the
form of village government, and Indigenous Peoples’ institutions no
longer have the status of official government. At this stage, Indig-
enous Peoples still need to find a place to be placed as public legal
entities of the government. As is the case in West Kalimantan, the
Dayak community has a strong customary structure with custom-
ary institutions that regulate various aspects of community life. The
existence of this customary law is a legacy from the ancestors and for
the Dayak Mualang Indigenous community which aims to regulate
order in community life.19

19 Lidya Imelda Rachmat, “Sistem Hukum Adat Dayak Mualang Butang
Dalam Kajian Aspek Hukum Dan Budaya,” Jurnal Hukum Dan HAM Wara
Indigenous peoples have been excluded from the circle of government institutions since the enactment of Law No. 5 of 1979. As a result, indigenous peoples are considered the same as other private legal organizations such as foundations, associations, cooperatives, and business entities that do not participate in government institutions. carry out responsibilities derived from public powers granted by the state. Efforts to restore Indigenous Peoples as public legal entities that are part of the government resurfaced in Village Law No. 6/2014. In the law, Masyarakat Adat is defined as “customary villages” that have rights of origin and rights belonging to the government, whose jurisdiction is organized in customary villages. Although the Village Law stipulates that Indigenous Peoples can have the status of public legal entities because they can be part of the government, most laws and regulations on the rights of Indigenous Peoples do not place Indigenous Peoples as part of the government. Therefore, within the existing Indonesian legal framework, Indigenous Peoples can be classified as private legal entities operating outside the government structure or as public legal entities operating within the national administration in the form of customary villages.20

Customary rights are different from the right to self-organization and self-regulation, which derive from Article 18 of the original 1945 Constitution and Article 18B paragraph (2) of the 1945 Constitution after amendment; recognition of customary law communities’ Ulayat rights derives from Article 33 paragraph (3) of the 1945 Constitution. These can be seen in Chapter IV on the National Economy and Social Welfare. Regulations governing the customary rights of Indigenous Peoples must be recognized to achieve social welfare for all Indigenous Peoples. The 1945 Constitution also states in Article 33 Paragraph (3) that land, water, and natural resources belong to the state and must be used for the greatest prosperity of the people.

However, this article is often used as a constitutional basis in

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regulating customary rights. Therefore, in current legislative practice, Article 18B Paragraph (2) has a more significant meaning that includes the governance and recognition of adat rights. Articles 1 and 2 of the UUPA regulate the state’s power to manage land, water, space, and natural resources, as referred to in Article 33 Paragraph (3) of the 1945 Constitution.

Recognition of customary rights is regulated in several sectoral laws and regulations based on the interests of each industry. The forestry industry pays the most attention to customary rights because the subject of regulation is closely related to the lives of indigenous peoples. Law No. 41/1999 on Forestry, which originally did not recognize customary forest units, was later revoked based on the Constitutional Court Decision 35 so that the status of customary forests is no longer part of state forests.21

D. Individual Rights of Indigenous People

The individual or property rights of indigenous peoples as Indonesian citizens are also protected by law, particularly over land and natural resources, in addition to customary rights. Individual rights to land and natural resources and property rights of indigenous peoples are recognized and protected under the 1945 Constitution. Article 28H Paragraph (4) of the 1945 Constitution states that “Every person shall have the right to private property which shall not be taken over arbitrarily by any person.”

The UUPA also regulates individual rights to land and natural resources, as well as customary rights of indigenous peoples. The UUPA gives special respect to agrarian law relating to land, water, space and natural resources by declaring it to be customary law. Thus, individual rights in the customary law of indigenous peoples are legally recognized and preserved. According to Article 5 of the LoGA, “The agrarian law applicable to the earth, water, and airspace is adat law, insofar as it does not conflict with national and state in-

terests, which are based on national unity, with Indonesian socialism, and with national regulations contained in the Law based on religious law.”

Based on these provisions, the UUPA states that individual rights and customary rights of indigenous peoples have been recognized, and such rights may turn into property rights or property rights depending on the nature of the right. As a result, indigenous peoples may receive their land rights through customary law, rather than through a grant of rights by the state. Individual rights in the form of hak milik are emphasized in Article II Paragraph (1) of the UUPA Conversion Provisions as follows: land rights that grant the same authority as or are equated with the rights referred to in Article 20 Paragraph (1) are referred to as agrarisch eigendom, hak milik, harta waris, andarbeni, hak druwe, hak desa druwe, pesini, grand sultan, landerijenbezitrecht, altijddurence erfpacht, hak usaha atas tanah milik bekas milik, and other rights.

Empirical facts regarding development challenges and the demands of society and the state related to the recognition and preservation of indigenous peoples’ customary rights have led to several agricultural disputes caused by legal ambiguity, namely: Indigenous peoples lose access to their lands, territories and natural resources; unequal agrarian structures damage the social structure of indigenous peoples; and ecological quality is directly related to the quality of people whose lives depend on agricultural resources.22 Furthermore, customary laws of indigenous peoples still exist in various places, both those that strictly apply the traditions they have received and those that have begun to follow trends from outside. The existence of Indigenous Peoples is an unavoidable social reality for a pluralistic society that seeks to maintain unity under the motto of Unity in Diversity.

E. Concept of Recognition in the 1945 Constitution

The government has intended to recognize the rights of indigenous peoples, particularly over their natural resources, since 1998. Various regulations ranging from Ministerial Decrees, Government Regulations, Laws, MPR Decrees to the 1945 Constitution reflect the course of legal politics that will increase recognition of indigenous peoples’ rights. The rights of indigenous peoples. However, as the concept of recognition enshrined in the 1945 Constitution and laws is still in a state of flux, this requirement will take time to be enforced.  

Recognition of indigenous peoples falls into three categories: recognition of indigenous peoples’ lands, recognition of indigenous peoples’ existence, and recognition of indigenous peoples as government entities. In relation to the recognition of indigenous peoples’ territories, the UUPA is used as the legal basis, and takes the form of district/city laws used in the determination of land and natural resource rights or customary land rights. Local regulations on the establishment of customary territories outline the boundaries and clarify customary territories on maps. One example is the Lebak Regency Regional Regulation No. 32/2001 which focuses on the protection of Baduy customary rights. Article 2-4 of the regulation reads: the establishment of Baduy customary area and its boundaries, including a map of Baduy customary area as a legal instrument of customary area. Furthermore, the area of Ulayat rights on Baduy customary land is decided to be in the “power” of Baduy tribe, this explains the acceptance of Baduy tribe’s legal rights on their territory. Spatial Planning Laws, such as Kerinci Regency Regional Regulation No. 1/2012 on Environmental Law, are also used to recognize Indigenous Peoples by identifying territories. According to Article 33, customary forests are included in the designated rights forest area. Customary forests are owned forests that are different from State Forests.

Recognizing the existence of Indigenous Peoples is the estab-

23 Latief, “Pengakuan Hak Masyarakat Hukum Adat Atas Sumber Daya Alam Dalam Politik Hukum Nasional.”
lishment of Indigenous Peoples as legal subjects. Such recognition is based on the Forestry Law and Constitutional Court Decision No. 35/2012 on Indigenous Forests, which requires proving the existence of Indigenous Peoples through local regulations to guarantee Indigenous Peoples’ rights over forests. According to Permendagri No. 52/2014 on Guidelines for the Recognition and Protection of Indigenous Peoples, Regent/Mayor Decrees and Joint Decrees of Regents and Mayors can affirm the existence of Indigenous Peoples. According to the Forestry Law and Permendagri No. 52/2004, the status of indigenous peoples as legal subjects is recognized in provincial laws, district/city laws, regent/mayor decrees, and joint decrees of regents and mayors. The position of indigenous peoples as legal subjects is the same as other legal subjects who have legal rights.

Recognition of the integration of indigenous peoples in government results in the recognition of indigenous peoples as government units. In this case, indigenous villages such as Nagari, Huta, Marga, and others become indigenous villages that have two authorities, namely the authority of the customary rights of indigenous peoples and the administrative authority of the village government. As a result, Indigenous Peoples become part of the state structure, carrying out state responsibilities and customary rights based on two legal frameworks, namely customary law communities and customary villages.

According to Rikardo Simarmata, the rights of indigenous peoples are divided into two categories, namely innate or “autochthonous” rights and rights granted by the State. Innate rights are rights attached to the legal community unit that existed before the establishment of the State. Indigenous peoples have innate rights that are distinct from rights granted by the State. The Constitution recognizes the innate rights of indigenous peoples, referred to as rights of origin and rights of origin of indigenous peoples. However, the constitution limits the exercise of these rights with some restrictions.

The need to implement indigenous peoples’ rights undermines this, particularly in relation to state law.\textsuperscript{26}

Conflicts often arise because of the fragility of indigenous peoples’ rights to land and natural resources. These disputes arise because of conflicting claims to land and natural resources by indigenous peoples, governments and other companies. There were 232 disputes recorded in HuMa’s records throughout 2012, which occurred in 98 cities/districts in 22 provinces.

Land and natural resource conflicts are common in Indonesia. This situation is caused by the unclear rights of indigenous peoples to natural resources based on customary rights compared to the demands of the state and extractive natural resource businesses whose rights and control are supported by state laws and regulations. Often the government recognizes customary land, but its ownership rights are not recognized.\textsuperscript{27}

As a result, indigenous peoples face legal discrimination. Due to the weak status of indigenous peoples in the national legal system, they lose access to and control over land and natural resources. Indigenous peoples often face conflicts that threaten their territories, ways of life and overall existence. Indigenous peoples’ status as legitimate rights holders is accepted only half-heartedly, with some severe constraints. Under these circumstances, supporting the existence of indigenous peoples as legal subjects is crucial to ensure that their rights are protected by law.

The existence and rights of indigenous peoples are protected and respected under Article 18B Paragraph (2) and Article 28 I Paragraph (3) of the 1945 Constitution. The spirit of protection, respect and fulfillment of human rights is the responsibility of the state to not violate the rights of indigenous peoples, avoid and respond to violations, and fulfill them. The most significant collective rights of indigenous peoples are rights to land, customary territories, and

\textsuperscript{26} Rahayu and Simarmata.

natural resources as ancestral heritage that is the basis of their survival. Efforts to fulfill Indigenous Peoples’ rights to natural resources must include the following fundamental concepts: (1) Recognition of territorial jurisdiction (2) Recognition of the right to choose their fate and priorities in the development process (3) All development or investment operations that enter indigenous peoples’ lands must be preceded by prior permission (4) Participation of indigenous peoples in the development, planning, implementation, and assessment of various plans and programs and (5) Recognition of the right to adequate and fair payment for lands, territories, and natural resources.

Efforts made to regulate the rights of indigenous peoples are within the authority of the region. Regional regulations, especially regional regulations, produce an appropriate legal framework for regulating and determining the rights of indigenous peoples. This delegation of regulatory authority is justified by the unique conditions of indigenous communities in each location. Uniformity of regulation in the form of legislation that applies universally is considered undesirable because it is not always relevant in locations where indigenous communities do not exist or have left. Even the situation is changing in indigenously populated areas. Several districts/cities and even provinces have the same customary law community units, such as Nagari in Minangkabau, Mukim in Aceh, and Villages in Java. However, several districts/cities have diverse indigenous communities. The model or context also needs to be differentiated. (1) In areas where the conditions of indigenous communities are similar, the regulatory model can be implemented by making Regional Regulations concerning the existence and rights of indigenous communities (2) In places where the conditions of indigenous communities are diverse, the regulatory model can be implemented by establishing Regulations Regions and (3) There are different regulatory models in the Regional Regulation on the Establishment of Traditional Villages for regions that will make their Indigenous Communities into traditional villages, as mentioned in Law Number 6 of 2014 concerning Villages.
F. Concluding

The state has recognized the rights of indigenous peoples to natural resources in various laws and regulations. However, this is difficult to implement because the expression of recognition in the 1945 Constitution is weak. There is also a strong desire to recognize and maintain the existence and rights of indigenous peoples. Yet, the idea of conditional recognition is difficult for indigenous peoples to fulfill. The state or government must play an active role in making it happen. This kind of recognition does not have to be requested by indigenous peoples, but the state or government must be involved in protecting their lives. Efforts to realize the rights of indigenous peoples to natural resources must adhere to fundamental principles. The form of recognition of indigenous peoples’ rights to natural resources must be stated in separate legal regulations that guarantee the existence, clarity of territory and access to natural resources for the customary rights of indigenous peoples. Regional regulations provide “confirmation” in the form of recognition. Confirmation is simply a type of declarative assertion; the absence of confirmation has nothing to do with the existence or rights of indigenous peoples. The consistency of regulations in the form of universally applicable laws and regulations is considered to be poor because they are not always relevant in locations where indigenous peoples do not exist or have left. Even in Indigenous-populated areas, the situation is changing. It is hoped that this solution can be implemented in Indonesian territory so that the right solution is obtained and does not corner indigenous communities who are often marginalized and disadvantaged in these disputes.

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