



## LEGAL PROTECTION OF INDIGENOUS PEOPLE'S RIGHTS IN THE UTILIZATION OF NATURAL RESOURCES

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**Abstract:** This journal thoroughly explores problems and potential solutions related to the legal protection of indigenous peoples' rights in using local natural resources in Indonesia by basing the analysis on a multidisciplinary perspective, which includes legal, cultural, and socio-economic impacts. The juridical-normative approach is used to evaluate the legal framework governing the rights of indigenous peoples, while the empirical approach involves concrete case studies to understand its practical implementation. The findings highlight the gap between existing legal provisions and the realities on the ground, identifying current challenges such as conflicts of interest, industrialization, and globalization. An in-depth analysis of possible solutions, including policy improvements and strengthening legal mechanisms, provides holistic insights into improving the protection of indigenous peoples' rights. It is hoped that this journal can be an essential contribution to the development of more inclusive and sustainable policies, as well as increase understanding of the urgency of legal protection of indigenous peoples' rights in the context of local natural resource utilization.

**Keywords:** Legal Protection; Indigenous People; Natural Resources

### 1. Introduction

There have been indigenous peoples in Indonesia from the beginning of time till the present day. According to many academics, Indigenous peoples and communities governed by customary law are two distinct concepts. Indigenous peoples are a catchall term for specific groups with commonalities in culture and history. On the other hand, a customary law society is defined by a set of rules and regulations established by a body of law, a system of leadership responsible for protecting the group's interests internally and externally, and a specific geographical location (ulayat) where the people live.

According to Kusmadi Pujosewojo, "A legal society is a society that establishes, is bound and submits to its legal system, while customary law society is a society that arises spontaneously in a certain area whose establishment is not established or ordered by a higher ruler or other ruler, with or enormous solidarity among its members, who view community members not as outsiders and use their territory as a source of wealth that can only be fully utilized by its members." Utilization by outsiders must be with permission and reward in the form of recognition and others.

Article 18 Letter B Paragraph (2) of the 1945 Constitution stipulates that "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State



of the Republic of Indonesia.” However, in practice there is often a neglect of the rights of indigenous peoples, especially regarding the environment that It is one of the most important rights for indigenous peoples because the existence of these rights is one measure of the existence of an indigenous community.<sup>1</sup>

Article 65, paragraph (1) of Law Number 32 of 2009 concerning Environmental Protection and Management states that “everyone has the right to a good and healthy environment as part of human rights.” The dangers that continually threaten environmental sustainability are pollution and ecological destruction. Environmental degradation and devastation can disrupt an ecosystem. The use and management of natural resources deemed to violate current rules and regulations has been the subject of numerous recent court disputes, leading to environmental damage directly reinforced by communities that practice customary law inside their boundaries.

Since traditional customary law communities were born and have existed long before the formation of the Unitary State of the Republic of Indonesia, it is crucial to recognize and defend the rights of indigenous peoples. Normative conditions in the laws and regulations ensure that the principles and spirit of the Unitary State of the Republic of Indonesia develop these customary rights. These normative restrictions hamper the rights of persons based on customary law in numerous ways.

**First**, in the practice of implementing development, the formulation of the phrase "as long as it is alive and by the development of society and the principles of the Unitary State of the Republic of Indonesia" It is believed that the government disregards the rights of indigenous peoples because their institutions are acknowledged as long as they do not interfere with the spirit of progress. At the same time, there is a genuine desire to stand up for indigenous peoples' rights inside the community.<sup>2</sup>

**Second, the** 1945 Constitution states that the traditional rights As long as they continue to survive and as long as society progresses and the principles of the Unitary State of the Republic of Indonesia are upheld, indigenous peoples are to be protected according to the law.

When this happens, questions of what or how to govern indigenous peoples' rights recognition come up in the law. In other words, the terms and structure of the agreement are still up in the air. Thus, some are subject to legal regulation, while others are subject to more general agreements at the regional level.

In giving an interpretation of Article 18 B paragraph (2) of the 1945 Constitution, according to Jimly Asshiddiqie, “It should be noted that recognition is given by the state (i) to the existence of a customary law community and its traditional rights; (ii) The recognized existence is the existence of the unity of indigenous peoples; (iii) the customary law community is indeed alive

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<sup>1</sup> Iskandar Zulkarnain, "Implications of Government Policy on the Recognition and Protection of Customary Law Peoples in the Use of Natural Resources in Jambi Province," n.d.

<sup>2</sup> Zulkarnain.*ibid.*

(still alive); (iv) In a particular environment (lebensraum); (v) Such recognition and respect shall be given without prejudice to measures of worthiness for humanity by the level of development of the nation's existence; (vi) Such recognition and respect shall not diminish the meaning of Indonesia as a unitary state Republik Indonesia.” This provision recognizes and appreciates indigenous peoples, a fundamental concept or joint pillar of customary law.<sup>3</sup>

Weak acknowledgment of indigenous peoples as legal persons with unique and distinctive rights gives rise to a number of issues. Subsequently, indigenous peoples' rights, particularly their customary rights, were grossly violated by the state. Development strategies and legislation in Indonesia should prioritize indigenous peoples' rights. The government is pressured to pass legislation recognizing and protecting indigenous peoples swiftly.

## 2. Research Method

Normative legal procedures were employed in this investigation. Scientific research techniques that seek truth based on the logic of legal science from a normative perspective are known as normative legal research methods. Research methods include conceptual techniques, which look at evolving ideas and doctrines in scientific law, and legal approaches, which examine applicable laws and regulations. This study falls under the category of descriptive research, and it takes a qualitative approach to describe its subject using data collected through qualitative analysis. “If you want to know how human groups, things, conditions, ideas, or events are doing right now, the descriptive method is what you need,” says Nazir.

## 3. Discussion

### 3.1. Development of unity of Indigenous Peoples

Members of indigenous communities are not only physically and spiritually tied to the land where they were born and raised (territorial) but also to one another through the bonds of blood and kinship, whether that be through direct lineage from a common ancestor or through more indirect relationships such as customary or genealogical ties. When issues arise in a native group's traditional setting, the community members look to their customary law for guidance. The bumi putera, or indigenous Indonesians, have standards for behavior that have not been defined formally.<sup>4</sup> Indigenous Peoples are also respected; this is regulated in 281 Paragraph (3) of the 1945 Constitution, which “states that cultural identity and rights of traditional communities are respected in line with the development of times and civilization.” In addition, the criteria for the unity of customary law, communities are also regulated as follows:

- a. Is a group of people from one ancestor and inhabit the same customary territory
- b. Have certain customary territories, both cultivated and preserved for generations, that are common property

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<sup>3</sup> Abdurrahman, "The Role of Customary Law in the Application of National and State Life in National Law Magazine No. 1 of 2007 p.191 BPHN Ministry of Law and Human Rights of the Republic of Indonesia," n.d.

<sup>4</sup> Muhammad Ikhsan Mukhlis Pembimbing et al., “PERLINDUNGAN HUKUM ATAS HAK MASYARAKAT HUKUM ADAT TERHADAP PENGELOLAAN LINGKUNGAN HIDUP DI DESA SIKALANG KECAMATAN TALAWI KOTA SAWAHLUNTO PROVINSI SUMATERA BARAT,” *JOM Fakultas Hukum Universitas Riau*, n.d.

- c. Have its custom board
- d. Have their own customs and customary law rules
- e. As long as it still exists, it does not conflict with the spirit of national development.

The anthropological approach explains that at the first level of development of society and culture, early humans lived like a herd of animals in groups, where men and women lived freely without ties. Over time, humans have the consciousness of forming a family. Marrying a husband and wife forms a social unit called the household, consisting of husband, wife, and unmarried children. The characteristic of this group is the existence of kinship relationships created because they are based on the similarity of offspring.

This grouping comes from families or clans whose members feel they come from a common ancestor, have broad autonomy, and their rules of conduct are based on a longstanding tradition of awareness of decisions made by many or a few.

The subsequent development of kinship groups is to interact with other kinship groups that inhabit a particular area, giving birth to local living units or communities. Koentjaraningrat explained that, in contrast to kinship groups, this social unity does not solely have ties based on kinship alone but rather on ties because it occupies a particular or unique area. This makes the characteristic of a community is the existence of territory and love for its territory. The form of community there is as large as city, state, and country. While the form of small communities such as RT, hamlets, or Customary Law Peoples. According to Abu Daud Busroh, this is related to the process of the occurrence of the state primarily (*Primaire Staats Wording*), a theory that discusses the occurrence of states that are not linked to a pre-existing country. According to this theory, the development of the state primarily goes through four phases, namely:

1) Phase Genootshap (*Genossenschaft*)

In this phase, there is a grouping of people who combine themselves for common interests based on equality. This is motivated by common interests and goals, and the leadership here is elected *Primus Inter Pares* or the leading among the same. Here, the National Element plays a vital Role.

2) Phase Reich (*Rijk*)

In this phase, there has been a growing awareness of the groups of people who joined themselves of the right to own the land, giving rise to the lords who rule over the land and those who rent the land. This gave rise to the system of Feudalism. In this phase, what is essential is the element of territory.

3) Phase State

In this phase, awareness of a state of life has existed. When they realize that they are in a group, the seeds of the formation of a country, namely, Nation, Territory, and Government, are fulfilled in this article.

According to Aristotle, “The state occurred because of the merger of families into a larger group; the group merged again until it became the Customary Law People.” Then these Customary Law Peoples joined again, and so on, until the State emerged, which was still a city or polis. Customary Law Peoples, in accordance with their nature, are genealogical Customary Law Peoples, namely Customary Law Peoples based on descent.

Thus, Customary Law Peoples evolutionarily originated from individuals who came together to form families, which in turn interacted to establish larger family groupings that shared not just a common genealogy but also the land they occupied. This sense of shared purpose is the bedrock of the Customary Law People and the precursor to statehood. As a result, this group's cohesion is often called the customary law community unity or the legal community alliance.

According to Ter Haar, “Legal societies are groups of people who are fixed and orderly by having their power and wealth, both tangible and intangible.” In addition, according to Tolib Setiady, to be said to be a legal society, “it must have a certain territory in addition to having certain leaders and wealth.” So a legal communion or legal society (*rechts gemeenschap*) is a group of people bound together as a whole in an orderly order, which is eternal and has its leadership and wealth both tangible and intangible and inhabits or lives on a certain territory.

Meanwhile, according to the Alliance of Indigenous Peoples of the Archipelago (AMAN), “customary law communities as a community that have ancestral origins for generations live in certain geographical areas, and have a distinctive value system, ideology, political economy, culture and social.” As a result, communities governed by customary law are groups of individuals legally tied to one another due to shared ancestry or shared places of residency. Regarding customary law communities, Dewi Wulansari stated that theoretically, its formation was caused by the factor of the bond that binds each member of the customary law community.

Based on these two factors, customary law communities are formed based on:

- A. Genealogical legal alliance. In other words, the bonding power of groups whose members are bound together by law is based on the principle of equal descent. This means that a shared sense of ancestral lineage holds the group together. There are further divisions within this legal fellowship:
1. Patrilineal society, in which the structure of society is drawn according to the lineage of the father (male)
  2. Matrilineal society, in which the structure of society is according to the maternal (female) lineage
  3. In a bilateral or parental society, the composition of society is drawn based on the lineage of both parents, namely father and mother (male and female). So, the kinship relationship is parallel, where each family member enters the clan of the father or mother.

- B. Territorial law alliance: this fellowship is a legal society alliance whose members have attachments based on ordinary residence. Meanwhile, Hilman Hadikusuma further explained “that territorial law fellowship is an orderly and fixed society, whose community members are bound to a certain area of residence, both about worldly life as a place of life and in spiritual relation as a place of worship of spirits.” This shows that territorial ties contain not only the understanding of the territory of earthly residence but also spiritual habitation. According to van Dijk, as quoted by Hilman Hadikusuma, authoritarian law alliances can be distinguished into three kinds;
1. Communion of Indigenous Peoples (*dorps gemeenschap*). The communion of Customary Law Peoples is like the Javanese Customary Law Peoples, a typical residence within its area, including some confirmations located around it that are subject to the apparatus of Customary Law Peoples residing in the center of Customary Law Peoples. Meanwhile, Tolib Setiady believes that the communion of Customary Law Peoples occurs when a group of people is attached to a place of residence, which also if it is in it consists of tiny homes that include villages (*dukun-dukun*) and where leaders or government officials of Indigenous Peoples reside in the center of Customary Law Peoples.
  2. Regional alliances, including the unity of *the Nagari community in Minangkabau, clans in South Sumatra and Lampung, and negorij in Minahasa and Maluku*. That is a joint residence area and controls customary land consisting of several hamlets or villages with one common customary government center.
  3. Customary Law Community Association, if between several Customary Law Peoples or clans located side by side, each enters into a cooperation agreement to regulate common interests, for example, in regulating joint customary governance, common defense, economic life, agriculture, or joint marketing.
- C. Genealogical-territorial legal alliance, which is a combination of the above two legal partnerships. According to Tolib Setiady, genealogical and territorial factors are essential. To become a member of the fellowship, one must meet two conditions at once: belonging to a genealogical entity and residing within the territory of the fellowship concerned. The same thing was also explained by Hilman Hadikusuma, who stated that the genealogical-territorial law alliance is a permanent and orderly community unit, where its members are not only bound to the place of residence in a certain area but also bound to hereditary relations in bonds of blood and kinship.

Thus, historically and based on de facto recognition that indigenous peoples' rights in the control and management of natural resources, including in coastal and marine areas, have automatically been inherent since the unity of indigenous peoples was formed and have been legitimized or recognized de jure in Article 18 of the NRI Constitution of 1945. The principle of recognition of the unity of Indigenous Peoples. Confession in terminology means the process,

way, or act of acknowledging, while the word To acknowledge is to declare entitlement. According to Abu Daud Busroh, there *are (two) kinds of Confession (Erkenning/Recognition)*, namely:

- 1) *De facto* recognition, i.e., interim acknowledgment of the birth or establishment of a new state since the new state does exist. However, whether the process is legal is unclear, necessitating additional research. According to Moh Kusnardi and Bintan Saragih, as quoted by Husein Alting, “*de facto* recognition is temporary which is addressed to the facts regarding the position of the government of the new State, whether its people support and whether its government is effective which causes its position to be stable. If it can be maintained and continued to advance, then *de facto* recognition will change to *de jure* recognition.” Based on this, the *de facto* continuity of customary law inside indigenous communities or villages is acknowledged because customary law remains alive and well within these communities and villages, thanks to the people who live there and work to keep it that way.
- 2) *De jure* recognition is the most comprehensive and permanent recognition of the emergence or formation of a state because the formation of a new state is based on law. Meanwhile, according to Husein Alting, “*de Jure* recognition is the recognition of a State to another State followed by certain legal actions, such as the opening of diplomatic relations and the ability to enter into agreements with other States.” Based on this concept, *de jure* (juridical), The State acknowledges and regulates the unity of customary law communities through the provisions of applicable laws and regulations or by positive law if the unity of these communities is still maintained and upheld by their supporting communities.

Based on this theory, if it is related to the context of recognition of the existence of the unity of customary law communities, it can be seen that *de facto* village recognition refers to the recognition of historical facts until now regarding the existence of the unity of customary law communities in the Republic of Indonesia that still exists. At the same time, *de jure* recognition refers to the legal recognition of villages in the Republic of Indonesia.

### 3.2. Existence of Customary Law Peoples in Defending Natural Resources

Customary law plays a vital role in maintaining natural resources because it regulates the relationship between the community and the environment for generations. Through customary norms, communities can maintain ecosystem balance and ensure sustainable use of natural resources. Customary law, a legal system developed in traditional societies, plays a central role in maintaining natural resources. Its existence can be understood through several aspects, including norms, values, and rules passed down from generation to generation.

First, customary law reflects the close relationship between communities and their natural environment. Customary norms are often related to the sustainable use and management of natural resources. The principles of local wisdom are embodied in rules governing when, how, and to what extent natural resources can be utilized. Second, customary law has social and

cultural functions that help maintain harmony between humans and nature. The concepts of togetherness, interdependence, and shared responsibility are embodied in indigenous values, which support ecosystem maintenance and community survival. In addition, customary law also offers an internal conflict resolution mechanism. In natural resource utilization, customary rules can guide the resolution of disputes between community members. This approach is often more effective because it involves direct participation from the community involved.

However, it should be recognized that customary law is not always without challenges. In an era of modernization and globalization, indigenous values often intersect with economic and development interests. This conflict of interest can threaten the sustainability of indigenous practices in safeguarding natural resources. Overall, customary law in maintaining natural resources reflects practical aspects of environmental management and describes the cultural heritage and local wisdom valuable for the sustainability of ecosystems and human life.

With the Juridicial Recognition, It is legally permissible for customary law communities to exist inside the Unitary State of the Republic of Indonesia, as established by the laws above and regulations protecting indigenous peoples and their rights. Community rights to natural resources in customary regions are among the traditional rights. As indicated earlier, it is equally important to recognize and honor the right of communities governed by customary law to maintain their own cultural practices. Along with that acknowledgment comes the necessity to grant them the chance to cultivate their culture and way of life. Without acknowledging the organizational structure of local customary government, work mechanisms, regulations, and the various rights and obligations contained in the institutional system of local communities, the recognition of the rights of Indigenous peoples has become nothing more than political rhetoric.

Therefore, it is essential to recognize the natural resources that constitute lebensraum and the sources of life, both symbolically and realistically.<sup>5</sup> Seeing the unity of indigenous peoples as a reality, to whom recognition and respect are given so that their existence is a right, according to Titahelu (2005), "rights as a unity of indigenous peoples are something that exists by itself and does not depend on recognition and application in state law, both constitution and legislation." The issue is whether normative and empirical customary law communities are given the space to defend their rights to natural resources and other traditional rights and, more than assert their rights, whether indigenous peoples can exercise them. This is important to point out because, from various experiences, it can be seen that indigenous peoples, as well as the individuals who exist in them as a reality, are often ignored and marginalized.

For indigenous peoples to properly defend and exercise their rights to natural resources, the Government (State, Province, District/City) must provide fair treatment and opportunities so that they can develop programs and activities that produce something broadly beyond the subsistence way of life. As stated earlier, there are at least several rights inherent in the unity

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<sup>5</sup> Clara Kesaulya, Rocky S Mantaiborbir, and Novyta Uktolseja, "The Effectiveness of Indigenous Peoples in Natural Resource Management of Small Areas of Border Islands," n.d.



of customary law communities, namely the existence of property rights, both individual (property rights) and collective (customary rights, lordship rights) over land and other natural resources, including water, rivers, forests, animals, seas, and coasts and so on. For the unity of indigenous peoples individually or as a whole to play a role in maintaining and using their rights to natural resources to produce something better, the right to live a healthy life to work, the right to have an environment that can produce life needs, the right to determine whether or not other parties (investors) can manage Natural resources within areas controlled by indigenous peoples with "free and prior informed consent" must also be provided to them. Regarding the right to determine whether or not investors can manage natural resources, according to Sumardjono, Regional Governments play an essential role in 2 (two) things.

First, to balance the interests of investors and customary law communities through facilitation efforts between the two parties to reach deliberation on the form and content of cooperation that benefits both parties and the wider community. Second, by designing regional policies that provide justice, legal certainty, practicality, and legal protection for all relevant parties following applicable laws and regulations. In addition, the government and companies offer support by providing facilities for efficient production processes, training, management, crediting, marketing, and others as needed by each customary law community.

The Company also has a social obligation to help the surrounding community, including customary law communities in physical form (educational facilities, worship, health, infrastructure, and so on) and non-physical in the form of scholarships and opportunities for cooperation/partnership. Recognition and respect for Indigenous peoples and their rights to natural resources are not mere rhetoric but can be realized for welfare purposes. For this reason, to realize good environmental governance and end exploitative, centralistic, sectoral, and repressive natural resource management practices, the Government in the formation of natural resources law needs to pay attention to the principles as stated by Nurjaya (2008), "among others, as follows: (1) regulate coordination mechanisms and integration between sectors in natural resource management; (2) using the paradigm of community-based resource management; (3) provide space for transparency and genuine public participation as a democratic form in natural resource management; (4) provide space for the recognition and protection of human rights, especially access and rights of indigenous/local peoples to the control and utilization of natural resources. (5) handing over the authority to manage natural resources to regions based on the decentralization principle; (6) Regulating the mechanism of supervision and accountability of natural resource management to the public (public accountability)."

### **3.3. Legal Protection of Indigenous Peoples by their Constitutional Rights**

Land has an essential position for customary law communities. In addition to having economic value, land is also a place where families and communities live, a place to find manuscripts, and a place where the deceased are buried. To that belief, the land is highly respected and is the only object for indigenous peoples.

There is a strong bond between the land and the customary law communities. There is a solid religious and magical foundation to the relationship. Because of this mystical religious bond, the legal community was granted the authority to govern the land, cultivate it, harvest its plants, and hunt its animals. The tenure rights or customary rights to the land are referred to in the literature as *beschikkingsrecht* by Van Vollenhoven.<sup>6</sup>

By the mandate of article 18B of the 1945 NRI Constitution, customary law communities are recognized with prerequisites, namely as long as they are alive and in accordance with the development of society. Conditional recognition by the 1945 NRI Constitution shows that by Indonesian national law, customary law communities are recognized and protected. Philosophically, the State's recognition and respect for customary law communities includes 3 (three) things, namely: the existence of customary law communities, the existence of institutions/institutions that exist in customary law communities, and the existence of customary law rules/norms in the lives of customary law peoples. The form of recognition and respect of the State for customary law communities in Indonesia can be traced from the provisions in the 1945 Constitution, MPR Decrees, Laws, and Government Regulations.<sup>7</sup>

#### 4. Conclusion

According to Article 28I, Paragraph (3) of the 1945 Constitution, customary law communities are defined as people who share a common cultural heritage and whose traditional rights are upheld in light of modern cultural norms and values. Legislation recognizing indigenous peoples' traditional rights, such as access to natural resources in their traditional territories, provides *de jure* and practical legal recognition of indigenous peoples' existence. This recognition has essential consequences for controlling and managing natural resources, where indigenous peoples have rights to land, water, forests, seas, etc. In addition, recognition also involves aspects of customary government organization, work mechanisms, and rights and obligations in local communities' institutional system.

In natural resource management, the government needs to provide fair treatment and opportunities for indigenous peoples to develop their existence and culture. With the principle of free, prior consent, the right to determine the management of natural resources in their territories is also crucial in empowering indigenous peoples. Protection of the rights of indigenous peoples must not only be limited to political rhetoric. Still, it must be realized through fair policies that provide legal certainty, practicality, and legal protection. In this case, the role of local governments and companies is essential to balance the interests of investors and customary law communities. Thus, recognition and respect for indigenous peoples include their traditional rights to natural resources and social, cultural, and organizational aspects. This understanding is the basis for creating good environmental management arrangements,

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<sup>6</sup> Aprianti & Kasmawanti, "Customary Law in Indonesia," *Refika Aditama*, 2016, 1–24.

<sup>7</sup> Septya Hanung et al., "THE POSITION AND PROTECTION OF THE CUSTOM COMMUNITY IN INHABITING THE CUSTOMARY FOREST," n.d.

ending exploitative practices, and ensuring the welfare of indigenous peoples and the wider community.

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