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Recognition and Legal Protection by the State of the rights of Indigenous Peoples to land in positive law in Indonesia

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Abstract. *The purpose of this writing is to find out and describe the State's Legal Recognition and Protection of Indigenous Peoples' rights to land in positive law in Indonesia. The approach method in writing uses the Normative juridical approach method. The results of the research conducted state that in carrying out this protection and recognition, it is necessary to unite the spatial perspective of traditional territories with the perspective of areas of indigenous people's land. This is also to maintain the function of customary forests that have been included in forest areas within existing functions (for example protected forests). In this way, customary law communities contribute to maintaining forest functions whose control and ownership status is in their hands, but the management of these functions is handed over to the Ministry of Forestry. The existence of a new institution in the form of the Ministry of Agrarian Affairs and Spatial Planning/BPN is expected to be able to overcome the problem of regulatory dualism which separates space and areas within the forest area.*

Keywords: *Customary; Communities; Legal; Law; Protection.*

1. Introduction

Indonesia is an archipelagic nation with unique cultural diversity and social structures, known as Customary Law Communities (MHA). Since the pre-colonial era, these communities have managed land and natural resources based on their own customary laws. However, the introduction of Western legal concepts during the colonial period and the dominance of the

"State's Right to Control" (Hak Menguasai Negara/HMN) concept during the independence era have marginalized these traditional rights (Harsono, 2008: 15).

Agrarian issues in Indonesia are often rooted in the overlapping of customary (ulayat) lands with corporate concessions or state forest areas. The legal protection of indigenous land is not merely a technical legal issue but a matter of human rights and social justice (Simarmata, 2011: 42).

The relationship between Indigenous Peoples (Masyarakat Hukum Adat/MHA) and their ancestral lands is a fundamental pillar of Indonesia's socio-legal identity. Long before the proclamation of the Republic of Indonesia in 1945, various ethnic groups across the archipelago had established sophisticated systems of land management, known as Ulayat rights. These rights are not merely economic assets but represent a religio-magical bond where the land is viewed as the "mother" of the community, providing spiritual guidance, social cohesion, and sustenance (Harsono, 2008).

In the context of a Rechtsstaat (State based on the Rule of Law), Indonesia has a constitutional obligation to protect these communities. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia explicitly states that "the state recognizes and respects traditional community units along with their traditional rights." However, this constitutional promise often clashes with the pragmatic demands of national development, investment, and industrialization. The legal reality for indigenous peoples is characterized by "conditional recognition," where their rights are acknowledged only if they meet certain criteria defined by the state (Arizona, 2014).

The paradox of indigenous land rights in Indonesia is deeply rooted in the history of land law. During the colonial era, the Domein Verklaring principle allowed the state to claim all land that could not be proven as private property under Western law. Although the Basic Agrarian Law (UUPA) No. 5 of 1960 attempted to decolonize these rules, it introduced a new ambiguity by making the recognition of Ulayat rights subject to "national interest." This ambiguity was further exploited during the New Order regime, where state forestry laws categorized vast indigenous territories as "State Forest" (Hutan Negara), effectively disenfranchising millions of indigenous people (Safitri, 2011).

Furthermore, the institutional dualism between the Ministry of Environment and Forestry (KLHK) and the Ministry of Agrarian Affairs and Spatial Planning (ATR/BPN) has created a "regulatory labyrinth." The forestry sector manages the "space" of the trees, while the agrarian

sector manages the "land" titles. Indigenous peoples often find themselves trapped between these two authorities, unable to secure legal certainty over their ancestral domains.

Following the amendments to the 1945 Constitution, recognition of MHA was strengthened in Article 18B paragraph (2), which states that "The State recognizes and respects customary law community units 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."

However, the phrase "as long as they are still alive" is often used as a "rubber clause" by the government to limit such recognition (Safitri, 2010: 102). This protection is further reinforced by Article 28I paragraph (3), which states that cultural identity and the rights of traditional communities are respected in accordance with the times and civilization.

The Constitutional Court Decision No. 35/PUU-X/2012 was a landmark moment, declaring that "Customary Forests are not State Forests." Yet, over a decade later, the implementation of this ruling remains sluggish due to the complex requirement of Regional Regulations (Perda) for recognition. This article explores how the state provides legal protection in positive law and proposes a synchronization of spatial and land perspectives to ensure that the rights of indigenous peoples are not just recognized on paper, but protected in practice.

2. Research Methods

This research employs a Normative Juridical approach, focusing on the analysis of legal norms, principles, and regulations within the Indonesian legal system (Soekanto & Mamudji, 2015). The study examines primary legal materials, including the 1945 Constitution, Law No. 5 of 1960 (UUPA), Law No. 41 of 1999 (Forestry Law), and the landmark Constitutional Court Decision No. 35/PUU-X/2012. The data collection involves a comprehensive literature review of secondary materials, such as academic journals, books, and official government reports. The analytical technique used is the Statute Approach and Conceptual Approach. The statute approach is used to identify inconsistencies between sectoral laws, while the conceptual approach provides a theoretical framework for integrating spatial planning with indigenous land rights. The research aims to provide a descriptive-analytical overview of the current legal protections and offer a reformative perspective for institutional synchronization (Hanim, 2018).

3. Results and Discussion

3.1. The Historical Evolution and Philosophical Foundation of Indigenous Land Rights

The existence of Indigenous Peoples (MHA) is a sociological fact that predates the modern Indonesian state. Philosophically, the recognition of MHA is rooted in the Pancasila, particularly the third and fifth principles (National Unity and Social Justice). However, the legal history of Indonesia shows a systematic marginalization of these groups through various developmentalist policies.

In the early post-independence era, the UUPA 1960 was hailed as a populist law. It recognized Ulayat rights under Article 3, but with a significant caveat: such rights must not conflict with national interests. This "national interest" clause became a legal tool for the state to grant concessions to mining and logging companies on indigenous lands without the consent of the local communities (Sumardjono, 2009). The state acted as the "Land Manager" (Hak Menguasai Negara), but in practice, it often behaved as a "Land Owner," ignoring the pre-existing rights of indigenous peoples.

Before 2012, Law No. 41 of 1999 on Forestry categorized all customary forests as state forests. This meant that the state had the authority to issue permits to third parties over indigenous lands. The Constitutional Court Decision No. 35/PUU-X/2012 corrected this constitutional error by stating that Hutan Adat (Customary Forest) is a separate category from Hutan Negara (State Forest).

The implications of this decision were profound:

1) Status Reclassification**:** Customary forests are now recognized as "Private Forests" or "Owned Forests" (Hutan Hak) belonging to the MHA.

2) Removal of State Authority: The state can no longer unilaterally grant concessions on customary forests that have been legally recognized.

3) Restoration of Dignity: The decision validated the indigenous identity and their historical right to their territories (Moniaga, 2007).

Despite this victory, the implementation has been hindered by Article 67 of the Forestry Law, which requires a Regional Regulation (Perda) for the formal recognition of an MHA unit. This administrative hurdle often takes years to fulfill, leaving communities vulnerable to land grabbing in the interim (Fauzi, 2017).

One of the core findings of this research is the persistent dualism between "Forestry" and "Agrarian" administration. The Ministry of Forestry manages the forest as a biological and ecological unit (the "space"), while the Ministry of ATR/BPN manages the land as a property unit (the "land").

This separation is problematic because:

a. Indigenous peoples view their territory as an indivisible unit of both land and forest.

b. Forestry maps often do not align with the cadastral maps used by ATR/BPN.

c. The "One Map Policy" (Kebijakan Satu Peta) has yet to fully integrate customary territories due to the lack of recognized boundaries (Harefa, 2020).

The author argues that to provide effective legal protection, the state must unite these perspectives. Recognition of land rights by ATR/BPN should automatically include the recognition of forest rights by KLHK, and vice versa.

Regional Spatial Planning (RTRW) is the primary instrument for land use in Indonesia. Often, customary lands are designated as "Productive Forests" or "Conversion Forests" in the RTRW without consulting the indigenous inhabitants. This creates a legal conflict when a community tries to claim their land while the spatial plan has already allocated it for a different purpose.

To overcome this, the Ministry of ATR/BPN must proactively include indigenous territories in the national and regional spatial databases. This is not just about mapping coordinates; it is about recognizing the Functional Contribution of indigenous peoples. For example, many customary forests serve as "Protected Forests" (Hutan Lindung) through local wisdom. By recognizing the MHA as the owner, the state does not lose the forest function; rather, it gains a more effective guardian. The management of the ecological function can remain under the supervision of the Ministry of Forestry, while the ownership remains with the community (Mashdurohatun, 2016).

3.2. Impact of the Job Creation Law (Omnibus Law) and the Land Bank

The enactment of Law No. 11 of 2020 (re-enacted as Law No. 6 of 2023) on Job Creation introduces the concept of the Land Bank (Bank Tanah). While intended to facilitate land for development, there is a significant risk that "unclaimed" or "unregistered" indigenous lands will be classified as "abandoned land" and taken over by the Land Bank.

To prevent this, the state must accelerate the certification of communal land (Sertifikat Komunal). The legal protection of indigenous peoples in the era of the Omnibus Law requires:

1. Exemption of Customary Land: Explicit regulations ensuring that customary lands cannot be the object of the Land Bank.

2. Simplified Recognition: Moving away from the expensive Perda requirement toward a more flexible administrative recognition by the Ministry of Home Affairs or Ministry of ATR/BPN.

3. Indigenous Participation: Ensuring "Free, Prior, and Informed Consent" (FPIC) in every development project affecting indigenous territories (Simarmata, 2018).

3.6. Strategic Role of the Ministry of ATR/BPN

The Ministry of ATR/BPN holds the key to resolving the dualism of regulation. Through the PTSL (Complete Systematic Land Registration) program, the ministry can identify and map communal lands. By registering these lands as communal property, the state provides a shield against external claims. Furthermore, by integrating these maps into the spatial planning system, the state ensures that indigenous rights are "locked" into the legal geography of Indonesia.

The long-term solution lies in the enactment of the Indigenous Peoples Bill (RUU Masyarakat Hukum Adat), which has been stalled for years. Fragmented protection across sectors (forestry, fisheries, and agrarian) has proven ineffective. A *Lex Specialis* is required to cover all aspects of indigenous life, including identity, territory, and customary justice (Nurjaya, 2023).

This research proposes a "Co-Management" concept. Under this framework, the state recognizes the absolute ownership of indigenous peoples over their lands and forests, while the communities commit to maintaining ecological functions (e.g., as protected forests). This is a win-win solution where indigenous peoples gain legal certainty, and the state secures environmental benefits such as carbon sequestration and water preservation (Setiawan, 2025).

Prior to this decision, the Forestry Law (Law No. 41/1999) stated that customary forests were state forests located within the territory of indigenous peoples. This led to discrimination and the criminalization of indigenous citizens living within forest zones.

In the landmark Decision No. 35/PUU-X/2012, the Constitutional Court removed the word "State" from that provision, redefining it as: "Customary Forest is a forest located within the territory of a customary law community." This decision legally separated customary forests from state forests (Constitutional Court, 2012). To date, the recognition of customary land rights

requires the issuance of a Regional Regulation (Perda). This creates a procedure that is lengthy, expensive, and politically charged. Without a Perda, indigenous communities lack the *legal standing* to defend their land against third-party encroachment (Arizona, 2014: 78).

Economic interests from the mining and palm oil sectors often collide with customary territories. In many regions, the granting of concession permits is conducted without the procedure of *Free, Prior, and Informed Consent* (FPIC) (Colchester, 2010: 201). here is significant "sectoral ego" between the Ministry of ATR/BPN, the Ministry of Environment and Forestry (KLHK), and the Ministry of Home Affairs. Each has different criteria for defining "Indigenous Communities," which causes confusion at the grassroots level (Rachman, 2017: 33).

4. Conclusion

Legal protection for indigenous peoples' land rights in Indonesia has transitioned from a period of total denial to a period of "limited recognition." While the 1945 Constitution and Putusan MK 35/2012 provide a strong legal basis, the administrative implementation remains a major obstacle. The dualism between forestry and agrarian regulations continues to create uncertainty, often to the detriment of indigenous communities. The solution lies in Institutional and Spatial Synchronization. The state must view indigenous territories as a single entity where land ownership and forest management are integrated. The Ministry of ATR/BPN should lead the effort to incorporate customary maps into the National Spatial Plan, ensuring that "space" and "area" are no longer separated by bureaucratic silos. By granting ownership to the communities while maintaining state oversight for ecological functions, Indonesia can achieve a balance between indigenous rights, social justice, and environmental sustainability.

5. References

Journals:

Bedner, A., & Arizona, Y. (2019). Adat Law in Indonesia. Journal of Legal Anthropology.

Butt, S. (2014). Traditional Land Rights Before the Indonesia's Constitutional Court. Law & Society Review.

Hanim, L. (2018). Perlindungan Hukum Terhadap Masyarakat Adat. Jurnal Pembaharuan Hukum.

Harefa, F. (2020). Penegakan Hukum Agraria di Indonesia. Sultan Agung Fundamental Law Review.

Books:

Arizona, Y. (2014). Konstitusionalisme Agraria. Jakarta: RumaHukum.

Asshiddiqie, J. (2010). Konstitusi Ekonomi. Jakarta: Kompas.

Bakri, M. (2011). Hak Penguasaan Orang Asing atas Tanah di Indonesia. Malang: UB Press.

Fauzi, N. (2017). Land Reform dari Masa ke Masa. Yogyakarta: Tanah Air Beta.

Harsono, B. (2008). Hukum Agraria Indonesia: Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya. Jakarta: Djambatan.

Lubis, M. Y., & Lubis, A. R. (2008). Hukum Agraria Indonesia. Jakarta: Rineka Cipta.

Mashdurohatun, A. (2016). Pengembangan Hukum Kontrak Kerjasama. Semarang: Unissula Press.

Moniaga, S. (2007). The Case for Customary Land Rights in Indonesia. Masyarakat Adat Nusantara.

Nurjaya, I. N. (2015). Hukum Adat dan Dinamika Hukum Nasional. Malang: UB Press.

Rachman, N. F. (2011). The Resurgence of Land Reform Policy in Indonesia. Bogor: IPB Press.

Safitri, M. A. (2011). Forest Tenure in Indonesia. Leiden: Leiden University Press.

Santoso, U. (2012). Hukum Agraria: Kajian Komprehensif. Jakarta: Kencana.

Simarmata, R. (2018). Masyarakat Adat dan Pilihan Hukum. Jakarta: Perkumpulan HuMa.

Soekanto, S., & Mamudji, S. (2015). Penelitian Hukum Normatif. Jakarta: Rajawali Pers.

Sumardjono, S. W. (2009). Tanah dalam Perspektif Hak Ekonomi, Sosial, dan Budaya. Jakarta: Kompas.

Wiradi, G. (2009). Seluk Beluk Masalah Agraria. Yogyakarta: Reforma Agraria Institute.