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# Human Rights of Indigenous People in Indonesia: A Constitutional Approach

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*This research will examine how the Indonesian constitution can effectively protect the indigenous people's rights to customary land when the land is under construction for infrastructure building. The authors will mainly discuss the relevance of justice for ensuring the rights to live and property of indigenous people under the Indonesian constitution. In this essay, the authors examine how constitutional and human rights protections interact with one another to ensure the security of customary land in Indonesia. The analysis will be carried out by two methodological approaches. One is the statute approach which is based on laws and regulations being specifically targeted. To implement the statutory approach, all Indonesian laws and regulations concerning the constitutional relationship and human rights to protect customary land will be reviewed. The other is the conceptual approach to identify the ideas that give rise to legal notions, the legal principles or legal arguments for solving the problem.*

## Keywords

Indigenous People, Indonesia, Constitution, Human Rights, Customary Land

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## 1. Introduction

According to Roscoe Pound, a human being has the right to control his/her ownership to property.<sup>1</sup> In this regard, the property rights are based on the economic nature of human beings. A noticeable example of property rights is land ownership which is customary rights. Human perspective on land is always changing. In the beginning, the land was seen as having or containing magical-religious value, in which the land is the mother with a womb which bore man.<sup>2</sup> In Indonesia, communities (legal subjects) can have rights to customary land (legal objects). More concretely, they contain, for example, customary land rights of *ulayat* in Sumatra, traditional land *bengkok* in Indonesian Java, and *druwe* customary land in traditional villages in Bali.<sup>3</sup>

Indigenous peoples have customary rights over their territories or customary lands because these rights have been inherited from generation to generation by their ancestors. In principle, the indigenous women's rights to customary land should be protected because it is a place for them to live.<sup>4</sup> Moreover, referring to the background records of the Pan-Commonwealth for the survival of their culture as well as their community, all forms of action taken to resolve discrimination against indigenous women in relation to these land rights must take into consideration the strategies of indigenous peoples in order to gain recognition of the collective rights of the land.

However, in reality, land disputes often occur between indigenous peoples and private companies or government agencies concerned for infrastructure construction.<sup>5</sup> Customary land that is the object of infrastructure such as road access, mining, and plantations is vulnerable to such disputes. It is thus important to understand the indigenous people's rights to their customary lands in the constitutional practice.

Most of land disputes in indigenous land occur when the government tries to seize private property for use in building roads and other public works for national infrastructure. Communities, capital investors or government agencies are frequently parties to land disputes. Disagreements may arise between the communities governed by customary law and the investors or government agencies when the investors or

<sup>1</sup> Munir Fuadi, *Teori-Teori Besar (Grand Theory)*, DALAM HUKUM 248 (2013).

<sup>2</sup> DOMINIKUS RATO, LAW OF INDIGENOUS PROPERTY AND ASSETS 80 (2016).

<sup>3</sup> I Made Suwitra, *Druwe Land Conservation in Strengthening Traditional Village in Bali*, COM. SERVICE J. L. 21 (2022).

<sup>4</sup> R. Sylvain, *At the Intersections: San Women and the Rights of Indigenous Peoples in Africa*, 15 INT'L J. HUM. RTS. 89-110 (2011).

<sup>5</sup> HEROWATI POESOKO (ET AL.), THE EXISTENCE OF CUSTOMARY COURTS IN THE INDONESIAN JUDICIAL SYSTEM 32 (2014).

government agencies are trying to construct infrastructure like roads, mines, and plantations on the land in dispute. Such land disputes are commonly found in Mesuji, Indonesia where the government agencies and companies frequently seize land from local communities to develop forests in this area providing many concessions or permits.

This research will examine how the Indonesian constitution can effectively protect the indigenous people's rights to customary land when the land is under construction for infrastructure building. The authors will mainly discuss the relevance of justice for ensuring the rights to live and property of indigenous people under the Indonesian constitution. In this essay, the authors examine how constitutional and human rights protections interact with one another to ensure the security of customary land in Indonesia. The analysis will be carried out by two methodological approaches. One is the statute approach which is based on laws and regulations being specifically targeted. To implement the statutory approach, all Indonesian laws and regulations concerning the constitutional relationship and human rights to protect customary land will be reviewed. The other is the conceptual approach to identify the ideas that give rise to legal notions, the legal principles or legal arguments for solving the problem. faced.

## 2. Discussion

Land, water, plants, and animals are the customary law communities' rights over their customary territories. Locations are delineated by both physical (field signs) and conceptual (ideological) boundaries (audible gong sounds). Any transactions involving land can be easily examined to see if they are conducted according to customary rules and institutions, allowing for the arrangement and determination of relationships.<sup>6</sup> Everything on the land (including trees, animals, and rocks with economic significance), in the soil of excavated materials, and along the coast, including above the water surface, in the water, and the part of the land, falls under the jurisdiction of communities governed by customary law.<sup>7</sup>

<sup>6</sup> KUSWORO, HOW THE RIGHTS OF INDIGENOUS PEOPLES IN MANAGING NATURAL RESOURCES ARE REGULATED 5-6 (1999).

<sup>7</sup> *Id.*

Figure 1: Customary Land Dayak, Indonesia<sup>8</sup>



Article 18, letter B, paragraph 2 of the 1945 Constitution of the Republic of Indonesia guarantees the legal certainty in the recognition and respect of customary law if it satisfies the reality requirements (if customary law is still active and following the development of society). Land rights should be codified in order for all parties involved to assure that they are protected. It will be also stipulated that other rights are not included in the foregoing rights as stated in Article 53 of the Basic Agrarian Law and Article 16 paragraph (1), letter h of the Basic Agrarian Law.

Article 28I paragraph (5) of the 1945 Constitution upholds human rights. Accordingly, implementation of human rights is guaranteed, regulated, and set forth in statutory regulations. Pursuant to Article 6 paragraph (1) of Law No. 39 of 1999 concerning Human Rights, indigenous peoples' different needs must be considered and protected by law, society, and the government in the context of upholding human rights. As time goes by, the communities governed by customary law have obtained their customary land rights recognized under Law No. 39 of 1999, which deals with human rights, as stated in Article 6 (2) of Law No. 39.

The lack of protection and recognition of indigenous rights, especially rights to land and natural resources, is usually coupled with a lack of political will to address the issues faced by indigenous peoples. Genially, most indigenous people live on territories where the last remaining nonexploited natural resources are located (IWGIA, 2017).<sup>9</sup> It is important to recognize the rights of indigenous people as a

<sup>8</sup> See Indra Nugraha, *Mongabay Indonesia*.

<sup>9</sup> Jérémie Gilbert, *Land Grabbing, Investments and Indigenous Peoples' Rights to Land and Natural Resources* (International Work Group for Indigenous Affairs, 2017), <https://www.iwgia.org/images/publications/new-publications/>

form of protecting human rights to customary land rights. In Indonesia, for example, customary lands have long been used as residences and were controlled and used by indigenous people before the Indonesian state was born.

The indigenous land claims often rely on anthropological and historical documentation, as well as physical evidence. As noted by Kirsch, anthropologists are able to transform local understandings into legible ones for the court. In a case of the Akawaio of Isseneru village in Guyana before the Inter-American Commission on Human Rights, for example, the anthropological evidence was used to demonstrate that local place names were toponyms in their language, establishing historical ties to the land that the state had denied.<sup>10</sup> As Kirsch notes, however, it is complex for anthropologists to ensure that their affidavits are “legible to all three of the overlapping, but sometimes incommensurate frames of the lawyers and the legal system, the communities seeking recognition of their rights, and the discipline of anthropology.”<sup>11</sup>

Indigenous organizations win important battles of cultural rights only to find themselves mired in the painstaking, technical, administrative, and highly inequitable negotiations for resources and political power necessary to realize those rights that follow.<sup>12</sup> The constitution and human rights are inter-relate to Indonesia’s protection of customary lands. Indigenous peoples and the corporate sector, which includes capital owners and governmental organizations, are the main parties in land disputes. Indigenous peoples and the capital owners as well as government agencies frequently engage in conflict over indigenous lands for road access infrastructure, mining, and plantations.

In this case, the International Labor Organization (ILO) Convention No. 169 of 1989 has been ratified in Indonesia in Law Number 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights. Based on Article 1 (a) of the ILO Convention No. 169 of 1989 defines customary law communities as “those living in independent countries where their social, cultural and economic conditions distinguish them from other parts of society in the country, and their status is governed, either wholly or partly by the customs and traditions of

land-grabbing-indigenous-peoples-rights.compressed.pdf.

<sup>10</sup> Stuart Kirsch, Expert Report, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association of Guyana, Petition 1424-13, Inter-American Commission on Human Rights (2016).

<sup>11</sup> Stuart Kirsch, *Afterword: Multidisciplinary Perspectives to the Adjudication of Indigenous Rights*, 1 ERASMUS L. REV. 86-7 (2018).

<sup>12</sup> C. Hale, *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*, POL. & LEGAL ANTHROPOLOGY REV. 10-28 (2005).

indigenous peoples or by special laws and regulations.”<sup>13</sup>

It is clear that the government is obliged to carry out justice in the sense of harmony and balance between the state and the customary law communities for protecting the human rights of indigenous people. State protection of *ulayat* land in customary law communities is essential to maintain peace and stability of the communities that rely on customary land tenure.

Figure 2: Customary Land Flores, Indonesia<sup>14</sup>



As a constitutional right of customary law communities, customary land should be protected in the courts in accordance with Article 28I, paragraph 5 of the 1945 Constitution of the Republic of Indonesia. Further, Article 6(1) of Law No. 39 of 1999 concerning Human Rights states that in the context of upholding human rights, differences and needs in indigenous peoples must be considered and protected by law, society and the government. Article 6(2) also states that the cultural identity of customary law communities, including protected customary land rights, is in line with the times.

Sieder notes: “New forms of social protest and resistance combine local customs and communal authority structures (customary law) with global rights discourses, as well as international instruments and institutions.”<sup>15</sup> Indigenous people are frequently considered socially and politically subordinate to ‘majority’ groups, so that they have generally lower levels of political participation and influence.<sup>16</sup>

<sup>13</sup> ILO Convention No. 169 of 1989 art. 1(a)

<sup>14</sup> Yulindra Affandi, World Resources Institute (WRI) Indonesia

<sup>15</sup> R. Sieder, *Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 161-81 (J. Couso, A. Huneus & R. Sieder eds., 2010).

<sup>16</sup> J. Grossman & A. Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 *L. & SOC’Y REV.* 321-46 (1975).

### 3. Conclusion

Article 18, letter B, paragraph 2 of the 1945 Constitution of the Republic of Indonesia guarantees that customary law is still alive, which is critical to the regulation of the protection of customary land in Indonesia. Legal certainty in land rights requires additional regulations such as Articles 16, paragraph (1), letter h and 53 of the Basic Agrarian.

Meanwhile, Article 28I (5) of the 1945 Constitution protect human rights in accordance with the principles of a democratic rule of law, thereby implementing human rights guaranteed, regulated, and set forth in statutory regulations. This is related to the protection of customary land in Indonesia. According to Article 6 (1) of Law No. 39 of 1999 concerning Human Rights, indigenous people's different needs must be considered and protected by law, society, and the government. For this purpose, communities governed by customary law should have their customary land rights recognized and protected under Law No. 39 of 1999, which deals with human rights, as stated in Article 6 (2).

Based on that article, it can be seen how the country can acknowledge and guarantee customary rights in Indonesia. it provides a legal certainty or legal protection for all customary law communities. This regulation will be able to protect the rights of indigenous peoples.

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