



**PROTECTION OF INDIGENOUS LAW COMMUNITIES THROUGH THE
REGULATION OF ULAYAT LAND REGISTRATION IN INDONESIA**

Wahyudi Saputro,¹ Muhammad Hatta Roma Tampubolon,² Ansar³

¹Local Land Office, Palu City, Email: wahyudisaputro4310@gmail.com

²Postgraduate Master of Law, Universitas Tadulako, Email: hatta.roma@untad.ac.id

³Postgraduate Master of Law, Universitas Tadulako, Email: anchabrochovick@gmail.com

Abstract

This legal research employs a socio-legal methodology, incorporating statutory, conceptual, and comparative approaches. The study aims to critically examine the regulatory framework governing the registration of ulayat land in Indonesia and to construct a regulatory model capable of providing effective protection for Indigenous Law Communities. The findings indicate that the current regulatory scheme for ulayat land registration is fragmented across several authorities: local governments are authorized to designate the subjects, the Ministry of Forestry determines the object in relation to the legal status of customary forests, and the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency determines the object in relation to ulayat land. This model is inconsistent with the holistic concept of customary territories, in which territory and its Indigenous community constitute an inseparable unity. Such a fragmented regulatory structure creates layered and repetitive administrative procedures, thereby hindering Indigenous Law Communities from obtaining adequate legal protection. To ensure meaningful protection, the study argues that a unified regulatory model is required – one that integrates the recognition and protection of Indigenous Law Communities (as legal subjects) with the recognition and protection of customary territories (as legal objects) under the authority of local government. This model would involve coordination with the land office, the forest area consolidation agency, and relevant vertical institutions within a formal Indigenous Law Community Committee. Every decision recognizing and protecting an Indigenous Law Community must be followed by the removal of customary territories from forest areas/state forests when such territories fall within forest zones, or by the demarcation and separation of customary territories from Other Land Uses (APL) when located within APL zones.

Keywords: *Customary Land Registration, Protection of Customary Law Communities, Critical Legal Studies.*

I. INTRODUCTION

The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has stated that one of the objectives of the establishment of the Republic of Indonesia is to protect all Indonesian people and all of Indonesia's territory. Over the course of its existence, the constitution of the Unitary State of the Republic of Indonesia has undergone several amendments, which have given rise to a new term for community communities, namely Customary Law Community Units. Article 18B paragraph (2) emphasizes that the state recognizes and respects customary law community units and their traditional

rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law. This shows that Customary Law Community Units are part of the Indonesian nation which must also be protected by the state.

Protection of citizens' rights in the formation of the state is in line with John Locke's writings in 1660. John Locke stated that the existence of the state is to defend individual rights that already existed before the existence of the state.¹In the theory of natural rights formulated by John Locke, the right to life, the right to liberty, and the right to own property are part of the natural rights that are inherent in individuals and cannot be revoked by anyone. Property ownership rights for Indigenous Law Communities in Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) are referred to as "customary rights or similar rights". The implementation of customary rights and similar rights of indigenous law communities, as long as they actually still exist, must be such that they are in accordance with national and state interests, which are based on national unity and must not conflict with other higher laws and regulations. (Indonesia 1960) Law Number 39 of 1999 concerning Human Rights (HAM Law) specifically states that one of the rights of Indigenous Peoples that must be protected is the right to customary land.²

In human rights principles, the state is positioned as a duty bearer, and every individual within its jurisdiction is a rights holder. The primary obligations a state must fulfill are the obligation to respect, the obligation to fulfill, and the obligation to protect.³In the context of providing protection for land rights, through the UUPA the government is attempting to provide certainty of land rights by registering land throughout the territory of the Republic of Indonesia.⁴ Government Regulation Number 24 of 1997 concerning Land Registration states that land registration objects include: a. plots of land owned with ownership rights, business use rights, building use rights and use rights; b. land with management rights; c. waqf land; d. ownership rights to apartment units; e. mortgage rights; and f. state land.⁵ Of the five types of land registration objects, customary land is uniquely not yet listed as an object of land registration. Therefore, regulations regarding customary land registration in Indonesia are still lacking or unclear in its legal demarcation. However, over time, regulations related to customary land registration began to be regulated in ministerial regulations. The first regulation was Regulation of the Minister of ATR/BPN Number 5 of 1999 concerning Guidelines for Resolving Customary Rights Issues of Customary Law Communities. This regulation has undergone several amendments, and the most recent is Regulation of the Minister of ATR/BPN Number 24 of 2024 concerning the Implementation of Land Administration and Registration of Customary Rights Land of Customary Law Communities.

¹ Peter Mahmud Marzuki, *Teori Hukum*, First (Jakarta: Kencana, 2022).

² Republic of Indonesia, Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights.

³ Penerapan Prinsip Pertanggungjawaban Negara Terhadap Kasus Pelanggaran HAM', *Jurnal Pembangunan Hukum Indonesia*, 2.2 (2022), p.1-14.

⁴ Republic of Indonesia, Law of the Republic of Indonesia Number 5 of 1960 concerning Basic Agrarian Regulations. Article 11.

⁵ Republic of Indonesia, Government Regulation Number 24 of 1997 concerning Land Registration. Article 9.

Since the birth of the UUPA in 1960 when customary land was first regulated until 2024, the Ministry of Agrarian Affairs and Spatial Planning has only issued 41 land title certificates in the name of customary law communities, with a total area of 129,698 hectares.⁶ Besides being under the authority of the Ministry of ATR/BPN, the recognition and protection of indigenous peoples also falls under the Ministry of Forestry and Regional Government. The Ministry of ATR/BPN has the authority to regulate customary land in Other Use Areas (APL)/outside forest areas. Therefore, the Ministry of Forestry has the authority to regulate forest areas through the product in the form of a decree establishing customary forests. Meanwhile, regional governments have the authority related to the recognition of customary law community subjects. As of 2024, regional governments have designated customary areas covering 4,850,689 hectares, and only 265,250 hectares of this area has been designated as customary forests by the Ministry of Forestry. Therefore, if the registered customary land certificates and the designated customary forest areas are combined, the total area is 394,942 hectares.

On the other hand, if we read the data published by the Customary Territory Registration Agency (BRWA), it states that currently 1,499 Customary Territory Maps have been registered in BRWA with an area of 30.1 million hectares.⁷ Such a significant difference in area indicates the ineffectiveness of the customary land registration currently implemented by the government, resulting in the failure to achieve its stated goal of providing certainty and protection for customary land. This situation results in a lack of protection for customary law communities. In May 2024, the Awyu and Moi Sigin tribes, native to the Papuan interior, staged a peaceful protest in front of the Supreme Court building regarding the issuance of permits by palm oil companies PT Sorong Agro Sawitindo (SAS) and PT Indo Asiana Lestari (IAL). PT SAS previously held a 40,000-hectare concession in Sorong Regency, which was allegedly encroaching on their customary forests.⁸ Meanwhile, PT IAL holds an environmental permit covering 36,094 hectares.⁹ Previously, in September 2023, a clash occurred between the Rempang Island Indigenous Community and joint personnel from the Indonesian National Armed Forces (TNI), the Police, the Public Order Agency (Pol PP), and the Batam Ditpam at the Bareleng Bridge, Batam, protesting the establishment of the Rempang Eco-City National Strategic Program.¹⁰ On August 9, 2024, dozens of Watutau Village residents together with the Kawal Pekurehue Coalition visited the

⁶ Iskandar Syah, *Paparan Pada Seminar Kajian Kebijakan 'Percepatan Pendaftaran Tanah Ulayat Di Sumatera Barat Berdasarkan Peraturan Menteri ATR/BPN Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat* (Andalas University, October 15, 2024).

⁷ Rukka Samboligi, 'Paparan Catatan Akhir Tahun AMAN 2024', *Kanal Youtube Aliansi Masyarakat Hukum Adat*, 2024 <<https://www.youtube.com/watch?v=yOgNMIMMsmY&t=2059s>>.

⁸ Greenpeace Indonesia, 'Suku Awyu Dan Moi Gelar Aksi Damai Di Mahkamah Agung, Serukan Penyelamatan Hutan Adat Papua', *Website Greenpeace Indonesia*, 2024 <<https://www.greenpeace.org/indonesia/siaran-pers-2/58406/suku-awyu-dan-moi-gelar-aksi-damai-di-mahkamah-agung-serukan-penyelamatan-hutan-adat-papua/>>..

⁹ Tirto.id, 'Siapa Pemilik PT Indo Asiana Lestari & Kenapa Suku Awyu Demo?', *Website Tirto.Id*, 2024 <<https://tirto.id/siapa-pemilik-pt-indo-asiana-lestari-kenapa-suku-awyu-demo-gZet>>.

¹⁰ WALHI (Wahana Lingkungan Hidup Indonesia), 'Darurat! Penyerangan Warga Kampung Tua Pulau Rempang', *Website Walhi (Wahana Lingkungan Hidup)*, 2024 <<https://www.walhi.or.id/darurat-penyerangan-warga-kampung-tua-pulau-rempang>>.

Central Sulawesi Representative Office of the Indonesian National Human Rights Commission with the aim of submitting a complaint letter regarding 7 people who were reported to the police during an action to reject and remove the Land Bank Sign in the Lore Highlands of Alitupu Village, Winowanga, Maholo, Kalemago, Watutau, Poso Regency, Central Sulawesi.¹¹

These three cases are just a few of the many conflicts that have occurred between indigenous communities and the government and/or corporations. The pattern of conflict is almost always the same: indigenous communities who have inhabited an area for generations face off against government and/or corporate interests. The land that serves as their living space becomes the object of disputes through legal mechanisms and violent practices. The Indigenous Peoples' Alliance of the Archipelago (AMAN) reported in its 2023 Year-End Notes: Throughout 2023, 2,578,073 hectares of indigenous territories were confiscated. Most of these confiscations were accompanied by violence and criminalization, resulting in 247 victims – 204 of whom were injured, one person was shot dead, and approximately 100 homes belonging to indigenous communities were destroyed because they were deemed to be living in a state conservation area.¹²

Customary Law Communities are the parties who have suffered the most from state policies since Indonesia's independence. In the economic field, the Old Order and New Order Politics have found various policies and laws that unilaterally determine the allocation and management of natural resources, most of which are in customary areas, under the authority and control of the government.¹³ Even after the reforms with the issuance of the Human Rights Law and Amendments to the 1945 Constitution of the Republic of Indonesia as well as various regulations regarding the recognition and protection of indigenous communities and customary land, it has not been able to change the fate of indigenous legal communities. The failure of the state to carry out its role in providing protection for the rights of customary law communities indicates that there are problems that need to be analyzed critically in relation to the regulation of customary land registration and then it is also necessary to formulate alternative regulations that can provide protection for customary law communities.

¹¹ WALHI Central Sulawesi, 'Buntut Dari Konflik Lahan Antara Bank Tanah Dan Warga Yang Berujung Kriminalisasi, Warga Desa Watutau Geruduk Kantor Komnas HAM RI Sulawesi Tengah', *Website WALHI (Wahana Lingkungan Hidup) Sulawesi Tengah*, 2024 <<https://walhisulteng.org/buntut-dari-konflik-lahan-antara-bank-tanah-dan-warga-yang-berujung-kriminalisasi-masyarakat-desa-watutau-geruduk-kantor-komnas-ham-ri-perwakilan-sulawesi-tengah/>>.

¹² Aman, Aman, *Catatan Akhir Tahun 2023; Masyarakat Adat Di Tahun Politik, Hukum Represif Dan Cengkraman Oligarki* (Jakarta: Rumah Aman Tebet, 2024) <<https://www.aman.or.id/publication-documentation?category=16>>.

¹³ M Hatta Roma Tampubolon, 'Konsepsi Masyarakat Adat Dan Problematika Pengakuan Dan Perlindungannya (Indigenous Peoples Conception and The Problematic of Admission and Protection)', *Risalah Hukum Fakultas Hukum Unmul*, 6.2 (2010), 71–82.

II. RESEARCH METHOD

This research is a type of normative-empirical legal research (socio-legal) with a Statute Approach, a Conceptual Approach, and a Comparative Approach using a descriptive analytical method where the approach used to collect data from various sources of legal literature, then analyze the data by describing legal phenomena in detail (descriptive) and conducting critical analysis to determine the implications and relevance of the data that has been collected. This approach aims to produce detailed knowledge about the legal problem being studied, as well as to formulate arguments or recommendations based on the analysis that has been carried out.

III. ANALYSIS AND DISCUSSION

A. Critique of the Division of Authority for the Recognition and Protection of Indigenous Communities, Registration of Customary Land and Recognition of Customary Forests

Based on the provisions of Article 67 of the Forestry Law and the Minister of Home Affairs Regulation Number 52 of 2014, the Determination of the Existence of Customary Law Communities or the Recognition and Protection of Customary Law Communities is the authority of the Regional Government, either in the form of regional regulations or in the form of regent/mayoral decrees. Meanwhile, based on the provisions of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Apartment Units, and Land Registration and Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 14 of 2024 concerning the Implementation of Land Administration and Registration of Customary Land of Customary Law Communities, the Ministry of ATR/BPN has the authority to register customary land. Then, the Ministry of Forestry, based on the Regulation of the Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management, has the authority to issue decisions on the determination of customary forests.

Borrowing the definition of Customary Law Communities as conveyed by AMAN, Customary Law Communities are legal subjects who are a group of people who have lived for generations in a certain geographical area and are bound by cultural identity, ties to ancestral origins, strong relationships with land, territory and natural resources in their customary area and a value system that determines economic, political, social and legal institutions.¹⁴ From this definition, it can be understood that customary law communities and customary territories are an inseparable whole. Therefore, the separation of authority between the agency that issues decisions on recognition and protection of customary law communities and the agency that issues decisions on the determination of customary territories is inappropriate. One of the main elements of the existence of customary law communities is customary territories, this argument is supported by historical facts regarding regulations regarding customary rights which have always been integrated with customary law communities.

¹⁴ Indigenous Peoples Alliance of the Archipelago (AMAN), Articles of Association of Indigenous Peoples Alliance of the Archipelago.

In the practice of issuing decisions on the recognition and protection of indigenous legal communities issued by local governments, it was found that almost all decisions on the recognition and protection of indigenous legal communities always contain articles or attachments that explicitly state the extent of customary territories. Even the decisions issued by the Regent of Sigi use the title "Decree on the Recognition and Protection of Indigenous Legal Communities and Customary Territories...". Given these facts, it is unwise to have a regulatory model that separates the authority to determine the recognition of indigenous legal communities and the determination of the recognition/registration of customary territories, whether in the form of customary land registration or the determination of customary forests.

Furthermore, the author also found in the Central Sulawesi Provincial Spatial Planning Plan (RTRW)¹⁵, there are at least 6 (six) customary forests in Central Sulawesi Province which are included in the RTRW, including:

1. Wana Posangke Customary Forest in North Morowali Regency;
2. Katuwua To Lindu Customary Forest Reserve in Sigi Regency;
3. Moa Customary Forest in Sigi Regency;
4. Ngata Toro Traditional Forest in Sigi Regency;
5. Marena Customary Forest in Sigi Regency; and
6. Huaka Topo Ada To Masewo Traditional Forest in Sigi Regency

As stipulated in Ministerial Regulation Number 9 of 2021 concerning Social Forestry Management, one of the requirements for establishing customary forests is the existence of a regional regulation/regent/mayoral decree regarding the recognition of customary communities. This regulation implies a gradual process between the recognition and protection of customary communities and the establishment of customary forests. For example, the Wana Indigenous Community received confirmation/recognition as a customary community in 2012, only to obtain customary forest designation from the Ministry of Environment and Forestry in 2016. The To Kulawi Indigenous Community in Marena, which received recognition in 2017, only received customary forest designation in 2021. This time lag leaves the customary community's rights to utilize forest products unprotected, making them vulnerable to lawsuits from parties outside the customary community.

In the context of customary land registration which is the authority of the Ministry of ATR/BPN, to achieve the issuance of certificates of customary land management rights or joint ownership rights for customary land, the provisions of the Minister of ATR/BPN Regulation Number 14 of 2024 concerning the Implementation of Land Administration and Registration of Customary Land of Customary Law Communities. Article 18 paragraph (3) also requires the existence of regional regulations/regent/mayoral decisions regarding the determination of customary law communities as proof of the identity of the applicant for management rights. There are similarities in the pattern between the issuance of decisions to determine customary forests and the issuance of certificates of customary law community management rights, both require regional regulations or regent/mayoral decisions. The difference

¹⁵ Central Sulawesi Regional Government, Regional Regulation of Central Sulawesi Province Number 1 of 2023 concerning the Spatial Planning Plan of Central Sulawesi Province for 2023-2042.

is, if in the process of determining customary forests there are no regional regulations or regent/mayoral decisions, what is issued is the Indicative Area of Customary Forests¹⁶, whereas in the process of issuing a management rights certificate, if the subject's identity requirements are not met, the final output is a list of customary land and it will remain in the status of customary land.

In Central Sulawesi Province, there has been no issuance of a list of customary land or certificates of customary land management rights. In 2022, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN), in collaboration with Hasanuddin University, conducted an inventory and identification of customary land in Central Sulawesi Province. However, as of the time of this research, there had been no follow-up to this inventory and identification activity.¹⁷The author's interview with the Head of the Rights Determination and Registration Division of the Central Sulawesi Province National Land Agency Regional Office, the official responsible for the determination and registration of customary land, indicates that no customary land certificates have been issued in Central Sulawesi Province to date. The author's interview with the Head of the Sigi Regency Land Office also indicates that the Sigi Regency Land Office was not involved in the process of determining the recognition and protection of customary law communities issued by the Sigi Regent, and copies of these decisions were not provided. In addition to the lack of coordination,

The division of authority for recognizing customary law communities and registering customary land among several agencies also results in repetition of processes carried out by these agencies on the same matter. The process for recognizing customary law communities, registering customary land, and establishing customary forests is broadly the same: government agencies, customary law experts/research institutions, and community leaders. Furthermore, the process is also nearly identical, at least encompassing inventory, identification, verification, and determination. Even in terms of the object/thing being examined, the principles are also nearly identical, namely the elements that can prove the existence of customary law communities.

The division of authority as in the current regulations only results in repetition of activities that are similar in process and object, and carried out by the same elements. Such regulations undoubtedly disadvantage indigenous communities, who must go through a multi-tiered and repetitive process to receive their rights to protection from the state.

¹⁶ Minister of Environment and Forestry of the Republic of Indonesia, Regulation of the Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management. Articles 70, 71 and 72.

¹⁷ Kurnia Warman, *Cerita Tanah Ulayat Hari Ini, Direktorat Pengaturan Tanah Komunal, Hubungan Kelem-Bagaan Dan PPT, Direktorat Jenderal Penetapan Hak Dan Pendaftaran Tanah*, 2023. (Jakarta: Directorate of Communal Land Regulation, Institutional Relations and PPT, Directorate General of Land Rights Determination and Registration, Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, 2023). p.155.

B. The Interests Behind the Customary Territory Registration Regulations That Do Not Provide Protection for Customary Law Communities

During the administration of Susilo Bambang Yudhoyono, a draft law on Indigenous Peoples was discussed, but the bill has not yet been ratified since his term expired. National Human Rights Commission (Komnas HAM) Commissioner Sandrayati Moniaga stated that the purpose of the draft law on Indigenous Peoples is to bridge the gap between indigenous peoples and the state. She stated that the state must ensure the fulfillment, respect, and protection of indigenous peoples through clear, comprehensive, and relevant regulations.¹⁸ Many policies governing indigenous peoples exist, but they are unclear, incomplete, and irrelevant. Therefore, these policies need to be harmonized to prevent them from becoming obstacles to the realization of human rights.¹⁹

According to Willy Aditya, Deputy Chairman of the Legislative Body of the Indonesian House of Representatives (DPR RI), the Indigenous Peoples Bill was completed by the DPR's Legislation Body on September 4, 2020. However, the bill never reached the second level of deliberation or plenary session for ratification. The narrative emerging from the DPR RI's deliberations on the Indigenous Peoples Bill is not about identity politics, but rather about development. There are concerns that the Indigenous Peoples Bill could hinder development and the business activities of large companies, such as in the plantation, forestry, mining, and other sectors.²⁰

In the researcher's research, there are a number of laws that directly relate to customary law communities and customary territories, including the Forestry Law, the Plantation Law, the Mineral and Coal Law, and the Law on Coastal Areas and Small Islands Management. Article 67 of the Forestry Law and Constitutional Court Decision Number 35/PUU-X/2012 have confirmed the recognition of Customary Law Communities and the Rights of Customary Law Communities to Customary Forests separate from State Forests. Article 12 of the Plantation Law states that business actors who wish to conduct plantation businesses on Customary Law Community Customary Land must hold discussions with the Customary Law Community to obtain approval regarding the transfer of land and compensation. This provision is further clarified in Article 17 which prohibits the issuance of Plantation Business Permits on Customary Law Community Customary Land without prior agreement being reached between the Customary Law Community and the plantation business actors. Article 108 paragraph (1) and (3) of Law Number 2 of 2025 concerning the Fourth Amendment to Law Number 4 of 2009 concerning Mineral and Coal Mining explains that IUP and IUPK holders are required to prepare community development and empowerment programs consisting of social and environmental responsibility programs, which include the involvement of local communities and indigenous communities in the WP in Mining activities. The preparation of the program is consulted with the Minister, Regional Government, and local communities and/or indigenous communities. Article 21 and 22 of Law Number 1 of 2014 concerning

¹⁸ Tirto.id, 'Apa Itu RUU Masyarakat Adat Dan Kenapa Belum Disahkan?' (Website Tirto.id, 2024) <<https://tirto.id/apa-itu-ruu-masyarakat-adat-dan-kenapa-belum-disahkan?-guj1>>

¹⁹*Ibid.*

²⁰*Ibid.*

Amendments to Law Number 27 of 2007 concerning Coastal and Small Island Management explains that the Utilization of Coastal Waters and small island waters in the area of the Customary Law Community by the Customary Law Community is the authority of the local Customary Law Community without requiring a permit, but the recognition of the Customary Law Community must be determined in accordance with the provisions of laws and regulations.

Observing these provisions, the state provides ample space for Indigenous Law Communities to control and utilize the resources within their customary territories, however, the Indigenous Law Communities that are granted such space are only those that have been established or recognized by the government in accordance with applicable provisions. Meanwhile, the regulations regarding the recognition of Indigenous Law Communities and the recognition of their customary territories as described by the author in the previous chapter are made with a repetitive and tiered model so that the difficulty of Indigenous Law Communities in obtaining recognition status for their existence and customary territories becomes an obstacle for Indigenous Law Communities in controlling and utilizing resources within their customary territories.

On the other hand, there are business people who easily establish a company so that it is recognized as a legal subject and then obtains permits for the utilization of resources, where the areas of these permits then overlap with the customary areas of the Indigenous Legal Community. This situation demonstrates an unfair distribution of resources between entrepreneurs and Indigenous Peoples. In the minds of those formulating regulations, the utilization of natural resources belongs to entrepreneurs, while the inclusion of Indigenous Peoples as subjects who can utilize resources in their customary territories is merely a ceremonial declaration, which in reality will not be achieved due to the complicated and complicated regulations for obtaining legal status as Indigenous Peoples.

C. Comparative Study of Laws Regulating Customary Territory Registration

Regulations for the protection and recognition of indigenous peoples vary across countries. ILO Convention-contracting and non-contracting countries have different regulations, including definitions, status, and rights.²¹ As an archipelagic country located in Southeast Asia, the Philippines shares characteristics with Indonesia and faces issues related to Indigenous Peoples.²² Indigenous Peoples (IPs) in the Philippines retain much of their traditional, pre-colonial culture, social institutions, and traditional livelihood practices. The 2010 Philippine census included an ethnicity variable for the first time, but official figures are not yet available. Indigenous Peoples (IPs) in the Philippines represent nearly 14 percent of the population and are among the poorest and most disadvantaged.²³

²¹ Juwahir Thontowi, Juwahir Thontowi, *Masyarakat Adat Dalam Cengkeraman Positivisme* (Yogyakarta: CLDS FH UII in collaboration with Buana Grafika Publisher, 2018). p.103.

²²The Philippines recognizes two terms for Indigenous Peoples: Indigenous Cultural Communities (ICCs), as used in the constitution, and Indigenous People, as defined in the Indigenous Peoples Rights Act of 1987 (IPRA). In practice, both terms are treated equally, although the term "indigenous people" is more commonly used.

²³ Linda Dewi Rahayu, *Rekonstruksi Politik Hukum Pengakuan Masyarakat Adat Di Indonesia* (Gadjah Mada University, 2023).

The Philippine Constitution expressly provides for the recognition of Indigenous Peoples within the framework of national unity and development,²⁴The state is obligated to protect the rights of Indigenous Peoples to their ancestral lands, including the economic, social, and cultural relationships established there. There is also a congress that accommodates customary law values and regulates the allocation of customary rights. The Philippine Constitution stipulates that political parties contesting elections to the House of Representatives must allocate 20 percent of their candidate lists from marginalized groups, including Indigenous Peoples.²⁵

One of the most radical policies in the Philippines concerns the security of tenure for Indigenous Peoples' territories, through Republic Act 8371 on the Rights of Indigenous Peoples (IPRA) in 1987. The Philippines became the first country in Southeast Asia to enact legislation recognizing Indigenous Peoples' rights to their ancestral territories. This was certainly inseparable from the struggle of Indigenous Peoples and their support base, which included academic organizations, civil society, and churches.

The IPRA assigns a number of authorities and functions concerning Indigenous Peoples' rights to the NCIP. These authorities and functions include:²⁶

- a. Issuing certificates of land rights/ancestral territories;
- b. Issuing certain certificates as a pre-condition for granting permits, leases, grants or other similar authorizations to locate, utilize, manage and provide to any individual, legal entity or any government agency, company or division certain parts or parts of ancestral territories by taking into account the agreement based on internal deliberations of the indigenous community concerned.

The presence of the NICP is evidence of the successful protection of Indigenous Peoples' rights, particularly land rights. Indigenous Peoples of the Philippines have communal land security through a clear mechanism for determining who constitutes an Indigenous People. The granting of certificates for Indigenous Peoples' rights in the Philippines is divided into two categories: Ancestral Domain and Ancestral Land. Ancestral Domain is an individual certificate, but the land is communally owned and cannot be sold. Ancestral Domain encompasses all categories of land rights and agrarian resources, including forests, pastures, settlements, agriculture, hunting grounds, cemeteries, worship areas, watersheds, mines, and other agrarian resources that are continuously controlled.

In its implementation, the NICP has limitations, even lacking resources and skills. Government service budget allocations for Indigenous Peoples' ancestral territories and the management of community agrarian resources continue to decline. According to a report by David E. De Vera, in the first three years of its existence, the NICP failed to issue a single CADT. However, the NICP certified approvals for dozens of mining applications. The NCIP, which can act for and on behalf of Indigenous Peoples' interests as subjects of public law, has the potential to usurp public authority from the

²⁴ Republic of the Philippines, The 1987 Constitution of the Republic of the Philippines.

²⁵ Grace.

²⁶ Republic of The Philippines, Republic Act Number 8371 October 29, 1997, An Act To Recognize, Protect and Promote The Rights of Indigenous Cultural Communities..." Section 44.

authority of Indigenous Peoples. The NCIP demonstrates that the institutions that manage Indigenous Peoples' land approvals are multi-layered. They are not entirely under the authority of Indigenous Peoples, but are partly under the control of national institutions and elite interests.

In Brazil, the 1988 Brazilian Federal Constitution provides comprehensive recognition of indigenous peoples' rights to their lands. Article 231 specifically provides:

- a. Recognition of original rights to traditional lands
- b. The federal government's obligation to demarcate
- c. Protection of natural resources

Law No. 6.001/1973 (Statute of the Indians) serves as the primary legal basis for the creation of the Fundação Nacional dos Povos Indígenas (FUNAI) and the duties it must carry out in carrying out its functions. The regulation details the rights of indigenous peoples, including territorial protection, health insurance, education, and participation in decision-making that affects their lives. The regulation affirms FUNAI's role as a government institution fully responsible for protecting the rights of indigenous peoples, from initial contact to the sustainable development of their communities.

Presidential Decree No. 9.010/2017 officially established FUNAI's organizational structure and duties, outlining that the agency has the authority to:

- a. Identifying and demarcating customary areas
- b. Protecting indigenous communities that are still isolated
- c. Promoting social and cultural rights
- d. Supporting sustainable economic development

This legal framework is reinforced by various international conventions that Brazil has ratified, such as ILO Convention No. 169 on Indigenous and Tribal Peoples, which emphasizes the principle of free, prior and informed consultation, participation and consent in any policies affecting indigenous peoples. Through this comprehensive legal framework, FUNAI is not merely an administrative institution, but a crucial constitutional instrument for safeguarding cultural diversity, protecting fundamental rights, and ensuring the survival of hundreds of indigenous communities in Brazil. The challenges facing this institution are complex, given the pressures of development, land conflicts, and economic interests that often conflict with indigenous rights. FUNAI is responsible for the recognition of indigenous territories in Brazil.

Implementing this regulation requires a holistic and culturally sensitive approach, recognizing that the protection of indigenous peoples is not simply a legal exercise but a fundamental commitment to safeguarding human diversity and dignity within their unique historical and cultural contexts. FUNAI is responsible for the process of demarcating indigenous lands in Brazil. By 2023, of the 723 identified indigenous territories, 440 had been fully demarcated and recognized (FUNAI, 2023). The main challenge in Brazil is pressure from the agricultural and mining sectors seeking access to natural resources in indigenous territories.

D. Customary Land Registration Regulations That Can Provide Protection for Indigenous Legal Communities

In the UUPA, recognition of customary law communities is affirmed in Article 3 which states, "Considering the provisions in Article 1 and Article 2, the implementation of customary rights and similar rights of customary law communities, as long as they actually exist, must be in accordance with national and state interests, which are based on national unity and must not conflict with other laws and regulations of a higher order." In this sense, the UUPA clearly details that the existence of customary law communities is also identical to the existence of rights to their customary territories (in the UUPA referred to as "their customary rights"). By using this concept, the UUPA indirectly recognizes the position of customary law communities as subjects who have customary territories as objects. The existence of rights to customary territories as objects will never exist without the existence of customary law communities.

Based on this concept, the recognition of customary law communities must also be interpreted as recognition of their customary territories, so that the regional government that issues regional regulations and the regent/mayor who issues decisions on recognition and protection of customary law communities is also accompanied by recognition and protection of their customary territories. The concept of rights to customary territories, which in terms according to Maria SW Sumardjono is called customary rights, shows the legal relationship between legal communities and certain land/territories where the relationship is a relationship of control, not a relationship of ownership.²⁷The objects of customary rights include all land and its contents, which include soil, water, plants and animals.

The concept of customary territory which includes land, water and the wealth contained therein is then confirmed by several laws. The Forestry Law in conjunction with Constitutional Court Decision Number 35/PUU-X/2012 states that "customary forests are forests located within the territory of customary law communities", Law Number 17 of 2019 concerning Water Resources states that "Customary Rights of Indigenous Communities to Water Resources as referred to in paragraph (2) remain recognized as long as they still exist and have been regulated by Regional Regulations", Law Number 27 of 2007 concerning Management of Coastal Areas and Small Islands Article 61 paragraph (1) states "The Government recognizes, respects, and protects the rights of Indigenous Communities, Traditional Communities, and Local Wisdom over Coastal Areas and Small Islands that have been utilized for generations".

These provisions further emphasize that the concept of customary territory for indigenous peoples encompasses the land, water, and natural resources within them. The current regulatory model, which separates customary land registration from customary forest recognition, is clearly inconsistent with the concept of customary territory. This would undoubtedly complicate and disadvantage indigenous peoples if the current customary territory registration model were maintained. Thus, in this section it can be summarized that the substance of the regulations for registering

²⁷ Sumardjono Maria SW, Sumardjono Maria S.W., *Kebijakan Pertanahan: Antara Regulasi Dan Implementasi* (Jakarta: Kompas Book Publisher, 2005). p. 56-57.

customary areas must:

1. unifying the recognition and protection of customary law communities (subjects) with the recognition and protection of customary territories (objects);
2. ensure that registration of customary areas is carried out in full in accordance with the concept of customary areas, without the need to separate customary land, customary forests, or other forms of natural landscape;
3. Registration of customary areas is oriented towards the protection and sustainability of customary areas, not towards the exploitation of customary areas.

The multi-step and repetitive process of registering customary territories is time-consuming and further alienates or, at the very least, complicates their access to protection. Therefore, a structural model that can better provide protection for customary communities is needed. The model of establishing a centralized institution that specifically deals with indigenous legal communities or indigenous territories, such as the National Commission on Indigenous Peoples (NCIP) in the Philippines and the Fundação Nacional dos Povos Indígenas (FUNAI) in Brazil, has turned out to be institutions that have the potential to become mere tools under the control of national institutions and elite interests.

Article 18B of the 1945 Constitution of the Republic of Indonesia, which serves as the basis for the recognition of indigenous legal communities, is part of Chapter VI concerning Regional Government. Then, Article 67 of the Forestry Law and Home Affairs Ministerial Regulation Number 52 of 2014 have expressly regulated that the confirmation/recognition and protection of indigenous legal communities are part of the authority of the regional government. The authority of the regional government in managing customary areas has actually also been regulated in Law Number 23 of 2014 concerning Regional Government. In this law, government affairs are classified into 3 (three) affairs, namely absolute government affairs which are entirely the authority of the central government, concurrent government affairs which are divided between the Central Government and the provincial and district/city regions, and general government affairs which are the authority of the President as head of government.²⁸

Regional autonomy holds a strategic position in fulfilling human rights. Several factors strongly support its strategic importance in fulfilling citizens' human rights. First, the Constitution of the Republic of Indonesia grants extensive authority to regional governments. Second, autonomy is fundamentally the political aspirations of regional communities. Autonomy serves both as a goal and as a means to achieve public welfare through improving the economy, public services, and good governance. This is the essence of regional governments' strategic position in fulfilling human rights. Third, the implementation of human rights-oriented autonomy is closely linked to the idea that development and public services serve as tools for prosperity and provide access to justice for all citizens.²⁹

²⁸ Republic of Indonesia, Law Number 23 of 2014 concerning Regional Government. Article 9.

²⁹ Ansar, ' Pemenuhan Hak Asasi Manusia Dalam Pengelolaan Keuangan Daerah (Hasanuddin University, 2021). p. 6.

Land affairs in the regulations are classified as concurrent affairs divided between the Central Government and the Provincial and Regency/City Governments. In the appendix to the regulation, in section J, we can find a matrix of the division of government affairs in the land sector, which states that the sub-affairs of customary land are the authority of the provincial and/or regency/city governments. This authority is linked to the concept of customary rights/customary territories, which are an inseparable part of customary law communities. Therefore, it is appropriate that recognition of customary territories also falls under the authority of the regional government. The Ministry of Forestry, which currently has the authority to issue recognition of customary forests, and the Ministry of ATR/BPN, which currently has the authority to determine customary land/issue customary land certificates, must be abolished. The authorities of the Ministry of Forestry and the Ministry of ATR/BPN are limited to recording or adjusting the data of each ministry to the Decree issued by the Governor or Regent or Mayor, so that there is no longer a hierarchical and repetitive process in the registration of customary territories.

With this regulatory model, Article 70 of the Regulation of the Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management which reads "Based on the minutes and reports of field verification results as referred to in Article 69 paragraph (8) the Director General on behalf of the Minister within a period of 14 (fourteen) working days issues a decision to determine the status of Customary Forests" and the provisions regarding the procedures for determining the status of customary forests which are the basis for the authority of the Minister of Forestry to determine the status of customary forests must be declared invalid. Regulations relating to the status of forests that have been determined by the regent/mayor as part of customary areas must be constructed as regulations in the context of separating or removing customary areas from forest areas or state forests.

Then, regarding the authority of the Ministry of ATR/BPN in issuing decisions to determine management rights over customary land as regulated in Article 10 paragraph (1) of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Apartment Units, and Land Registration, Article 21 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 14 of 2024 concerning the Implementation of Land Administration and Registration of Customary Land of Customary Law Communities, and Article 38 paragraph (2) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights which are the basis for the Minister of ATR/Head of BPN to issue decisions recognizing management rights over customary land, these must be declared invalid. Regulations relating to land for land plots that have been designated by the regent/mayor as part of customary areas must be constructed as regulations for the purpose of separating or recording customary areas, such as the demarcation concept practiced in the regulation of customary areas in Brazil.

Considering that customary areas can consist of different landscapes (forest areas, APL, etc.), local governments need to involve forestry and land work units and other ministries/institutions in teams tasked with identifying, verifying, and validating customary law communities before issuing their designations. This is in line with the spirit of bureaucratic reform initiated by the government. Presidential Regulation Number 5 of 2010 explains that bureaucratic reform should not only be intended for mental reform of government officials, but also to reform the service system for citizens so that future public services can be carried out efficiently, effectively, and avoid the attitude of prioritizing individual interests, more often known as sectoral egos within an agency. As time goes by, the public increasingly expects agile, convenient, and safe service delivery.³⁰

In the discipline of public policy, the concept of Whole of Government, or WoG, is known. This is an approach to governance that unites collaborative government efforts across all sectors within a broader coordination framework to achieve policy development, program management, and public service objectives. Therefore, WoG is also known as an interagency approach, an approach that involves a number of institutions involved in relevant matters.³¹ The WoG practice was implemented to accelerate the implementation of agrarian reform through the establishment of the Agrarian Reform Task Force by the president through Presidential Regulation Number 86 of 2018 concerning Agrarian Reform and Presidential Regulation Number 62 of 2023 concerning the Acceleration of Agrarian Reform Implementation. Another practice seen in the formation of the Task Force is to implement forest area regulation through Presidential Regulation Number 5 of 2025.³²

The government has implemented the WoG approach to expedite the resolution of certain issues involving several government institutions. In the context of recognizing and protecting indigenous communities and customary territories, there are several reasons why the WoG approach is necessary. First, registering customary territories is a government obligation as stipulated in the Basic Agrarian Law (UUPA). Second, the slow pace of recognition and protection of indigenous communities and customary territories in various regions. Third, many regulations related to natural resources recognize/respect indigenous communities and customary territories, but data on customary territories is not yet optimally available. Fourth, many conflicts arise from the unclear status of indigenous communities and customary territories.

Concretely, the implementation of WoG in the registration of customary areas can be done by amending Article 3 paragraph (2) of the Regulation of the Minister of Home Affairs Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities by including elements of the land office, elements of the forest area consolidation center and other vertical agencies that have links to

³⁰ Khairani Ritonga, Hasim As'ari, and Nur Laila Meilani, ' Whole of Government Dalam Penyelenggaraan Mal Pelayanan Publik Di Kota Pekanbaru', *Moderat : Jurnal Ilmiah Ilmu Pemerintahan*, 9.1 (2023), p. 81-93.

³¹ Yogi Suwarno, *Modul Pelatihan Dasar CPNS Whole of Government* (Jakarta: State Administration Institute, 2016). p.5.

³² President of the Republic of Indonesia, Presidential Regulation Number 5 of 2025 concerning the Regulation of Forest Areas. Article 10 paragraph (1).

customary areas into the customary law community committee. Then the Governor/Regent/Mayor in the preparation of regional regulations regarding the process of recognition and protection of customary law communities needs to include elements of the land office, elements of the forest area consolidation center and other vertical agencies that have links to customary areas into the customary law community committee. With this complementary and integrated structural model, the registration of customary areas will no longer be carried out repeatedly and in stages so that protection of customary areas for customary law communities will be fulfilled more quickly.

Article 28H paragraph (2) of the 1945 Republic of Indonesia Constitution states that everyone has the right to receive special treatment in order to achieve equality and justice.³³The formulation of this article is identical to what is known internationally as affirmative action. In his book, "Heterogeneity, Leveling the Playing Field, and Affirmative Action in Contests," Chowdhury argues that affirmative action is a series of ethically motivated policies aimed at providing special opportunities to groups that have been consistently marginalized historically. Chowdhury outlines the purpose of affirmative action as providing greater opportunities for marginalized groups to compete in situations and conditions similar to those of other groups historically positioned "higher" than the group in question.³⁴

The affirmative action policy appears in Law Number 7 of 2017 concerning Elections (Election Law) in the form of a "command" in the Law regarding the determination of minimum female representation of 30 percent of all prospective members of the DPR and DPRD.³⁵This directive stems from the reality of women's underrepresentation in parliament and their perceived lack of empowerment in open competition with male politicians in the election process for members of the House of Representatives (DPR), Regional Representatives Council (DPD), and Regional People's Representative Council (DPRD). This policy aims to encourage women's participation through regulations that provide special treatment for women considered marginalized in open electoral competition.

John Dewey's reconstruction of Confucian democracy focuses on the concept of equality, namely equal opportunity for self-development for every individual. This concept of equality is based on moral values. Therefore, democratic institutions must be able to provide and maintain equal opportunities for everyone to participate in political life. The government must act to improve the lives of its citizens and provide equal attention to all citizens.³⁶

³³ Angela Ranina Listiyani and Andina Elok Puri Maharani, 'Penerapan Affirmative Action Oleh Partai Politik Sebagai Upaya Peningkatan Keterwakilan Perempuan Pada Lembaga Legislatif, *Jurnal Re Publika* Vol. 5 No. 1, Jan-Apr 2021, p.1'.

³⁴ Angela Ranina Listiyani and Andina Elok Puri Maharani.

³⁵ Hendri Sayuti, 'Hakikat Affirmative Action Dalam Hukum Indonesia (Ikhtiar Pemberdayaan Yang Terpinggirkan)', *Menara Riau: Jurnal Ilmu Pengetahuan Dan Pengembangan Masyarakat Islam Menara Riau: Journal of Islamic Science and Community Development*, 12.1 (2013), p. 41-47.

³⁶ Prinsip Kesetaraan Dalam Pemilihan Kepala Daerah', in *Inaugural Speech as Professor at the Faculty of Law, Tadulako University*, 2023.

Indigenous peoples are categorized as vulnerable groups in various perspectives. ILO Convention No. 169 of 1989, Article 4.1, explains that special measures will be taken to safeguard the safety of individuals, institutions, property, workers, culture, and the environment of indigenous peoples. ILO Convention No. 169 was adopted in response to the vulnerable conditions of indigenous peoples. The convention requires special measures to be taken to protect the institutions, property, culture, and environment of indigenous peoples. The purpose of these special measures is to improve the living conditions of indigenous peoples to the same level as the rest of the population in the country.³⁷ The Philippine Constitution stipulates that political parties contesting elections to the House of Representatives must allocate 20 percent of their candidate lists from marginalized groups, including indigenous peoples. This constitutional model should be implemented in Indonesia to gradually empower indigenous peoples and ensure equality with the rest of the population.

Article 245 of the Election Law stipulates that the list of prospective legislative candidates must contain at least 30% (thirty percent) female representation.³⁸ This is a concrete form of affirmative action policy implementation, which should also be implemented to pave the way for representatives of indigenous communities to serve as legislators. Therefore, the article could be expanded to include an additional 30% female representation, along with an article providing at least a 10% quota for members or representatives of indigenous communities. With this special discrimination model, indigenous legal communities who have not had representation and whose presence has often been ignored will have representatives in parliament who can voice the rights they should receive.

IV. CONCLUSION

The regulation of customary land registration which divides authority between the Regional Government to determine the subject, the Ministry of Forestry to determine the object of customary forest status and the Ministry of ATR/BPN to determine the object of customary land is not in accordance with the concept of customary territory and creates a tiered and repetitive process, making it difficult for Customary Law Communities to obtain protection for their customary territory. In order to provide protection for customary areas for Indigenous Legal Communities, a model for regulating customary area registration is required which:

1. unifying the recognition and protection of customary law communities (subjects) with the recognition and protection of customary areas (objects) as the authority of the regional government by involving elements of the land office, forest area consolidation center and other vertical agencies related to customary areas in the customary law community committee;
2. every decision on the recognition and protection of customary law communities is followed up by the removal of customary areas from forest areas/state forests if the customary areas are in forest areas and demarcation or separation of customary areas from other use areas (APL) if they are in APL;

followed by an affirmative action policy in the form of providing special quotas for members or customary law communities to compete in legislative elections.

³⁷ ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples: A Guide.

³⁸ Republic of Indonesia, Law Number 7 of 2017 concerning Elections. Article 243.

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The Philippines recognizes two terms for Indigenous Peoples: Indigenous Cultural Communities (ICCs), as used in the constitution, and Indigenous People, as defined in the Indigenous Peoples Rights Act of 1987 (IPRA). In practice, both terms are treated equally, although the term "indigenous people" is more commonly used.

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