

# The Legal Strategies Concept for Protecting the Customary Rights and Human Rights of Indigenous Peoples Based on Indonesian Law

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## ABSTRACT

The Customary land is a form of land ownership in Indonesia that is collectively used by indigenous communities as a means to meet their daily livelihood needs. Recognition of customary land is regulated in various legal regulations such as the 1945 Constitution of the Republic of Indonesia, the Basic Agrarian Law No. 5 of 1960, and various derivative regulations. However, the implementation of legal protection for the rights of indigenous communities over customary land still faces serious challenges. Inconsistent customary land regulations have led to numerous customary land disputes, resulting in the disregard for customary rights as indigenous populations' fundamental rights. This research is a doctrinal study with a black letter law approach, which relies on the law to explain the law, with the aim of systematizing, improving, and clarifying the law on the topic of customary land. This study analyzes the concept of customary land in Indonesian law and evaluates the extent to which existing legal instruments are able to guarantee the protection of the human rights of indigenous peoples by analyzing court decisions, legislation, and combining them with a conceptual approach to human rights. The results of the study show that court decisions and existing regulations are not yet able to fully protect the human rights of indigenous peoples. The recommendations of this study are to encourage agrarian reform to explicitly include customary land rights as collective rights equal to individual property rights, to include a mechanism for registering collective customary land that is different from the ordinary property rights system, to establish an independent institution for resolving indigenous land conflicts, and to include the protection of indigenous peoples' human rights in the national development and investment agenda.

**Keywords:** *Customary Land, Indonesian Legislation, Customary Land, Human Rights, Communities.*

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## INTRODUCTION

The Indonesian state implements three legal systems simultaneously, namely Civil law, Islamic law, and customary law.<sup>1</sup> This means that there are laws that operate simultaneously, i.e., several regulations that apply concurrently in a country, in this case Western law, Islamic law, and customary law. Western law itself is a legacy of Dutch colonial rule, which was later codified and developed into national law (in the form of laws, government regulations, etc.) and serves as the primary legal framework applicable to all citizens. Islamic law applies in certain aspects, particularly in family and inheritance matters for Muslims, while the traditional legal system is rooted in the customs of the community and is

practiced within certain indigenous groups.<sup>2</sup>

When discussing customary law systems, customary law is often referred to as the distinctive law of the Indonesian people because it is a law that has grown and developed from the customs and cultural traditions practiced by the relevant communities.<sup>3</sup> Thus, customary law emerged alongside humanity as its creator, as where there is society, there is law (*Ibi Ius Ibi Societas*). Customary law applies to indigenous communities or indigenous peoples as long as they still exist and meet the criteria of indigenous peoples.<sup>4</sup> In this case, indigenous communities or indigenous peoples are subject to the customary law that applies in their respective areas.<sup>5</sup> The distinctive characteristics of customary

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law include: it is unwritten but recognized, alive, and obeyed by the community; it is flexible and dynamic, able to change with the times; it is communal, prioritizing the interests of the group over the individual; and it is restorative, emphasizing the restoration of social relations.

Customary law regulates almost all aspects of indigenous communities' lives in an unwritten manner, based on customs, values, and norms that exist within those communities.<sup>4</sup> Historically, indigenous communities have supplemented their laws with simple customary courts. Examples of matters regulated by customary law include: (1) Family Law (Marriage and Descent), such as traditional marriage procedures, the status and roles of husbands and wives, kinship systems (patrilineal, matrilineal, bilateral); (2) Inheritance Law, such as the distribution of inheritance based on traditional kinship systems, the management and inheritance of customary land; (3) Land and Property Law, and about Customary rights. Customary rights involve shared authority over traditional resources, including the collective stewardship of the environment, such as land, water, etc. Customary rights limit the division and use of customary land, as well as prohibiting or restricting the sale of customary land to outside parties.<sup>6</sup>

Land regulated by land law in the customary legal system is referred to as "customary land". Cornelius Van Vollenhoven coined the term *beschikingsrecht* (right of disposal) for the rights of indigenous communities over their land.<sup>7</sup> Customary rights are one of the rights of indigenous peoples over immovable property, which can only be owned by social units, not by specific units, and cannot be relinquished permanently. Customary land is one element of customary rights, as mentioned above. Customary rights are rights collectively owned by indigenous communities regarding control over land, forests, water, and other natural resources in the area, with the aim of ensuring the sustainability of the indigenous community's livelihood.<sup>8</sup> Thus, customary land is land controlled communally (collectively) by indigenous communities, where the community has the right to regulate, manage, and utilize the land according to their customs and traditions.<sup>9</sup>

The characteristics of customary land are that it is collective (not individually owned, but jointly owned by an indigenous community (tribe, clan, village, etc.)). Furthermore, it is inherited according to custom, meaning that land ownership is not based on certificates but on customary lineage.<sup>10</sup> It cannot be sold to outsiders, except with customary permission or under certain circumstances, and it has customary boundaries that are recognized and

respected by other communities.<sup>11</sup> Customary land is controlled and utilized collectively by certain indigenous communities for their livelihood. The utilization of customary land can be carried out through activities such as agriculture, farming, settlement, plantations, and customary forests, as well as collective economic utilization.<sup>6</sup>

Customary land is governed by customary law, which is unwritten. Therefore, customary land is only recognized through acknowledgment, which leads to conflicts because acknowledgment alone is not legally strong or certain. One of the main issues related to customary land is that the approach to proving land ownership, such as the existence of certificates and permits for ownership and use of customary land, is not officially registered or certified like private land or state land, leaving the position of customary land owned by indigenous communities in a very weak position. Many parties abuse customary land, making it subject to overlapping interests. Overlapping interests from parties who have no right to customary land cause the human rights of indigenous peoples to be neglected and unprotected.

A customary law expert, M. Koesnoe, stated that customary rights are fundamental rights for indigenous peoples, which are inherent to the existence of indigenous peoples and cannot be permanently revoked.<sup>12</sup> Human rights are rights inherent to humans from birth, while indigenous communities are bound by genealogical ties, meaning that genealogical indigenous communities are communities bound by blood ties or descent from a common ancestor or forefather. This means that customary rights are inherent from birth, which is consistent with the concept of human rights. Therefore, the issue of customary land is not just a matter of ordinary land, but falls within the realm of human rights violations.

The rights of indigenous peoples are even recognized and protected at the international level, however, the issue of customary land in Indonesia seems like a never-ending story.<sup>13</sup> A review of data on customary land disputes and the intensity of these disputes, compiled by the Agrarian Reform Consortium, reveals conflicts and disputes over customary land across various sectors. This can be seen from the fact that customary rights are essential for the survival of indigenous peoples, such as their place of residence, their livelihoods, and their dependence on daily food supplies. The issue of customary land is growing increasingly serious. According to data on customary land disputes and the intensity of such disputes from the Agrarian Reform Consortium,<sup>14</sup> conflicts and disputes over customary land are occurring across various sectors.

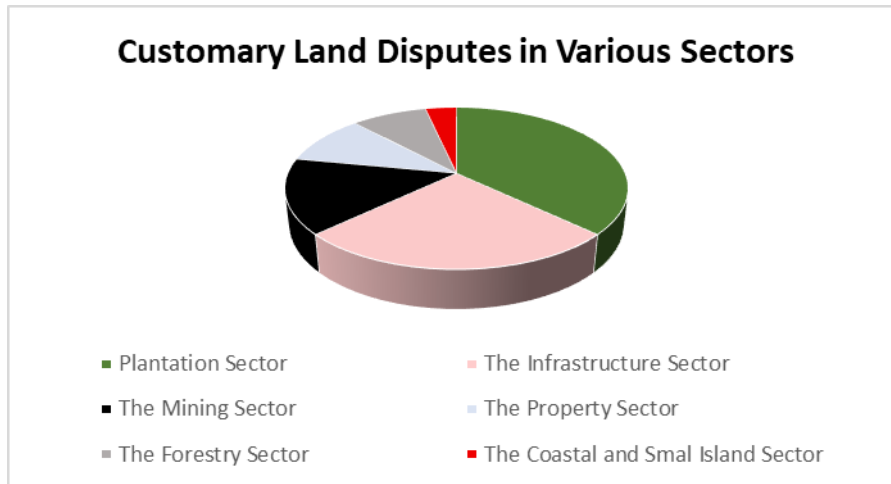


Figure 1. Customary land Disputes in Various Sectors

According to data from the Agrarian Reform Consortium (KPA), the graph above shows that customary land disputes occur in various sectors, including the plantation sector with 74 incidents of conflict covering an area of 276,162.052 hectares and affecting 23,531 families; The infrastructure development sector with 52 conflict incidents covering an area of 8,604.697 hectares and affecting 3,648 families; The mining sector with 30

conflict incidents covering an area of 155,166.86 hectares and affecting 161,136 families; The property sector with 20 incidents on land covering 8,558.59 hectares occupied by 1,200 families; The forestry sector with 17 conflict incidents affecting 4,601 families on land covering 45,087.98 hectares; The coastal and small island sector had 7 conflicts covering an area of 3,709.9 hectares, affecting 4,260 families.



Figure 1.2. Graph of Customary Land Conflicts from 2020 to 2024

According to data from the Agrarian Reform Consortium, conflicts over customary land appear to have increased from 2020 to 2024. Data from the past five years on agrarian conflicts, including those involving customary land, shows that starting in 2020, the number of disputes was nearly 250, then decreased in 2021, but gradually increased in subsequent years, reaching a peak of 295 cases in 2024. The surge in disputes in 2024 is closely related to large investment projects, national infrastructure (PSN), and plantation areas that overlap with the land rights of indigenous peoples.

Therefore, the objective of research that seeks to explain, critique, or re-examine the legal position of customary land within the national regulatory system is highly relevant.<sup>15</sup> This research contributes to clarifying the legal status of customary land within the national legal system,

providing an argumentative basis for the protection of indigenous peoples' rights, and formulating legal policy recommendations that are fairer, more contextual, and operational. In short, the significance of this research lies in its urgency in bridging customary law and state law, as well as resolving various regulatory overlaps and conflicts of interest that arise from the vagueness of customary land regulations.<sup>16</sup> The advantages of this research compared to previous studies include:

- (1) Promoting agrarian law reform based on communal justice;
- (2) Linking local issues (customary land) to the international human rights framework;
- (3) Assessing the implementation of Indonesian positive law in protecting customary rights from agrarian

conflicts, dispossession, and exploitation;

- (4) Develop legal and policy recommendations to strengthen substantive protection of customary rights;
- (5) Be relevant to the agenda of climate change, sustainable development, and environmental justice;
- (6) Provide a basis for strategic advocacy and litigation.

**RESULT & DISCUSSION**

In the results and discussion section of this study, we'll talk about the review and analysis of the concept of customary land protection in Indonesian law, like court rulings and regulations. Then, the legal analysis in this study will look at various aspects, linking the implications of these rulings and regulations to the human rights of indigenous peoples.

**Analysis of Court Decisions on Customary Land Disputes**

In this section, the study will analyze court decisions on customary land disputes, namely disputes between indigenous peoples and companies and also between indigenous peoples and the government. The analysis of court decisions will be conducted by examining several aspects, including the conformity of the decisions with applicable law,<sup>17</sup> legal consequences, and the implications of the decisions on the human rights of indigenous communities, and recommendations related to customary land policy was reviewed based on existing court decisions, combined with a conceptual approach to human rights.

**1. Conflict between Indigenous Peoples and the Government**

Supreme Court Decision No. 4241 K/Pdt/2022 on Customary Land in Papua.

**Identity of the Decision**

- (1) Cassation Case: Dispute over the Building Use Rights Certificate (SHGB) issued by the National Land Agency (BPN) on customary land belonging to the Hubikiak indigenous community, Wamena, Papua;
- (2) Cassation Petitioner: Indigenous community (heirs);
- (3) Respondent in the Appeal: PT Pertamina (Persero) as the holder of the SHGB on behalf of the Legal Entity.

**Case Position (Posita & Petitum)**

Posita (main arguments of the petitioner):

- (1) That the land in question is customary land, which has been inherited from generation to generation;
- (2) The Pertamina certificate should be invalid because it conflicts with customary law;
- (3) The transfer to Pertamina was carried out through customary procedures (release of customary rights) but without official registration procedures;

Petitum (legal claims):

- (1) To revoke the SHGB in the name of Pertamina;
- (2) To establish that the land is lawfully controlled by the indigenous community (appellant);
- (4) Request the National Land Agency to revoke the SHGB.

**Judge's Considerations (Ratio Decidendi)**

- (1) SHGB certificates issued to parties who have actual control and good faith have legal legitimacy as long as they are not contested within 5 years in accordance with Government Regulation No. 24 of 1997 Article 32 paragraph (2);
- (2) SHGB is valid proof of ownership under formal law, whereas customary documents such as "Pipil Garuda" are not equivalent legal evidence;
- (3) Although the transfer occurred through the customary village, the document is not a valid basis in the formal agrarian legal system;
- (4) Since more than five years have passed without formal objection, Pertamina's right to the SHGB is deemed to have become legally valid.

**Judgment Ruling**

The Supreme Court ruled:

- (1) To grant Pertamina's appeal;
- (2) To establish the SHGB in Pertamina's name as valid and binding;
- (3) To legitimize Pertamina's rights to the land, including the rejection of restitution to the customary community;
- (4) To order the Appellant (the customary community) to pay the court costs.

**Table 1.1.** Judicial Analysis of Supreme Court Decision No. 4241 K/Pdt/2022 Regarding Customary Land in Papua

Aspects of Study	Judgment Analysis
Consistency with Applicable Law	1. The Supreme Court Decision No. 4241 K/Pdt/2022 refers to the Basic Agrarian Law (UUPA) and Government Regulation No. 24 of 1997 concerning land registration, emphasizing the principle of legalizing land rights for those who possess land in practice; 2. The ruling does not incorporate customary law norms as valid legal evidence within the national formal legal system; 3. The decision is consistent with prior jurisprudence that prioritizes registered land certificates over oral or customary documentary evidences.
Legal Consequences	1. The formal strength of land titles (e.g., Right to Build or SHGB) prevails over customary land claims, even if the latter are deeply rooted in

	<p>traditional practice;</p> <ol style="list-style-type: none"> <li>2. The decision affirms the principle of legality and legal certainty for Pertamina's land rights, rejecting claims based on customary norms;</li> <li>3. Negative implications arise for indigenous communities:             <ol style="list-style-type: none"> <li>a. Customary law becomes less recognized in formal legal proceedings;</li> <li>b. Opportunities for restitution through litigation are effectively lost;</li> <li>c. The decision underscores the urgency for formal registration of customary land before disputes arise or within five years of certificate issuance.</li> </ol> </li> </ol>
<p>Human Rights Implications for Indigenous Peoples</p>	<ol style="list-style-type: none"> <li>1. The ruling disregards the collective rights of indigenous communities. It emphasizes that formal land titles take precedence over communal customary possession, thereby ignoring indigenous peoples' rights to land, natural resources, and their environment—rights protected under Article 28I(3) of the 1945 Constitution, Law No. 39 of 1999 on Human Rights, and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP);</li> <li>2. It places indigenous peoples in a weaker legal position in court:             <ol style="list-style-type: none"> <li>a. Customary documents such as <i>pipil</i> or oral agreements are not accepted as valid legal evidence;</li> <li>b. Indigenous peoples face difficulty in asserting their rights due to a national legal system that does not accommodate non-certificated communal claims;</li> </ol> </li> <li>3. There is a potential for criminalization and displacement:             <ol style="list-style-type: none"> <li>a. Indigenous communities still occupying customary land already titled to others are at risk of being deemed unlawful occupants;</li> <li>b. This opens the door to eviction, forced relocation, and potential criminal charges against indigenous groups.</li> </ol> </li> </ol>
<p>Policy Recommendations Based on Supreme Court Decision No. 4241 K/Pdt/2022</p>	<p>To address the legal gap, the government should integrate customary law into the national agrarian system through the following measures:</p> <ol style="list-style-type: none"> <li>1. <b>Amendment of the Basic Agrarian Law (Law No. 5 of 1960):</b> Explicitly recognize customary land rights as collective rights equal to individual property rights; Establish distinct registration mechanisms for communal customary land, different from individual land certificates (SHM).</li> <li>2. <b>Participatory Mapping of Customary Territories:</b> The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) should facilitate participatory mapping and registration of customary land; Agrarian reform can be implemented through the Customary Territory Mapping scheme, which can serve as valid customary proof in court.</li> <li>3. <b>Amendment of Civil Procedural Law:</b> Allow customary evidence, such as oral agreements, customary witnesses, <i>pipil</i>, and other forms of traditional proof, to be treated equally with legally recognized evidence; Include testimonies from customary law experts and anthropologists as crucial elements in customary land cases.</li> <li>4. <b>Community-Based Dispute Resolution:</b> Promote the establishment of nationally recognized customary dispute resolution institutions; Decisions made by these institutions should be final and binding, backed by state protection.</li> </ol>

2. Customary Land Dispute Between Indigenous Peoples and Company.

West Pasaman District Court Decision Number

05/Pdt.G/2012/PN.PSB Supreme Court Decision No. 4241 K/Pdt/2022 Regarding Customary Land in Papua.

Identity of the Decision

- (1) **Plaintiff** : Simaharajo indigenous community, Nagari Kinali, West Pasaman Regency;
- (2) **Defendant**: Plantation company that utilized customary land without valid customary permission.

**Position of the Case**

Posita (Plaintiff's Arguments):

- (1) The indigenous community claims that the land used by the company is their customary land, with witness testimony and documents to prove their customary rights to the customary land;
- (2) The plantation company's control of the customary land was not accompanied by the consent of the ninik mamak (customary leaders), and is therefore considered to be against customary law and national agrarian law.

Petitum (Legal Claims):

- (1) To declare that the land in question belongs to the indigenous

- (2) To declare the company's actions as unlawful;
- (3) To request compensation and the return of the land.

**Judicial Considerations (Ratio Decidendi)**

- (1) Although the plaintiffs submitted witness testimony and documents to prove their customary rights to the communal land, the panel of judges ruled that the evidence was not strong enough to invalidate the company's legal rights;
- (2) The judges did not recognize customary documents or local witnesses as sufficient evidence to invalidate the formal legal status held by the plantation company.

**Judgement**

- (1) The lawsuit was dismissed in its entirety by the court;
- (2) The indigenous community was found to have failed to prove its customary land rights claim within the formal legal system;
- (3) No compensation or land restitution was awarded to the community.

**Table 2.1.** Judicial Analysis of West Pasaman District Court Decision Number 05/Pdt.G/2012/PN.PSB about Customary Land in West Pasaman Regency.

Aspects of Review	Judgment Analysis
Consistency with Applicable Law	1. The panel of judges emphasized the application of national positive law, such as the Basic Agrarian Law (UUPA), which requires formal recognition and registration to validate land rights; 2. In the absence of certificates or formal legal legitimacy, customary claims are considered insufficient according to national evidentiary standards.
Legal Consequences	1. Indigenous communities are legally disadvantaged, even when they have long-established factual control over the land; 2. The decision highlights that in formal court proceedings, traditional customary evidence (oral testimony, local witnesses, indigenous documents) often loses to formal legal documentation or state-issued permits; 3. Consequences include heightened vulnerability for indigenous communities without formal recognition (through local regulations or certificates) to lawsuits by permit holders or corporations.
Human Rights Implications for Indigenous Peoples	1. The decision constitutes a violation of rights to land, adequate livelihood, culture, and self-determination, as protected by Article 28I of the 1945 Constitution, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), and Law No. 39 of 1999 on Human Rights. The ruling dismissed the Simpang Tigo indigenous community's lawsuit against a plantation company due to lack of formal legal evidence to prove their customary land rights. This directly impacts their access to ancestral land, natural resources essential for survival, and cultural-spiritual heritage; 2. Structural discrimination is evident, as the legal system favors corporate actors with access to land legalization, while indigenous communities' sociocultural evidence (e.g., <i>pipil</i> , testimony of traditional elders) is subordinated; 3. Potential displacement and social injustice: The decision legitimizes corporate control over customary land without customary consultation, potentially leading to marginalization, structural poverty, and loss of cultural identity.
Policy Recommendations Based on Court Decision Number 05/Pdt.G/2012/PN.PSB	1. <b>Ratify the Bill on Indigenous Peoples (RUU Masyarakat Adat):</b> Provide a national legal umbrella recognizing indigenous rights to land, culture, and traditional institutions. This would form the basis to challenge state or corporate actions that neglect customary rights. Although listed in the National Legislation Program (Prolegnas), the bill has not been passed;

	<p><b>2. Reform the UUPA and Harmonize with Constitutional Court Decision No. 35/PUU-X/2012:</b>                  While Article 3 of the UUPA recognizes customary rights, it remains limited and lacks mechanisms for implementation. The MK Decision reinforces indigenous legal standing over customary territories, including forests, land, and natural resources. Recommendations include:                  a. Remove the phrase "as long as it still exists" from Article 3 and replace it with more affirmative and operational language.                  b. Integrate the substance of MK Decision 35/2012 explicitly into UUPA provisions on customary forest and land recognition.                  c. Classify customary rights as formal agrarian rights, elevating customary land to an equal status with ownership, cultivation, and usage rights;</p> <p><b>3. Participatory Mapping and Registration of Customary Territories:</b>                  The state must actively support participatory mapping involving indigenous communities. Results should be legally registered with the National Land Agency (BPN) to provide standing in court.;</p> <p><b>4. Expand Admissibility of Customary Evidence in Court:</b>                  Revise civil procedure law to recognize customary evidence (e.g., <i>pipil</i>, testimony of cultural elders) as valid legal proof. Include certification of cultural witnesses or customary experts in court proceedings;</p> <p><b>5. Establish Customary Dispute Resolution Bodies:</b>                  Create non-litigation forums rooted in traditional deliberation, but formally acknowledged by the state. Decisions by such customary institutions could be upheld within the national court system.</p>
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**The Concept of Customary Land Protection Based on Legislation in Indonesia.**

A study of the concept of customary land protection based on Indonesian law is very important in order to assess the extent to which the existing legal framework is able to provide recognition and protection for customary land,<sup>18</sup> analyze the gap between normative recognition and actual implementation, and contribute to the discourse on agrarian law reform and the rights of indigenous peoples in Indonesia.

In this study, the concept of customary land based on Indonesian legislation will be examined by analyzing the strengths and weaknesses of existing legal provisions,<sup>19</sup> so that this study can provide recommendations for improving legal regulations, which can be used as guidelines for the government in terms of agrarian reform with the aim of providing fair protection for customary land and indigenous peoples,<sup>20</sup> equal to the protection given to land rights entities and state land in Indonesia. The review was conducted on various legal regulations, including MPR Decree No. IX/MPR/2001, Article 3 of the UUPA, Law No. 39 of 1999 on Human Rights, Law No. 41 of 1999 on Forestry, Article 51(1) of Law No. 24 of 2003 on the

Constitutional Court, Article 9 of Law No. 39 of 2014 on Plantations, Law No. 23 of 2014 on Regional Government, and Law No. 11 of 2005 on the Ratification of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

**1. Decree of the People's Consultative Assembly (TAP MPR) No. IX/MPR/2001 on Agrarian Reform and Natural Resource Management**

TAP MPR No. IX/MPR/2001 is a decree of the People's Consultative Assembly, thus serving as a guideline and direction for legislative policy, not as a direct operational regulation, but constitutionally binding in the formulation of laws and state policies.

TAP MPR No. IX/MPR/2001 recognizes, respects, and protects the rights of indigenous peoples and the cultural diversity of the nation over agrarian resources/natural resources. It stipulates that agrarian reform and natural resource management must ensure the protection of indigenous peoples and marginalized groups.<sup>21</sup> Agrarian and natural resource law reform is designed to eliminate land ownership inequality and guarantee customary rights.<sup>22</sup> It also recognizes legal diversity, including customary law, within the national system.<sup>23</sup>

**Table 1.1.** Strengths of MPR Decree No. IX/MPR/2001.

Aspect	Explanation
Foundation for National Policy	This decree serves as a normative foundation for promoting agrarian and natural resource policy reform that is more inclusive of indigenous peoples.
Explicit Recognition of Indigenous Peoples	The decree explicitly acknowledges and protects the rights of indigenous peoples to land and natural resources as part of the nation's cultural diversity.

Principle of Justice and Sustainability	It encourages a democratic, equitable, environmentally conscious, and locally grounded model of agrarian and natural resource governance. communities' sociocultural evidence (e.g., pipil, testimony of traditional elders) is subordinated; Potential displacement and social injustice: The decision legitimizes corporate control over customary land without customary consultation, potentially leading to marginalization, structural poverty, and loss of cultural identity.
Basic for Sectoral Legislation	The decree mandates the drafting of new laws related to agrarian reform and resource management that respect communal rights.

**Table 1.2.** Weakness of MPR Decree No. IX/MPR/2001.

Aspect	Explanation
Not an Operational Regulation	The decree cannot be directly used as a legal basis for lawsuits or policy implementation without being translated into statutory law and derivative regulations.
Unrealized Mandate	Since its issuance, there has been no comprehensive revision of the 1960 Basic Agrarian Law (UUPA) or the passage of an Agrarian Reform Law that elaborates on the decree's content.
Overlapping Sectoral Policies	Many sectoral regulations (forestry, mining, plantations) continue to ignore customary rights and conflict with the spirit of the decree.
Limites Formal Recognition of Indigenous Peoples	Indigenous communities must still struggle to obtain administrative recognition (such as local regulations or customary territory maps) to have their rights acknowledged by positive law.

**Table 1.3.** Implications of MPR Decree No. IX/MPR/2001 for the Human Rights of Indigenous Peoples.

Aspect	Explanation
Right to Land and Customary Territories	The decree recognizes customary rights and directs the state to respect collective ownership of land and natural resources by indigenous communities.
Right To Cultural al Identity Recognition	The decree acknowledges the identity and cultural expressions of indigenous peoples as a component of national unity and diversity.
Right to Participation in Development	The decree promotes the involvement of indigenous communities in agrarian and natural resource policymaking to prevent marginalization.
Right to Livelihood and Environmental Sustainability	It rejects exploitative approaches to natural resources and encourages management models based on local wisdom and ecological balance.
Right to Live Free From Structural Discrimination	The decree paves the way for reform of sectoral laws to eliminate discrimination against indigenous communities.

**Recommendations for Improving MPR Decree No. IX/MPR/2001:**

- (1) Transform the TAP into an agrarian reform law, so that the principles in the TAP can be legally binding and implemented;
- (2) Encourage local governments to draft local regulations on the recognition of indigenous peoples with the support of participatory maps of indigenous territories, to provide legal certainty for customary lands in each region;
- (3) Accelerate the ratification of the Indigenous Peoples Bill, providing a strong legal framework to guarantee indigenous rights to land, culture, and territory;
- (4) The government should establish an indigenous peoples'

rights monitoring agency, an independent institution or special commission to monitor the implementation of TAP and the protection of indigenous peoples' human rights;

- (5) Organize the drafting of an Integrated Natural Resources Law, as mandated by TAP, to avoid sectoral conflicts (forestry, mining, etc.). Also, ensure the involvement of indigenous communities in the formulation of natural resource policies and the management of their territories.

**2. Article 3 of Law No. 5 of 1960 on Basic Agrarian Law (UUPA)**

Text of Article 3:

*"In consideration of the provisions in Articles 1 and 2, the*

*implementation of customary rights of indigenous communities, if they still exist in reality, must be exercised in with the national interest and the State and may not contradict laws and other higher-level regulations”.*

**Table 2.1.** Strengths of Article 3 of the Basic Agrarian Law.

Aspect	Explanation
Explicit Recognition of Customary Law	Article 3 provides the first formal legal foundation in Indonesia’s national agrarian law that explicitly acknowledges the existence of customary (communal) land rights held by indigenous communities.
Contextual Flexibility	The provision allows for the consideration of local conditions and social realities in the implementation of customary rights, offering adaptability to regional customs and practices.
Balancing National Interest.	This article ensures that the exercise of customary rights remains consistent with national interests, helping to prevent separatism or legal exclusivity that could undermine national unity.
Legal Basis for Protection	Article 3 can serve as a legal basis for indigenous communities to assert their land rights, especially if such rights have been formalized through local regulations (perda) or administrative recognition.

**Table 2.2.** Weaknesses of Article 3 of the Basic Agrarian Law.

Aspect	Explanation
Discriminatory and Conditional in Nature	The phrase “insofar as they still exist in reality and are in line with national interests” creates room to disregard customary rights that are not formally codified in writing.
Lacks a Standardized Procedure	The law does not specify a clear mechanism for proving that customary rights “still exist.” This creates barriers for indigenous communities in seeking legal protection.
Subordinate to National Law	Indigenous communities are required to independently pursue legal recognition—typically through local regulations (perda) or court decisions—placing customary rights in a subordinated legal position.
Triggers Overlapping Land Interests	Many customary territories remain unrecognized due to the absence of official mapping or because concessions have already been granted to third parties.

**Table 2.3.** Implications of Article 3 of the Basic Agrarian Law for the Human Rights of Indigenous Peoples.

Aspect	Impact
<b>Legal</b>	Customary land rights are difficult to enforce because they are not automatically recognized within the national land administration system.
<b>Social</b>	Indigenous communities experience marginalization in land control, especially in areas rich in natural resources.
<b>Economic</b>	Indigenous peoples lose access to productive land, putting their economic livelihoods at serious risk.
<b>Cultural</b>	The loss of customary land severs spiritual and cultural ties between indigenous communities and their ancestors.

**Recommendations for Improving Article 3 of The Basic Agrarian Law:**

- (1) Amend Article 3 of the Basic Agrarian Law to ensure that recognition of customary (customary) rights is based on positive affirmation, rather than conditional recognition;
- (2) Introduce clear administrative procedures for the recognition and registration of customary territories through the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN);
- (3) Harmonize Article 3 of the Basic Agrarian Law with

Constitutional Court Decision No. 35/PUU-X/2012 and Article 18B(2) of the 1945 Constitution.

**1. Law No. 39 of 1999 on Human Rights**

Article 6 of Law No. 39 of 1999 states that:

*“In the enforcement of human rights, the differences and needs of indigenous peoples must be recognized and protected by law, society, and the government. The cultural identity of indigenous peoples, including rights to customary land, shall be protected in accordance with the times”.*

**Table 3.1.** Strengths of Article 6 of Law No. 39 of 1999.

Aspect	Explanation
Explicit recognition of indigenous peoples	The law explicitly mentions “indigenous peoples,” positioning them as subjects of human rights that must be protected.
Customary Land Rights are Part of Human Rights	Article 6(2) states that customary land is part of indigenous cultural identity and is protected by the state.
Mandate for State and Society	The responsibility to protect indigenous peoples lies not only with the state but also with society at large (multi-actor approach).

**Table 3.2.** Weaknesses of Article 6 of Law No. 39 of 1999.

Aspect	Explanation
Not Operational	The law does not specify how customary land rights are to be protected through administrative or judicial mechanisms.
Weak Protection of indigenous peoples’ Human Rights	It lacks specificity in protecting the human rights of indigenous peoples and offers few mechanisms for remedies or sanctions in cases of rights violations..
No direct linkage to agrarian and forestry systems	There is no legal coordination between the Human Rights Law and sectoral laws like the Agrarian Law or Forestry Law, which directly affect customary lands.
Weak legal impact	Although rights are guaranteed, in practice, court rulings in land disputes often do not favor the collective rights of indigenous peoples.

**Table 3.3.** Implications of Law No. 39 of 1999 on the Human Rights of Indigenous Peoples.

Aspect	Explanation
Constitutional Recognition	Provides a strong legal foundation for recognizing the existence of indigenous peoples, including customary land as part of their identity and fundamental rights.
Land Rights as Human Rights	Reaffirms that customary land rights are human rights, not merely agrarian entitlements—essential in resisting land grabs by the state or corporations.
Protection on Cultural Identity	Safeguards the values, norms, and traditions of indigenous peoples as cultural rights that must be preserved by the state.
Legal Advocacy Instrument	The law can serve as a legal basis for indigenous communities and NGOs to file lawsuits, advocate, and seek justice when rights violations occur.
Declarative and Normative in Nature	The law lacks concrete operational or administrative mechanisms to directly protect customary land rights. Institutions like Komnas HAM have limited authority in enforcing decisions.
Weak remedy and restitution system	There is no adequate mechanism for compensation or collective restitution for indigenous communities forcibly displaced from their ancestral lands.
Poor integration with the land administration system	There is no provision allowing customary rights to be registered under this law; land certification still depends on the ATR/BPN and local regulations.

**Recommendations for Improving Law No.39 of 1999:**

The government should harmonize the Human Rights Law with sectoral laws (agrarian, forestry, mining) to prevent conflicting regulations that undermine indigenous rights;

Strengthen the provisions regarding indigenous peoples by detailing collective rights and providing administrative mechanisms for protecting customary lands;

Expand the authority of Komnas HAM to issue enforceable (executory) recommendations;

Accelerate the passage of the Indigenous Peoples Bill (RUU Masyarakat Adat) as a *lex specialis* to guarantee the human rights of indigenous communities.

**2. Law No. 11 of 2005 on the Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR)Rights**

States that:

*“Affirms the “Right to Self-Determination,” whereby indigenous communities have the right to govern their own lives, cultures, and territories.*

*Guarantees non-discrimination in the implementation of rights, meaning that indigenous peoples must not be excluded from protection and access to public services”.*

**Table 4.1.** Strengths of Law No. 11 of 2005.

Aspect	Explanation
Provides an international legal basis for protecting indigenous rights	The ICESCR recognizes collective rights over land, culture, and social life for indigenous communities.
Expands the scope of human rights protection in Indonesia	Complements civil and political rights (regulated in the ICCPR) with economic and social rights.
Legally binding and must be implemented by the state	Indonesia is obligated to develop policies and allocate budgets to fulfill the rights guaranteed by the ICESCR.
Promotes state accountability	Offers a legal basis for litigation against violations of indigenous economic rights in development projects.
Progressively oriented	Encourages states to realize these rights gradually (progressive realization) but without discrimination.

**Table 4.2.** Weaknesses of of Law No. 11 of 2005.

Aspect	Explanation
Not directly operational	This law merely ratifies the covenant; it does not automatically function as an implementing regulation at the national level.
Not yet incorporated into sectoral laws	Many sectoral laws (e.g., on land, forestry, mining) are not yet harmonized with ICESCR principles.
Weak enforcement	No specific national mechanism or institution monitors ICESCR implementation systematically.
Limited access to remedies for indigenous peoples	There is no effective complaint mechanism for indigenous communities to claim their rights.
Fails to protect unrecognized customary territories	The state often only protects communities that have obtained formal recognition, despite their social existence.

**Table 4.3.** Implications of Law No. 11 of 2005 for the Human Rights of Indigenous Peoples.

Aspect	Explanation
Rights to land and natural resources	The ICESCR supports the rights of indigenous peoples to control and utilize their customary (customary) land.
Cultural rights and collective identity	Guarantees the preservation of language, customs, and traditional knowledge systems.
Rights to culturally appropriate health and education	The state must accommodate local and traditional service models in indigenous areas.
Economic justice	Indigenous peoples must be included and benefit from development projects within their territories.
Right to self-determination	The ICESCR reaffirms the right of indigenous peoples to manage their own lives free from unilateral interference.

**Recommendations for Improving Law No. 11 of 2005:**

- (1) Harmonize the ICESCR with sectoral laws (e.g., land, forestry, mining laws) to formally recognize the economic and cultural rights of indigenous communities;
  - (2) Develop national indicators to measure ICESCR fulfillment, enabling both national and local governments to be held accountable for protecting the socio-economic rights of indigenous peoples;
  - (3) Establish a national complaint mechanism to allow individuals or indigenous communities to file complaints for rights violations through administrative procedures or human rights courts.
- 3. Ministerial Regulation of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) No. 14 of 2024 on the Registration of Customary Land**

States that:

*“Customary land (tanah customary) belonging to indigenous legal communities may be registered within the national land administration system through three forms of legal recognition:*

1. Recording in the Customary Land Register, which serves as administrative acknowledgment that the land is collectively held by an indigenous community.
2. Granting of Management Rights (Hak Pengelolaan or HPL) to the indigenous community, provided that its existence and customary governance structures have been officially recognized by the regional government through local regulations.
3. Issuance of a Communal Land Certificate, which constitutes formal recognition of collective land rights for indigenous communities, without requiring individual legal subject status”.

**Table 5.1.** Strengths of Ministerial Regulation of ATR/BPN No. 14 of 2024 on the Registration of Customary Land.

Aspect	Explanation
Legal Certainty	The regulation provides the first structured guidelines for administering and registering customary land, replacing outdated rules from 2019 and aligning with national agrarian principles of cleanness and clarity.
Enhanced Government Role	ATR/BPN shifts from passive to active, enabling mapping, identification, and registration of customary land—even initiating from community applications
Multiple Legal Pathways	Provides three registration outputs: land listed in the Customary Land Register; issuance of Land Management Rights (HPL); and shared ownership certificates for communal groups
No Subject Pre-Approval Needed	Communities can register customary land without first obtaining recognition through local regulation—except when seeking HPL, which requires formal recognition.
Pilot Projects Implemented	Pilot initiatives in West Sumatra and Papua show practical steps toward formalizing customary land as HPL, representing a departure from past practices.

**Table 5.2.** Weaknesses of Ministerial Regulation of ATR/BPN No. 14 of 2024 on the Registration of Customary Land.

Aspect	Explanation
Excludes Land with Existing Rights	The regulation excludes customary land already subject to formal land rights—this limitation undermines its ability to address overlapping land claims and conflicts.
Limited Scope	Only land directly controlled by officially recognized customary law communities qualifies, neglecting broader customary land held by kinship or used traditionally.
No Forestry Coverage	Does not apply to forest zones, missing major tenurial conflicts within customary forests.
Insufficient Community Inclusion	Consultation with indigenous peoples and civil society was limited to data collection, with minimal participation in drafting—raising concerns about the representativeness and substance of the regulation.

**Table 5.3.** Implications of Ministerial Regulation of ATR/BPN No. 14 of 2024 on the Registration of Customary Land for the Human Rights of Indigenous Peoples.

**Positive Outcomes:**

Aspect	Explanation
Legal certainty	Offers stronger legal certainty and state support for indigenous land rights.
Recognition of collective land ownership	Facilitates recognition of collective land ownership and use through legal titles and registries.
Provides access to indigenous communities	Increases potential for indigenous communities to benefit from development and avoid marginalization.

**Negative Outcomes:**

Aspect	Explanation
Not all indigenous communities can be protected	Exclusion clauses perpetuate inequality, bypassing customary land covered by existing concessions or state land designations.
Not all customary lands can be safeguarded	Continued denial of protection for customary rights in forest zones.
Formal documentation is still required.	Limited scope undermines broader indigenous land tenure, leaving many communities vulnerable to land dispossession.

**Recommendations for Improving Ministerial Regulation of ATR/BPN No. 14 of 2024:** Modify provisions that exclude land with existing formal titles to allow inclusion of contested *customary* land in registration;

**(1) Revise Exclusion Clauses**

## (2) Expand Subject Coverage

Broaden definitions to include kinship-based and traditionally used customary lands, ensuring greater inclusivity;

## (3) Include Forestry Lands

Extend the regulation to include customary forest territories to resolve tenure conflicts and protect sacred spaces;

## (4) Ensure Community Participation

Institutionalize meaningful engagement of indigenous peoples and civil society in drafting, implementation, and periodic review;

## (5) Integrate Mechanisms for Conflict Resolution

Introduce provisions for mediation or participatory adjudication to address overlapping rights and ongoing *customary* disputes.

## CONCLUSION

The analysis of court decisions on customary land disputes *both between indigenous communities and the government and between indigenous communities and corporations* shows that rulings and regulations are often normative and declaratory in nature but lack operational mechanisms or concrete protection. The Analysis of Supreme Court Decision No. 4241 K/Pdt/2022 Regarding Customary Land in Papua and West Pasaman District Court Decision Number 05/Pdt.G/2012/PN.PSB, shows that indigenous communities frequently lose their claims over customary land due to the absence of formal proof, such as land certificates. Legal documents such as Right to Build (SHGB) or Right to Cultivate (SHGU) are still considered stronger evidence of land ownership in the eyes of the law compared to customary land claims. Another finding is that customary evidence such as oral agreements, testimony from traditional leaders, *pipil* (customary land records), and other forms of traditional proof are often not accepted as valid evidence in court. Therefore, the government is urged to revise the civil procedure law to allow customary evidence to be accepted on equal footing with formal legal evidence as recognized by statute.<sup>24</sup> Due to the weak status of customary evidence and the lack of formal documentation of customary lands, the human rights of indigenous peoples are often left unprotected. Indigenous communities face the loss of their ancestral land *both as places of residence and as sources of livelihood* are involved in conflicts with the state or corporations, and suffer from structural discrimination in accessing justice.<sup>25</sup>

The analysis of statutory regulations related to *customary* rights, customary lands, and indigenous peoples reveals that recognition of indigenous land rights is stipulated in various laws and regulations, both explicitly and implicitly—such as Article 3 of the Basic Agrarian Law (UUPA), TAP MPR No. IX/MPR/2001, Law No. 39 of 1999 on Human Rights (Article 6), Law No. 11 of 2005 on the ICESCR, and Ministerial Regulation of ATR/BPN No. 14 of 2024. However, many of these regulations remain normative in nature and lack binding, operational

standards. The mechanism for recognizing indigenous communities is still heavily dependent on formal acknowledgment through regional regulations (*Perda*), which leaves many indigenous communities unrecognized legally despite their evident existence in society. Fundamental rights of indigenous peoples such as the right to cultural identity, customary land, natural resources, and participation in development are still not comprehensively protected, even though they are guaranteed by national legal principles and international conventions like the ICESCR. There exists a significant gap between legal recognition of indigenous land rights in statutory law and court rulings, and the actual realization and protection of those rights in practice. To ensure the substantive protection of indigenous peoples' human rights, the state must commit to consistently implementing court decisions, reform sectoral regulations to align with constitutional and human rights principles, and provide legal access and inclusive administrative recognition to all indigenous communities. Agrarian reform is seen as a potential solution to the unresolved legal uncertainty surrounding customary land management.

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