

Recognition and Legal Protection of Customary Rights of Customary Communities in the Indonesian National Land Legal System

Muhammad Dias Saktiawan¹⁾ & Hendro Widodo²⁾

¹⁾Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: diassaktiawan@gmail.com

²⁾Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Semarang, Indonesia, E-mail: hendro.w@unissula.ac.id

Abstract. *Ulayat rights are communal rights held by customary law communities over land and natural resources within their traditional territories, rooted in living customary law passed down through generations. Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) recognizes the existence of customary rights, but such recognition is conditional upon their continued factual existence and conformity with national interest. This article analyzes the legal status of ulayat rights within Indonesia's national land law system, the criteria and procedures for their formal recognition, and the impact of Constitutional Court Decision Number 35/PUU-X/2012 on the paradigm of recognizing indigenous communities' rights. This research employs a normative juridical method using statutory and case approaches. The findings indicate that although a normative framework exists through the UUPA, Ministerial Regulation of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019, and Constitutional Court jurisprudence that has shifted from a repressive-derogable to a progressive-derogable approach, implementation continues to face structural obstacles: overlapping sectoral regulations, dependence on local government political will, and the prolonged stagnation of the draft Law on Indigenous Peoples, delayed for more than eighteen years. This article recommends accelerating the passage of the draft law, harmonizing sectoral regulations, and developing a participatory, digitally based registration system for ulayat rights as strategic steps toward legal certainty and agrarian justice for customary law communities.*

Keywords: *Agrarian; Certainty; Community; Law; Legal.*

1. Introduction

Land has a very fundamental position in the life of the nation and state in Indonesia, not merely as an economic object, but also as a living space, cultural identity, and source of social legitimacy for the people who have occupied it for generations. Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia affirms that the earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity

of the people. This provision gave birth to the concept of the right of state control (HMN) which became the philosophical basis of the Indonesian national land law system as regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as UUPA).

On the other hand, the constitution also explicitly recognizes and respects customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated in Article 18B paragraph (2) of the 1945 Constitution. This constitutional recognition is then explained in Article 3 of the UUPA which states that the implementation of customary rights and similar rights of customary law communities, as long as in reality they still exist, must be such that they are in accordance with national and state interests, which are based on national unity, and must not conflict with other higher laws and regulations.

This formulation shows that customary rights have been placed in an ambivalent position from the outset: normatively recognized, but their recognition is conditional and subordinate to national interests, the definition of which is often unilaterally determined by the state (Harsono, 2008). This condition is a legacy of the long struggle between customary law (*adatrecht*), which colonial legal scholars such as Van Vollenhoven recognized as a living and autonomous legal system, and the need for the modern state to build a unified land law system and support national economic development.

In practice, this normative ambivalence gives rise to various structural problems. Various studies have shown that the absence of comprehensive and consistent technical regulations leads to legal uncertainty and frequently triggers agrarian conflicts between indigenous communities, the government, and private parties holding permits or concessions (Lubis et al., 2025). The agrarian conflict on Rempang Island, Riau Islands, involving a planned large-scale investment project on land traditionally inhabited by the indigenous Malay community, is a clear example of how weak legal certainty over customary land can lead to forced evictions and the criminalization of residents (Lubis et al., 2025). A similar pattern also occurs in Papua, where the process of determining customary rights by the local government is slow, creating a vulnerability to land disputes in land administration (Rahmadi, 2022).

A significant development occurred through Constitutional Court Decision Number 35/PUU-X/2012, which stated that customary forests are no longer part of state forests, but rather forests located within the territory of customary law communities. This decision is considered to bring a paradigm shift from a *repressive-derogable* approach, which subordinates the rights of customary law communities to the authority of the state, to a *progressive-derogable* approach that recognizes the rights of customary law communities as rights that existed before the state was formed (the principle of recognition) (Tobroni, 2013). Although the decision specifically concerns forest areas, its spirit and legal principles have had a significant impact on the perspective of national land law in viewing the status of customary rights in general.

However, as of mid-2026, the Draft Law on Indigenous Peoples, which was expected to provide a single legal umbrella (*lex specialis*) for the recognition and protection of the rights of indigenous peoples, had yet to be ratified, despite discussions having been ongoing for over eighteen years and repeated inclusion in the National Legislation Program. The Legislative Body of the House of Representatives targeted completion of the discussions in early 2027 (Kompas.com, 2026), while other legislators expressed optimism about a resolution in 2026 (Hukum online, 2026). This legislative stagnation prolongs the legal vacuum and increases the potential for protracted agrarian conflicts.

Based on the above description, this article is written to answer three main problems, namely: first, what is the legal position of customary rights of indigenous peoples in the Indonesian national land law system; second, what are the criteria and procedures for recognizing and determining customary rights according to applicable laws and regulations; and third, what are the implementation problems and strategic steps needed to strengthen legal protection for customary rights in the future.

Conceptually, customary rights (*beschikkingsrecht*) are a series of authorities and obligations of a customary law community related to land located within its territory, which is the area of its power and responsibility, both within and outside the community (Harsono, 2008). Customary rights are communal in nature, not owned by individuals but by the customary law community as a whole, and their objects include all customary areas, both those that have been and have not been cultivated by the community members.

As legal subjects, customary law communities must fulfill certain elements so that their customary rights can be formally recognized by the state. Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019 concerning Procedures for the Administration of Customary Land of Customary Law Community Units, which replaces the previous regulation in Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 10 of 2016, requires the existence of a community unit with the same cultural identity, living for generations in a certain geographical area, having customary institutions, and being subject to customary legal systems that are still adhered to in daily life.

Several previous studies provide an empirical basis for this study. Rupadana and Swetasoma (2025) demonstrated that globalization and massive investment in the natural resources sector have driven land dispossession, necessitating collaboration between the government, indigenous communities, and legal institutions to ensure effective recognition and protection through on-the-ground monitoring. Lubis et al. (2025) identified a significant gap between the constitutional recognition of customary rights and the absence of clear verification and registration mechanisms, and recommended the establishment of an independent institution and a digital-based registration system responsive to local wisdom. Meanwhile, Rahmadi (2022) emphasized the urgency of establishing customary rights in Papua as a mandate of special autonomy, a means of reducing disputes, and simplifying the land registration process.

Tobroni (2013) analyzed Constitutional Court Decision Number 35/PUU-X/2012 as an important turning point in the legal paradigm of indigenous peoples, which emphasized three progressive dimensions, namely the pro-people dimension that positions indigenous peoples as independent legal subjects, the liberation dimension that shifts the perspective from conditional recognition to recognition based on the principle of recognition of pre-existing rights, and the empowerment dimension that provides capacity and bargaining power for indigenous peoples in managing their natural resources. This theoretical framework is used in this article to assess the extent to which the principle of recognition has, or has not, been consistently internalized in the regulation and practice of national land law.

2. Research Methods

This article was compiled using a normative legal research method (doctrinal legal research) by combining the statute approach and the case approach. The statutory approach is used to examine the consistency and harmonization between the 1945 Constitution, the UUPA, and implementing regulations in the land sector that regulate the customary rights of indigenous peoples. The case approach is used to analyze the Constitutional Court Decision Number 35/PUU-X/2012 as jurisprudence that influences the legal construction of indigenous peoples' rights. The legal materials used consist of primary legal materials in the form of laws and court decisions, as well as secondary legal materials in the form of books, scientific journal articles, and credible media reports. All legal materials are analyzed descriptively and qualitatively to answer the established problem formulation.

3. Results and Discussion

3.1. The Position of Customary Rights in the Construction of National Land Law

Article 2 of the UUPA places the state as the holder of the right to control all land, water, and space in the territory of Indonesia, which gives the state the authority to regulate the allocation, use, supply, and maintenance of the land, water, and space. The construction of this right to control the state is philosophically different from the concept of *domein verklaring* in the colonial era, which placed the state as the owner (*eigenaar*) of the land, because the right to control the state in the UUPA is not an ownership right but a public right that originates from the sovereignty of the people and functions as a regulatory instrument for the prosperity of the people (Harsono, 2008).

Within this framework, Article 3 of the UUPA places customary rights as rights whose implementation is recognized as long as three cumulative conditions are met: namely, the rights still exist in reality, their implementation is in accordance with national and state interests based on national unity, and they do not conflict with higher laws and regulations. These three conditions demonstrate that state recognition of customary rights is not unconditional, but rather a recognition that can always be limited by national interests which, in practice, are often interpreted expansively for the benefit of large-scale investment and infrastructure development. This condition is what a number of researchers consider to be

the most fundamental source of legal uncertainty in the protection of customary rights (Lubis et al., 2025).

The communal nature of customary land rights also fundamentally distinguishes them from individual land rights regulated by the Basic Agrarian Law (UUPA), such as ownership rights, land use rights, or building rights. Because the subject of these rights is the customary law community as a whole, each member of the community essentially has the right to utilize customary land in accordance with applicable customary law, without the need for a formal individual title. This characteristic often creates difficulties in proving customary land when dealing with the national land registration system, which is based on an individual rights approach and parcel-by-parcel certification.

3.2. Criteria and Procedures for Determining the Customary Rights of Indigenous Law Communities

To bridge the gap between normative recognition in the UUPA and the need for administrative legal certainty, the government issued Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019 which regulates the procedures for administering customary land of customary law communities. This regulation stipulates that a community group can be categorized as a customary law community if it fulfills the elements of a community with a common cultural identity, living for generations in a certain geographic area, having customary institutions, a clearly defined customary territory, and a customary legal system that is still adhered to and implemented in managing its territory in accordance with local values.

The procedure for recognizing customary rights according to these regulations is implemented through three main stages. The first stage is identification, carried out by the regent or mayor, involving the participation of the local indigenous community to collect data on history, institutional structures, territory, and applicable customary laws. The second stage is verification and validation, carried out by the Customary Law Community Committee at the district/city level, usually involving academics, traditional leaders, and civil society organizations to assess the feasibility of recognition. The third stage is determination, which is outlined in the form of a regional head decree. Following this determination, customary land administration is carried out, including measurement, mapping, and registration in the customary land register at the local land office.

The fundamental problem with this mechanism lies in its dependence on the initiative and political will of local governments. Because the decision to establish customary rights rests with regional heads, there are no binding timeframes or sanctions for regions that fail to establish the status of customary communities within their territories. As a result, the recognition of customary rights varies widely across regions and is susceptible to short-term political influence. Rahmadi (2022) noted that in Papua, for example, the slow process of establishing customary rights by local governments creates a vulnerability to disputes in land

administration, even though such determination is a direct mandate of the special autonomy policy.

3.3. Constitutional Court Decision Number 35/PUU-X/2012 as a Paradigm Turning Point

Constitutional Court Decision No. 35/PUU-X/2012 arose from a petition to review several articles in Law No. 41 of 1999 concerning Forestry, which categorizes customary forests as part of state forests located within the territories of customary law communities. In its decision, the Constitutional Court emphasized that customary forests are forests located within the territories of customary law communities, and not state forests. This decision fundamentally changed the legal status of customary forest areas, which were previously under state control through the forestry licensing regime.

Tobroni (2013) assessed that the decision brought a shift from a repressive-derogable approach, which places indigenous peoples' rights as something subordinated to state authority and only recognized if the state explicitly grants them, to a *progressive-derogable* approach that liberates and empowers indigenous peoples as independent legal subjects. Through this approach, indigenous peoples' rights are no longer viewed as a gift from the state (attributive), but rather as rights that existed before the state was formed and therefore must be recognized (recognitive).

Although this ruling textually concerns only forest areas, its principal implications are also relevant to the construction of land law in general. The principle of recognition, upheld by the Constitutional Court, provides a stronger constitutional argument for interpreting the requirements of Article 3 of the UUPA in a more protective manner for customary rights, rather than simply as restrictions that can easily be overridden by investment interests. However, harmonization between the spirit of this ruling and sectoral regulations in the areas of forestry, plantations, mining, and spatial planning remains slow and uneven, so the potential for conflicting norms between regulations remains high.

3.4. Implementation Problems: Overlapping Regulations and Agrarian Disputes

One of the biggest challenges in protecting customary rights is overlapping sectoral laws and regulations governing the use of space and natural resources. Customary territories are often encumbered with mining business permits, plantation business permits, or state forest areas before the status of customary communities and their customary lands is officially determined by local governments. The absence of a single database on customary territories means that sectoral licensing processes often proceed without considering the existence of customary rights that have not yet been, or are currently, formally recognized (Lubis et al., 2025).

The agrarian conflict on Rempang Island is a vivid illustration of how the unclear legal status of customary land in the face of a national strategic investment project can trigger social tension, community resistance, and even repressive action by authorities. Similar patterns have occurred in various other regions in Indonesia, where indigenous communities

defending their customary land face the risk of criminalization due to being considered illegally occupying the area, even though their claims are rooted in hereditary control under customary law (Hukum online, 2026). This phenomenon of criminalization is what legislators have called one of the fundamental issues driving the need to accelerate the development of specific legislation concerning indigenous communities (Hukum online, 2026).

Another equally important issue is the lack of integration of the customary land registration system into the national land information system in a digital and participatory manner. The manual and fragmented nature of customary land registration across regions makes it difficult to synchronize data with national spatial planning, forestry, and investment policies. Lubis et al. (2025) recommend the establishment of a digital-based customary land registration system that is responsive to local wisdom as one solution to address this gap, while simultaneously strengthening transparency and accountability in the recognition process.

3.5. Urgency to Accelerate the Ratification of the Indigenous Peoples Law

The lack of a single legal framework that comprehensively regulates the recognition, protection, and empowerment of indigenous communities is at the root of the various implementation issues outlined above. The Draft Law on Indigenous Communities has been repeatedly included in the National Legislation Program for over eighteen years, but deliberations were not completed until mid-2026 (Hukum online, 2026). The Legislative Body of the House of Representatives targeted completion of these deliberations by early 2027, emphasizing that the draft law be designed simply, not overlap with other sectoral regulations, and clearly regulate the division of authority between the central and regional governments in the recognition of indigenous communities (Kompas.com, 2026).

The existence of this special law is expected to address at least three fundamental issues identified in the discussion above. First, the law can provide a uniform definition and criteria for indigenous legal communities nationally, thereby reducing disparities in recognition between regions, which have previously depended on the political will of regional heads. Second, the law can serve as a *lex specialis* that harmonizes various sectoral regulations in the fields of forestry, mining, plantations, and spatial planning to be consistent with the principle of recognizing indigenous peoples' rights, which has been strengthened by Constitutional Court Decision Number 35/PUU-X/2012. Third, the law can serve as a foundation for the establishment of an independent institution and a participatory digital-based customary land registration system, as recommended by Lubis et al. (2025), thereby making the verification process more transparent, faster, and minimizing the potential for conflicts of interest.

4. Conclusion

Based on the discussion above, it can be concluded that the customary rights of indigenous peoples have received normative recognition in the constitution and Article 3 of the UUPA, but this recognition is conditional and vulnerable to being subordinated to national interests interpreted broadly for investment and development purposes. Constitutional Court Decision Number 35/PUU-X/2012 brought an important paradigm shift from a repressive-derogable

approach to a *progressive-derogable* one that strengthens the principle of recognition of the rights of indigenous peoples, even though its implications for land law in general have not yet been fully internalized in sectoral regulations. The implementation of the recognition of customary rights through Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019 in practice still faces structural obstacles in the form of dependence on the political will of local governments, overlapping sectoral permits, and the absence of a single, comprehensive legal umbrella, as reflected in various recurring agrarian disputes, including the criminalization of indigenous peoples who defend their ancestral lands. To address these issues, this article recommends three strategic steps. First, accelerate the discussion and ratification of the Indigenous Peoples Bill as a single legal umbrella that can standardize recognition criteria and serve as a *lex specialis* for harmonizing sectoral regulations. Second, harmonize and synchronize regulations in the forestry, mining, plantation, and spatial planning sectors with the principle of recognizing the rights of indigenous peoples, particularly through the integration of indigenous territory data into the sectoral licensing process from the planning stage. Third, establish a participatory, digital-based customary land registration and administration system, along with strengthening legal assistance for indigenous peoples, to accelerate the verification process, increase transparency, and reduce the potential for future agrarian conflicts.

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