

PROTECTION OF INDIGENOUS PEOPLES' RIGHTS TO CUSTOMARY LAND AMIDST INVESTMENT AND AREA EXPANSION

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Abstract

This study aims to analyze the forms of legal protection for the rights of indigenous peoples to customary land amidst increasing investment and regional expansion, while simultaneously formulating strengthening measures that can maintain legal certainty and justice for indigenous peoples. The study uses a normative legal method with a statutory approach, a case approach, and a conceptual approach. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, the Basic Agrarian Law, the Human Rights Law, Regulation of the Minister of Agrarian Affairs and Spatial Planning or the Head of the National Land Agency Number 14 of 2024, and Constitutional Court Decision Number 35/PUU X/2012. Data are analyzed qualitatively through systematic and teleological interpretation to examine the relationship between the recognition of customary rights, land governance, investment, and human rights protection. The results of the study indicate that customary land has a fairly strong basis for recognition in the Indonesian legal system, but its implementation still faces obstacles in the form of complicated recognition procedures, overlapping maps and permits, limited access to information, unequal bargaining positions, and consultations that do not always reflect the free and conscious consent of the community. Protection needs to be strengthened through participatory mapping, integration of customary territory data into spatial planning and licensing systems, meaningful consultation, independent legal assistance, equitable benefit-sharing agreements, and effective complaint and redress mechanisms. This approach ensures that investment can proceed without compromising the sustainability of livelihoods, cultural identity, and collective rights of indigenous communities.

Keywords: Customary law communities, customary land, legal protection, investment, regional expansion.

INTRODUCTION

Customary land has a much broader meaning than a single piece of economic property. For customary law communities, customary land provides a basis for livelihoods, social regulations, intergenerational relations, and religious and cultural practices. It is on this land that community members obtain forest products, cultivate agriculture, protect springs, perform traditional ceremonies, and pass on local knowledge. Due to its collective nature, control of customary land cannot be equated with individual property rights. Decisions regarding its use are generally bound by deliberation mechanisms, the authority of customary institutions, and the obligation to maintain continuity for future generations (Fariz & Kodiyat, 2023; Ernis, 2019). Therefore, any change in the status, use, or access to customary land has the potential to impact the sustainability of customary law communities as a whole.

The protection of customary land has a strong constitutional basis. Article 18B paragraph 2 of the 1945 Constitution of the Republic of Indonesia mandates state recognition and respect for the unity of customary law communities and their traditional rights. Article 28I paragraph 3 also emphasizes respect for the cultural identity and rights of traditional communities. This recognition demonstrates that indigenous communities are not merely social groups worthy of informal involvement, but rather subjects with constitutional interests in the management of their territories. However, the constitution also stipulates that indigenous communities must be viable, in line with societal developments, not in conflict with the principles of the Unitary State of the Republic of Indonesia, and regulated by law. These requirements require the state to establish fair recognition procedures and not to use administration as an obstacle that negates rights that already exist in social reality. (Republic of Indonesia 1945, Article 18B paragraph 2 and Article 28I paragraph 3). Law Number 5 of 1960 concerning Basic Agrarian Regulations also places customary law as the basis for national agrarian law. Article 3 recognizes the implementation of customary rights and similar

rights of indigenous communities as long as they still exist in reality and their implementation does not conflict with national interests and statutory regulations. This provision is important because it affirms that customary rights have a place in the national legal system. However, this formulation also demonstrates the broad scope for interpretation regarding the extent of customary rights, the significance of national interests, and the relationship between customary rights and the granting of investment permits (Morizha, 2021; Telussa *et al*, 2021). In practice, this unclear interpretation can place indigenous communities at a disadvantage when dealing with permit documents, area designations, or claims of control from other parties. (Republic of Indonesia 1960, Article 3).

Investment, infrastructure development, the opening of industrial areas, plantation expansion, mining activities, tourism development, and spatial planning are all part of the economic development agenda. These activities can create jobs, open access to public services, and increase regional revenue. However, the benefits of development must not be achieved at the expense of the constitutional rights of citizens, especially those directly dependent on customary territories (Arsyad, 2020; Soenartho & Sudiro, 2023). When business permits are issued before the status of indigenous communities and customary land boundaries are confirmed, the risk of conflict increases. Communities can lose production space, access to water sources, forests, cultural sites, or traditional mobility routes. This situation demonstrates that customary land issues are not simply disputes about ownership, but also issues of social justice, human rights protection, environmental sustainability, and the quality of investment governance.

Law Number 39 of 1999 concerning Human Rights strengthens this protection. Article 6 requires the law, society, and government to pay attention to and protect the differences and needs of indigenous communities in upholding human rights. This provision directs that development cannot be implemented with a uniform approach that ignores social structures, customary law, and collective land tenure patterns. The state must ensure that licensing procedures, land acquisition, and area determination take into account the specific conditions of indigenous communities. Protection cannot be achieved through symbolic recognition alone. It must be present in the form of easily accessible information, genuine consultation, legal assistance, effective objection mechanisms, and redress for losses suffered by communities (Republic of Indonesia 1999, Article 6). This becomes more complex when customary land is located or is later included in areas managed under sectoral regimes. In the forestry sector, for example, the distinction between state forests and customary forests has created uncertainty regarding the position of indigenous communities regarding their territories. Constitutional Court Decision Number 35/PUU X/2012 provides important confirmation that customary forests are not state forests. The Court placed customary forests within the territorial integrity of customary rights and emphasized that state control over natural resources must take into account the collective rights of indigenous communities.

This ruling marked a milestone in correcting the approach that placed the state as the sole authority without ensuring the rights that already exist within the community. (Constitutional Court of the Republic of Indonesia 2013). Land regulations also demonstrate the state's efforts to strengthen customary land administration. Regulation of the Minister of Agrarian Affairs and Spatial Planning or the Head of the National Land Agency Number 14 of 2024 regulates the implementation of land administration and registration of customary land rights belonging to indigenous communities. This regulation defines customary land rights as land located within the territory controlled by indigenous communities, still existing in reality, and not attached to any land rights. The presence of this regulation is important because organized land data can strengthen legal certainty, prevent overlapping, and serve as a basis for decision-making before permits are issued. However, land administration must be understood as a means of protection, not a tool to complicate recognition. (Republic of Indonesia 2024). At the international level, the principle of free, prior, and informed consent provides a crucial framework for projects impacting indigenous peoples' territories. The United Nations Declaration on the Rights of Indigenous Peoples encourages states to consult and cooperate in good faith through indigenous peoples' representative institutions to obtain their consent before approving projects affecting their lands, territories, and resources.

This principle is relevant as an ethical and governance standard because it rejects consultations that are merely formalities. Valid consent requires freedom from coercion, full information, sufficient time for internal deliberation, and respect for authorized indigenous institutions. (United Nations 2007, art. 32). The question that needs to be answered is how the protection of indigenous peoples' rights to customary land can be realized when investment interests and regional expansion continue to increase. This question is crucial because development is often understood as a choice between economic growth or the protection of indigenous rights. This understanding is incorrect. Investments that ignore land rights actually bring social costs, risks of disputes, business uncertainty, community resistance, and environmental damage. On the other hand, investments built through recognition of

rights, transparency of information, fair agreements, and consistent oversight can create certainty for the community, government, and business actors (Nurdin, 2019; Rumkabu *et al*, 2023).

The protection in question also needs to distinguish between formal and substantive recognition. Formal recognition is reflected in government decisions, maps, or administrative records. Substantive recognition is evident when communities are truly able to use their territories, implement customary law, protect the environment, and determine forms of cooperation in accordance with the common interest. Both forms of recognition must exist simultaneously. Documents without guaranteed access will not restore rights. Conversely, factual control without administrative support is easily undermined by subsequent permits. Therefore, the protection of customary land requires a strong relationship between state law, customary law, and development governance.

This article aims to analyze the legal basis for customary land protection, identify protection issues amidst investment and regional expansion, and formulate a model for strengthening protection that positions customary law communities as decision-makers. This article starts from the perspective that customary rights must be protected through preventive and repressive approaches. The preventive approach is implemented before permits or changes to land use are issued. The repressive approach is implemented through dispute resolution, rights restoration, cancellation of flawed actions, and provision of adequate compensation in the event of violations. With this framework, the protection of customary land is not seen as an obstacle to development, but rather as a prerequisite for just, peaceful, and sustainable development.

METHOD

This article uses a normative legal research method. This method was chosen because the focus of the discussion lies in the legal norms governing the recognition, protection, administration, and utilization of customary land belonging to indigenous peoples. Normative legal research views law as a rule that can be analyzed through legislation, court decisions, doctrine, and legal principles. This approach is used to examine whether existing regulations adequately guarantee protection when customary land is confronted with investment projects and area expansion. The legislative approach is used to examine the 1945 Constitution of the Republic of Indonesia, Law Number 5 of 1960 concerning Basic Agrarian Principles, Law Number 39 of 1999 concerning Human Rights, Law Number 41 of 1999 concerning Forestry, and Regulation of the Minister of Agrarian Affairs and Spatial Planning or the Head of the National Land Agency Number 14 of 2024. The analysis examines the relationship between the recognition of indigenous peoples, customary rights, state authority, land administration, and the process of granting space for business activities. This approach is also used to identify potential overlaps between sectors that could weaken protection.

This article also uses a case study approach, based on Constitutional Court Decision Number 35/PUU-X/2012. This decision was chosen because of its significance in changing the meaning of customary forest status and the relationship between state control and the rights of customary communities. The analysis of the decision focuses on the Court's considerations regarding the protection of collective rights, the recognition of customary law as living law, and the state's obligation to respect existing rights when managing natural resources. A conceptual approach is also used to explain the concepts of customary rights, legal recognition, substantive justice, preventive protection, repressive protection, and free, prior, and informed consent.

The validity of the analysis is maintained through systematic and teleological interpretation. Systematic interpretation is used to interpret the relationships between norms so that provisions regarding investment, land, forestry, spatial planning, and human rights are not applied in isolation. Teleological interpretation is used to assess whether the implementation of norms aligns with the constitutional goals of social justice, respect for human dignity, legal certainty, and the prosperity of the people. Next, legal issues were formulated into three focuses: the status of customary rights, the vulnerability of customary rights in the investment process and regional expansion, and forms of protection that need to be strengthened. Based on these focuses, recommendations were formulated, taking into account the principles of prudence, participation, intergenerational justice, and sustainability.

Primary legal materials consisted of the constitution, laws and regulations, Constitutional Court decisions, and relevant international instruments. Secondary legal materials included books, scientific articles, and policy studies on indigenous peoples, agrarian affairs, human rights, and sustainable investment. Tertiary legal materials, including legal dictionaries and other supporting sources, were used to clarify terms. The analysis was conducted qualitatively by inventorying norms, categorizing issues, comparing regulations, and drawing deductive conclusions. The results of the analysis are presented descriptively and analytically to systematically understand the relationship between customary land protection and investment governance.

A limitation of this research lies in the lack of field data from a single community. Therefore, the results are not intended to uniformly describe the experiences of every indigenous community. Nevertheless, this normative analysis can be used as a framework for subsequent empirical research assessing the implementation of recognition, the quality of consultation, and the effectiveness of redress in specific areas.

RESULTS AND DISCUSSION

The review shows that the protection of customary land has a multi-layered basis within the Indonesian legal system. The first layer is the constitution, which recognizes customary law communities and their traditional rights. The second layer is national agrarian law, which recognizes customary rights to the extent they exist in practice. The third layer is human rights law, which mandates protection of the special needs of customary law communities. The fourth layer is a Constitutional Court ruling that corrects sectoral regulations inconsistent with the protection of customary rights. This arrangement emphasizes that customary land cannot be treated as ownerless simply because it has not been registered in a modern form of land administration. Constitutional Court Decision No. 35/PUU X/2012 reinforces this position. The Court considered that the existence of customary forests within the customary rights area is a consequence of the recognition of customary law as living law. The Court also emphasized that state control over land, water, and natural resources must be used to the maximum extent for the prosperity of the people, while still considering the individual and collective rights of customary law communities. This ruling is important because it shifts the perspective from unilateral state control to state control limited by the constitutional obligation to respect existing rights. (Constitutional Court of the Republic of Indonesia 2013). Protection Amidst Investment and Regional Expansion.

Despite the availability of a normative basis, the protection of customary land still faces administrative recognition issues. Indigenous communities are often asked to prove their history, territory, institutions, customary law, and the existence of their communities through formal procedures. Such proof is necessary to create legal certainty. However, procedures should not be applied rigidly without understanding the nature of customary evidence. Oral histories, participatory maps, sacred sites, natural boundaries, decisions of customary institutions, and long-standing tenure practices need to be considered as valid evidence. When the standard of proof prioritizes only formal documents that have never existed in a community's history, the recognition process can become a mechanism of exclusion.

Another problem is the overlap between customary territory maps, spatial plans, zoning designations, business permits, and land data. This overlap can create situations where an area is already under customary use but is administratively included in a concession or development project. In such situations, communities are often the last to learn about plans to utilize their territory. Information delays reduce communities' ability to raise objections, assess impacts, or prepare a bargaining position. Regulation of the Minister of Agrarian Affairs and Spatial Planning or the Head of the National Land Agency Number 14 of 2024 provides space for the administration and registration of customary land rights, including data maintenance and information provision. Strengthening the implementation of this regulation is crucial so that customary land data can serve as a reference before licensing decisions are made. (Republic of Indonesia 2024).

Information and bargaining power are also serious issues. Business actors generally have expertise, technical documents, access to licensing processes, and negotiating skills. In contrast, indigenous communities may face limited access to information, legal assistance, financing, and understanding of the consequences of agreements. In such circumstances, signatures or consent obtained do not always reflect free decisions. Valid consent must be obtained before a final decision is made, accompanied by clear information regarding the area, timeframe, type of activity, social and environmental impacts, benefit sharing, rejection options, and dispute resolution mechanisms. This standard aligns with the principle of free, prior, and informed consent in the United Nations Declaration on the Rights of Indigenous Peoples. (United Nations 2007, art. 32). Strengthening the Protection of Customary Land Rights

Effective protection must begin before investment or area expansion is approved. The central and regional governments need to prioritize the recognition of indigenous communities and the mapping of customary territories as an early part of the permitting process. Mapping must be conducted in a participatory manner, involving indigenous communities, village governments, regional governments, land offices, and relevant sectoral agencies. Mapping results need to be compared with existing spatial plans, area maps, and permit maps. This process aims to prevent overlaps from the outset, not simply resolve them after conflicts arise. Participatory maps must be complemented by field verification and incorporated into an official, updatable database.

The second stage is meaningful consultation and collective consent. Consultation should not be limited to a single meeting or representatives selected without customary mechanisms. The government and business actors need to provide sufficient time for communities to conduct internal deliberations using procedures they understand. Information must be conveyed in a language acceptable to the community. Technical documents need to be translated into simple explanations of risks, benefits, alternative locations, permit validity periods, and consequences if the project is terminated or diverted. In this process, the state needs to play a role as a guarantor of balance, not merely a facilitator of investment.

The third stage is the development of a fair agreement if the community accepts cooperation in the use of customary land. The agreement must clearly define the parties, boundaries, types of activities, timeframes, forms of compensation, benefit sharing, environmental protection, use of local labor, community access to important areas, evaluation mechanisms, and termination procedures. The agreement must also prohibit practices that convert community consent into permanent transfers without a legitimate collective mandate. Independent legal assistance is needed so that communities understand the contents of the agreement and can assess whether their rights are protected. Local governments can provide legal assistance and regular monitoring as part of their responsibility to protect.

The fourth stage is accessible oversight and redress. Communities must have a safe, fast, and non-intimidating complaint channel. Complaints should be handled by an institution authorized to review permit documents, conduct field verification, mediate between the parties, and recommend corrective actions. If violations are found, such as issuing permits without due process, using areas outside the agreement, pollution, or denial of compensation, the state must provide concrete redress. Recovery can take the form of temporary suspension of activities, environmental improvements, compensation payments, restoration of access, changes to permits, or revocation of decisions proven legally flawed.

Ultimately, the state has three primary obligations. First, respect the rights of indigenous peoples by not issuing policies or permits that ignore customary rights. Second, protect these rights by preventing private parties or other parties from exercising detrimental control. Third, fulfill these rights through recognition, mapping, registration, assistance, and restoration. Strengthening customary land administration through Regulation of the Minister of Agrarian Affairs and Spatial Planning or the Head of the National Land Agency Number 14 of 2024 must be implemented consistently and integrated with the licensing and spatial planning systems. In this way, the protection of customary rights moves from normative recognition to concrete guarantees in development decision-making. (Republic of Indonesia 2024).

Customary land constitutes the collective living space of indigenous communities, embodying economic, social, cultural, ecological, and spiritual values. The Constitution, agrarian law, human rights law, Constitutional Court decisions, and land administration regulations have provided the basis for the recognition and protection of these rights. However, this normative basis has not always resulted in effective protection. Major obstacles remain in the form of cumbersome recognition procedures, overlapping data and permits, information gaps, formalistic consultations, and inaccessible redress. Customary land rights must be placed at the forefront of investment governance and regional expansion. The government needs to ensure recognition of indigenous communities, participatory mapping, data matching with spatial planning and permits, and information transparency before decisions are made. Any project impacting customary land must undergo meaningful consultation and obtain free, prior, and informed collective consent. Cooperation agreements must ensure equitable benefit sharing, environmental protection, community access, and evaluation mechanisms.

The success of this model depends on the consistency of the central and regional governments in unifying data, improving recognition processes, and enforcing business actors' obligations. Oversight must continue throughout the project cycle, from planning to post-activity. This way, protection does not stop at the initial documents but continues to ensure that changes in land use do not diminish the dignity, livelihoods, and identity of indigenous communities. This principle also maintains long-term trust between communities, the government, and investors. With this approach, customary land protection does not hinder investment. Instead, protection creates legal certainty, reduces conflict, and ensures sustainable development. The state must act as a guarantor of rights, not merely a permit issuer. Indigenous communities need to be positioned as subjects with the right to determine the future of their territories. Development that respects customary rights will be fairer, more stable, and more aligned with the goal of people's prosperity. Legal certainty born of a fair process will support long-term prosperity without sacrificing basic rights.

CONCLUSION

Protecting the rights of indigenous peoples to customary land is a crucial part of implementing social justice and respecting the constitutional rights of citizens. Customary land not only holds economic value but also holds social, cultural, historical, and spiritual ties, and serves as a source of livelihood for indigenous peoples. Therefore, the use of customary land for investment, infrastructure development, plantations, mining, or regional expansion must not be carried out unilaterally. The state must ensure that all development policies respect the existence of indigenous peoples and their traditional rights. Frequent problems arise not only from land ownership but also from overlapping permits, weak administrative recognition, limited information, unequal bargaining power, and inadequate consultation. These conditions can trigger prolonged conflict and threaten the sustainability of indigenous peoples' livelihoods. Therefore, protection of customary land must be realized through clear legal recognition, participatory mapping of customary areas, information transparency, meaningful consultation, and accessible complaint and redress mechanisms for the community.

The central and regional governments need to expedite the process of recognizing indigenous peoples and recording customary land within the land administration system. Mapping of customary territories must involve indigenous communities directly to ensure that boundaries, important areas, water sources, forests, and cultural sites are accurately recorded. Before issuing investment permits, the government must ensure there are no land tenure conflicts and that the rights of indigenous communities are not violated. Business actors must also conduct open and honest consultation processes and respect community decisions through legitimate customary institutions. Furthermore, indigenous communities need legal assistance and capacity building to understand permit documents, cooperation agreements, and the impacts of investment activities. These measures ensure that investments can proceed without compromising the rights, dignity, and sustainability of indigenous communities.

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