

Protection Of The Rights Of Customary Communities Towards The Use Of Natural Resources From A National Legal Perspective

Anis Noviyya¹

¹Universitas Jambi, Indonesia

E-mail: anisnoviyanoviyya@gmail.com

Entered : July 01, 2026

Accepted: July 28, 2026

Revised : July 19, 2026

Published: July 31, 2026

ABSTRACT

Customary law communities are social entities that have existed long before the formation of the Indonesian state and have functional and cosmological relationships with natural resources in their customary territories. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia recognizes and respects the existence of customary law communities 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, this constitutional recognition has not been fully implemented consistently in various sectoral laws and regulations governing the use of natural resources, resulting in overlapping regulations and legal uncertainty. This study aims to examine the form of recognition and legal protection of the rights of customary law communities to natural resources from a national legal perspective, as well as to analyze the challenges and effectiveness of such protection amidst the strong flow of investment and development. This study uses a normative juridical method with a legislative approach, a conceptual approach, and a case approach. The research results show that although the national legal framework, including Constitutional Court Decision Number 35/PUU-X/2012, has provided a strong foundation for the recognition of indigenous peoples' rights to customary forests and other natural resources, its implementation in the field still faces structural, procedural, and political obstacles, including the slow ratification of the Draft Law on Indigenous Peoples and the weak application of the principle of free, prior, and informed consent in the business licensing process in customary areas. This research recommends accelerating the formation of special laws on indigenous peoples, strengthening institutions at the regional level, and internalizing the principle of free consent into all licensing processes for the use of natural resources.

Keywords: Customary Law Communities; Natural Resources; Customary Rights; National Law; Free Prior Informed Consent.

INTRODUCTION

Indonesia, a nation built on ethnic, cultural, and local legal diversity, boasts thousands of customary law communities spread from Sabang to Merauke, each with its own set of norms, institutions, and territories. The existence of customary law communities is inextricably linked to their functional relationship with natural resources, including customary lands, customary forests, water areas, and other biological resources that serve as sources of livelihood for generations. These relationships are not merely economic but also social and cultural, inherited through customs and collective management mechanisms that have been empirically proven to be effective in preserving the environment¹, as demonstrated by a number of indigenous communities that have successfully protected thousands of hectares of forest from encroachment and illegal

¹Perlindungan Dan Pengakuan Hak Ulayat Masyarakat Adat. Rule of Law Review (RLR) Journal. (2022).



logging. Unfortunately, these long-standing relationships often clash with the interests of the state and business actors in managing natural resources for national development, giving rise to various forms of protracted agrarian conflicts in indigenous territories. The Indigenous Peoples' Alliance of the Archipelago noted that in the past ten years, hundreds of agrarian conflicts have been recorded in indigenous territories covering an area of more than eleven million hectares, most of which were triggered by the granting of forestry, plantation, and mining business permits without the knowledge and consent of local indigenous communities.² This phenomenon shows that normative recognition alone does not necessarily guarantee substantive protection of the rights of indigenous peoples to natural resources.

Constitutionally, the state has given recognition to the existence of customary law communities through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which confirms 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.³ This recognition is reinforced by Article 28I paragraph (3) which emphasizes that the cultural identity and rights of traditional communities are respected in line with the development of the times and civilization, and Article 33 paragraph (3) which places the land, water, and natural resources contained therein under the control of the state for the greatest prosperity of the people. These provisions are essentially complementary, but in practice, they have the potential to create normative tension between the concept of the state's right to control natural resources and the original rights of indigenous peoples over their customary territories. This tension arises because the application of the state's right to control is often interpreted in a centralistic manner, so that the state positions itself as if it were the sole owner of natural resources, not merely the holder of a regulatory mandate for the benefit of all the people, including indigenous peoples within it. In fact, the philosophy of the state's right to control should be subject to the principle of popular sovereignty as the holder of original rights over agrarian resources, including indigenous peoples who have historically controlled and managed their territories long before the modern state was formed.⁴ In such a framework, the customary rights of indigenous legal communities should be understood as inherent rights, not as a gift from the state, so that restrictions can only be made to the extent that they are truly necessary for the wider public interest and are accompanied by respect for the principle of justice.

Historically, the recognition of customary law has fluctuated in line with changes in the political orientation of national agrarian law. Law Number 5 of 1960 concerning Basic Agrarian Principles laid the foundation for the recognition of customary rights of customary law communities, provided that such rights still exist, are in the national interest, and do not conflict with higher laws and regulations.⁵ However, entering the New Order era of development, the spirit of centralization of control over natural resources actually encouraged the birth of various sectoral regulations that tended to reduce the rights of indigenous peoples, including in the forestry sector, which placed indigenous forests as part of state forests. This condition only experienced a significant

²Sahkan RUU Masyarakat Adat. Free Prior Informed Consent (FPIC) bagi Masyarakat Adat. (2026).

³Pasal 18B ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

⁴ Buana, A. P., & Mamonto, M. A. W. W. (2023). The Role of Customary Law in Natural Resource Management: A Comparative Study between Indonesia and Australia. *Golden Ratio of Mapping Idea and Literature Format*, 3(2), 167-186. <https://doi.org/10.52970/grmilf.v3i2.400>

⁵Republik Indonesia. Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria, Pasal 3 dan Pasal 5. Lembaran Negara Republik Indonesia Tahun 1960 Nomor 104.

turning point after the Constitutional Court issued Decision Number 35/PUU-X/2012, which confirmed that indigenous forests are forests located within the territory of indigenous peoples and are no longer part of state forests.⁶ This ruling marks a significant milestone in the history of Indonesian agrarian and forestry law, as it corrects the paradigm of forest control that for decades tended to ignore the existence of indigenous communities as legal subjects with sovereignty over their own territories.

Post-reform, a number of derivative regulations were issued to follow up on the constitutional mandate and the Constitutional Court's ruling. Law Number 6 of 2014 concerning Villages recognizes the existence of traditional villages as legal community units with territorial boundaries, the authority to regulate, and manage the interests of the local community based on ancestral rights and customs.⁷ In the environmental sector, Government Regulation Number 22 of 2021 concerning the Implementation of Environmental Protection and Management also requires the involvement of affected communities in the preparation of Environmental Impact Analysis documents through business plan announcements and public consultations.⁸ However, the introduction of policies geared towards ease of doing business through major changes to various sectoral laws, including the simplification of risk-based business licensing, has raised concerns about weakening the guarantee of participation and consent of indigenous communities in the process of granting permits for the use of natural resources in their customary territories. This concern is not without basis, considering that in practice, various cases of granting business permits in forest areas and land directly adjacent to customary territories continue without meaningful involvement of local indigenous communities.

Another fundamental issue complicating the protection of indigenous peoples' rights is the failure to ratify the Draft Law on Indigenous Peoples, which has been proposed for over a decade. The absence of a comprehensive umbrella law has resulted in regulations regarding indigenous peoples being scattered across various sectoral laws, which are not always consistent with each other, whether in terms of recognition criteria, verification procedures, or legal protection mechanisms. The construction of imperative norms that lack strong coercive power also contributes to legal uncertainty regarding the recognition of indigenous peoples and their traditional rights.⁹ As a result, the process of recognizing indigenous legal communities is highly dependent on the political will of local governments in issuing regional regulations or letters of recognition, thus giving rise to disparities in protection between regions.¹⁰ This disparity in recognition across regions in turn widens the gap in legal protection for indigenous communities in areas with weak regional institutional capacity.

Based on the background description, this research is formulated into two main problems, namely: first, what is the form of recognition and legal protection of the rights of indigenous peoples to the use of natural resources in the national legal system; and second, what are the challenges and effectiveness of the protection of the rights of indigenous peoples in the use of natural resources amidst the strong flow of investment and national development. This research aims to answer these two problems comprehensively by examining the national legal framework across sectors, not limited

⁶Mahkamah Konstitusi Republik Indonesia. Putusan Nomor 35/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan. (2013).

⁷Republik Indonesia. Undang-Undang Nomor 6 Tahun 2014 tentang Desa, Pasal 96–97.

⁸Republik Indonesia. Peraturan Pemerintah Nomor 22 Tahun 2021 tentang Penyelenggaraan Perlindungan dan Pengelolaan Lingkungan Hidup, Pasal 27 ayat (1) dan Pasal 28 ayat (2).

⁹Sempo, V. Hak Masyarakat Hukum Adat di Tengah Modernisasi Ditinjau dari Pasal 18B Ayat (2) Undang-Undang Dasar 1945. *Lex Privatum*. (2024).

¹⁰Pengakuan Dan Perlindungan Terhadap Masyarakat Hukum Adat Dalam Pemanfaatan Sumber Daya Alam di Provinsi Jambi. *Datin Law Jurnal*, 4(1), 1–22. (2023).

to one particular field such as forestry or mining alone. The novelty of this research lies in the effort to integrate normative analysis of the recognition of the rights of indigenous peoples with an implementation study of the application of the principle of free, prior, and informed consent in various sectors of natural resource utilization, including forestry, plantations, and mining, which have tended to be studied separately in the existing legal literature. With this more holistic approach, it is hoped that a more complete picture can be obtained regarding the extent to which the national legal framework is able to protect the rights of indigenous peoples substantively, not merely as a mere normative formality.

The issue of natural resource utilization in customary territories is also inextricably linked to the political-economic context of national development, which over the past few decades has positioned the forestry, plantation, and mining sectors as the primary drivers of regional economic growth. This development orientation based on large-scale natural resource exploitation is often implemented through a top-down licensing scheme, where decisions on the allocation of space and natural resources are made at the central level without adequate consideration of the socio-cultural conditions of the indigenous communities residing in the areas concerned. As a result, it is not uncommon for areas traditionally controlled and managed by a particular indigenous community to be included in forestry, plantation, or mining concession maps without adequate consultation, thus placing indigenous communities on the defensive and having to fight for their rights through various legal channels and social advocacy. This unequal relationship between the state, corporations, and indigenous communities has, in turn, given rise to a recurring cycle of agrarian conflict, where dispute resolution tends to be casuistic and fails to address the root of the structural problem, namely the lack of legal certainty over the customary territories themselves.

The issue of protecting the rights of indigenous peoples to natural resources also has a human rights dimension that cannot be ignored. Rights to land, forests, and other natural resources for indigenous peoples are not merely material rights, but are closely intertwined with the right to a decent livelihood, the right to food, the right to practice beliefs and traditions, and the right to maintain cultural identity as a collective. When indigenous peoples' access to natural resources in their territories is disrupted due to the granting of business permits that do not meaningfully involve them, what is threatened is not only economic interests but also the continuity of the social, spiritual, and cultural structures of the indigenous peoples themselves as a whole.¹¹ This dimension makes the urgency of legal protection for indigenous peoples' rights to natural resources increasingly urgent and requires a comprehensive study, considering that the implications concern not only aspects of agrarian and environmental law, but also fundamental human rights aspects.

The debate regarding the protection of indigenous peoples' rights to natural resources is also inseparable from the increasingly progressive development of international legal norms in recognizing the rights of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples have the right to determine and develop their own priorities and strategies in the use of their territories, lands, and other resources, including the right to participate fully in decision-making that affects their rights. Although the declaration does not have the direct binding force of a typical international treaty, its existence still exerts normative and moral pressure on member states, including Indonesia, to align their national policies

¹¹ Clarke, P., & Jupiter, S. D. (2010). Law, custom and community-based natural resource management in Kubulau District (Fiji). *Environmental Conservation*, 37(1), 98-106. doi:10.1017/S0376892910000354

with globally agreed standards for the protection of indigenous peoples' rights. In this context, examining the compatibility of Indonesian national legal norms with internationally established standards for the protection of indigenous peoples' rights becomes increasingly relevant, particularly to assess the extent to which Indonesia has fulfilled its commitment to these universal principles of indigenous peoples' protection.¹²

The significance of this study also lies in its timely momentum, given that the discourse on ratifying the Draft Law on Indigenous Peoples has been rekindled in recent administrations, but has yet to yield concrete results. While the legislative process has been slow, pressure on indigenous territories due to the expansion of investment in the forestry, plantation, and mining sectors has continued to increase, widening the gap between the urgent need for legal protection and the slow legislative response over time. This situation demands a clear mapping of the legal instruments available to protect the rights of indigenous peoples within the current legal framework, while continuing to encourage more comprehensive legislative improvements in the future. Therefore, this research is expected to be not only academically beneficial in enriching the study of agrarian law and indigenous peoples, but also provide practical contributions to stakeholders, including the government, legislative institutions, and indigenous peoples themselves, in formulating more effective legal protection measures going forward.

METHODS

This research uses a normative juridical legal research method (doctrinal legal research), namely research that examines law as written norms and as principles and doctrines in order to answer the legal issues faced.¹³ Several approaches are used simultaneously in this research, namely the statute approach to examine various laws and regulations related to the recognition and protection of the rights of indigenous peoples, the conceptual approach to analyze the concept of customary rights, the right to control the state, and the principle of free consent, and the case approach by examining the Constitutional Court Decision Number 35/PUU-X/2012 and a number of state administrative cases relevant to disputes over the use of natural resources in indigenous areas. The legal materials used in this study consist of primary, secondary, and tertiary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 5 of 1960 concerning Basic Agrarian Regulations, Law Number 41 of 1999 concerning Forestry, Law Number 6 of 2014 concerning Villages, Law Number 32 of 2009 concerning Environmental Protection and Management, Government Regulation Number 22 of 2021, and decisions of relevant judicial institutions. Secondary legal materials were obtained from legal textbooks, scientific journals, previous research results, and policy documents from civil society organizations focusing on indigenous legal community issues. While tertiary legal materials in the form of legal dictionaries and encyclopedias were used to explain the technical terms used in this study.

The legal material collection technique was conducted through library research by tracing relevant laws and regulations, court decisions, and legal literature from official databases and scientific repositories. Data analysis was conducted descriptively and qualitatively with a prescriptive-analytical approach, namely not only describing the applicable legal norms, but also assessing their conformity with legal principles and the substantive needs for protecting the rights of indigenous peoples. Interpretation of legal

¹² Akbar, M., Permana, M. D., & Rusli, H. (2023). The Progressive Legal Perspective of Legal Justice in Customary Dispute Resolution Related to Natural Resources. *Jurnal IUS Kajian Hukum Dan Keadilan*, 11(2), 225-236. <https://doi.org/10.29303/ius.v11i2.1252>

¹³Tan, D. Metode Penelitian Hukum: Mengupas dan Mengulas Metodologi dalam Menyelenggarakan Penelitian Hukum. NUSANTARA: Jurnal Ilmu Pengetahuan Sosial, 8(8). (2021).

norms was carried out grammatically, systematically, and teleologically, taking into account the social context and the purpose of establishing the relevant norms. This research was limited to the study of terrestrial natural resources, particularly forestry, plantations, and mining, with case studies selected purposively based on their relevance and legal significance to the issue of protecting the rights of indigenous peoples.

This research also utilizes legal materials in the form of policy documents and monitoring reports compiled by civil society organizations engaged in advocacy for indigenous communities, given that these organizations possess relatively up-to-date field data on the dynamics of agrarian conflicts and policy implementation in indigenous territories. The use of these sources is selective and remains positioned as secondary legal materials that complement the normative analysis, not as the sole basis for drawing research conclusions. By combining primary, secondary, and tertiary legal materials, this research seeks to produce an analysis that is not solely based on the text of the legislation but also considers the context of its implementation and the surrounding social dynamics. To maintain the objectivity of the analysis, this research also consciously considers sources with different perspectives, ranging from normative-doctrinal academic studies to field monitoring reports that are more empirical and critical of government policy. In this way, the conclusions drawn are expected to reflect not only the ideals of legal norms as written in laws and regulations, but also consider the reality of their implementation in the field, which often deviates from these normative ideals.

RESULTS AND DISCUSSION

Recognition and Legal Protection of the Rights of Indigenous Legal Communities in the National Legal System

State recognition of indigenous legal communities is essentially based on the doctrine of legal pluralism, which acknowledges the existence of other legal systems outside of state law, particularly customary law, which has grown and developed long before the colonial or national legal systems were implemented. Indonesia's national legal framework has gradually accommodated the existence of indigenous legal communities through various legal instruments, from the constitutional level to implementing regulations at the regional level.¹⁴ At the constitutional level, this recognition is affirmed through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as previously described, which places recognition of indigenous legal communities as a conditional recognition norm, namely recognition that is dependent on the fulfillment of a number of certain conditions. This conditional nature of recognition distinguishes indigenous legal communities from other legal subjects whose recognition is absolute, so that the existence of indigenous legal communities must always be proven and verified before their rights can be legally protected. Consequently, protection of the rights of indigenous legal communities cannot be separated from the identification and verification mechanisms that serve as the entry point for formal legal recognition of the existence of a particular indigenous legal community unit.

In the context of agrarian law, Law Number 5 of 1960 concerning Basic Agrarian Principles places customary rights as part of the state's control rights, the implementation of which is delegated to customary law communities, as long as they still exist in reality. This provision philosophically changes the colonial land control paradigm known as the principle of *domein verklaring*, namely the assumption that all land for

¹⁴ Istanto, Y., Surya, F. A., Wardhani, L. C., & Setiyowati, F. J. (2025). The Urgency of Recognizing and Protecting the Rights of Customary Law Communities to Natural Resources in Mining Management: A Review of the Perspective of Islamic Law. *Al Maqashidi: Jurnal Hukum Islam Nusantara*, 8(1), 117-134. <https://doi.org/10.32665/almaqashidi.v8i1.4595>

which written ownership cannot be proven is considered state land. The elimination of this principle confirms that customary rights of customary law communities are essentially a mini-concept of national rights, because customary law communities are the primary owners of agrarian resources within their customary territories and therefore have the right to regulate and lead the control and use of these resources.¹⁵ However, in practice, this concept is rarely implemented consistently, as many local government agencies still treat customary land as free state land that can be allocated for investment purposes without going through the legal rights release process according to local customary law.

In the forestry sector, the tension between state interests and the rights of indigenous peoples is most apparent. Prior to 2013, Law Number 41 of 1999 concerning Forestry placed customary forests as part of state forests, so that the status of customary forest control was entirely under the authority of the central and regional governments, not the customary communities who have traditionally managed them. This provision was then materially tested at the Constitutional Court by the Indigenous Peoples Alliance of the Archipelago together with a number of indigenous communities, arguing that the placement of customary forests as state forests had caused constitutional losses for customary communities, contradicting Article 1 paragraph (3), Article 18B paragraph (2), and Article 28 and Article 33 paragraph (3) of the 1945 Constitution.¹⁶ The Constitutional Court in its considerations emphasized that customary law is generally unwritten law and is a living law, namely a law that is accepted, implemented, and obeyed by the community concerned because it fulfills their sense of justice and has also been recognized by the constitution. Based on these considerations, the Constitutional Court granted part of the petition by removing the phrase "state" from the definition of customary forests, so that customary forests are from that point on categorized as rights forests and no longer state forests.¹⁷ This ruling represents a significant legal breakthrough because it returns the authority to manage customary forests to indigenous communities as the true rights holders.

Although the legal status of customary forests has changed since 2013, the implementation of this decision in the field requires a series of administrative procedures before a customary forest area can actually be designated as a forest owned by a customary law community. The process of recognizing customary forests is generally preceded by recognition of the existence of the customary law community itself through regional regulations, followed by an application for the determination of customary areas submitted by customary leaders to the Ministry of Environment and Forestry.¹⁸ The determination will be issued if the validation and verification process shows that the application has met all the requirements and criteria stipulated by the legislation.¹⁹ In practice, this multi-layered series of procedures often presents a barrier, particularly for indigenous communities in remote areas with limited access to legal information,

¹⁵Pengakuan Dan Perlindungan Hak Atas Tanah Masyarakat Hukum Adat di Kawasan Hutan. Sekolah Tinggi Pertanahan Nasional. (2021).

¹⁶Ikhtisar Putusan Perkara Nomor 35/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan. Mahkamah Konstitusi Republik Indonesia. (2013).

¹⁷Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012). Jurnal Konstitusi, 10(3). (2013).

¹⁸ Prasetia, R. (2023). LEGAL PROTECTION OF INDIGENOUS PEOPLE'S RIGHTS IN THE UTILIZATION OF NATURAL RESOURCES. *Communale Journal*, 1(3), 204-214. <https://doi.org/10.22437/communale.v1i3.30356>

¹⁹Pengakuan Hutan Adat: Komitmen Negara Terhadap Perlindungan Hak-Hak Masyarakat Hukum Adat di Indonesia. Hukum Properti. (2025).

assistance, and the institutional capacity to prepare application documents that meet government-set administrative standards.

Recognition of customary law communities is also affirmed at the village government level through Law Number 6 of 2014 concerning Villages, which distinguishes between villages and customary villages as two forms of legal community units with equal status. Customary villages are given the authority to regulate and manage the interests of local communities based on ancestral rights, including in the management of natural resources within their territories. Therefore, institutionally, customary villages have the potential to become a formal forum for strengthening the rights of customary law communities at the local level. However, not all areas with strong customary law communities choose to transform into customary villages, considering that the process requires adjustments to government structures that often clash with traditional customary structures that have been in place for generations. Therefore, the implementation of customary villages in the field is still far from evenly distributed throughout Indonesia.²⁰

Disparities in recognition between regions are a particular problem in the practice of protecting the rights of indigenous peoples in Indonesia. Several regions, such as Jambi Province, have demonstrated good faith by issuing regional regulations specifically regulating the recognition and protection of indigenous peoples in the use of natural resources, although their implementation still faces various technical and political obstacles.²¹ Conversely, in other regions such as Papua, which sociologically has a much larger population of indigenous peoples, the formal recognition mechanism is actually slower, so that many indigenous territories that have in fact been inhabited for generations have not received adequate legal recognition. More than ten years after Constitutional Court Decision Number 35/PUU-X/2012, the Indigenous Peoples Alliance of the Archipelago noted that the process of recognizing indigenous territories in various regions remains complicated and slow, while the threat of the seizure of indigenous territories by various business interests continues.²² This condition illustrates the real gap between normative recognition at the constitutional level and its actual implementation on the ground.

From the perspective of progressive legal theory, legal provisions should be understood as instruments to serve human interests, not the other way around, making humans into objects that must submit to the formal logic of regulations alone.²³ This perspective is relevant to apply in the context of protecting the rights of indigenous peoples, considering that a rigid legalistic-procedural approach to the requirements for recognizing indigenous peoples has the potential to ignore the sociological reality that many indigenous communities have effectively implemented their own legal systems and natural resource management long before the state came to regulate the region. Therefore, the approach to legal recognition of indigenous peoples should ideally not only rely on fulfilling formal administrative requirements, but also consider the sociological facts regarding the survival of an indigenous peoples unit in the field.

In addition to forestry and land aspects, recognition of the rights of indigenous peoples has also begun to penetrate the environmental and marine sectors. Law Number

²⁰ Fahmi, C. (2024). The application of international cultural rights in protecting Indigenous peoples' land property in Indonesia. *AlterNative: An International Journal of Indigenous Peoples*, 20(1), 157-166. <https://doi.org/10.1177/11771801241235261>

²¹Pengakuan Dan Perlindungan Terhadap Masyarakat Hukum Adat Dalam Pemanfaatan Sumber Daya Alam di Provinsi Jambi. *Datin Law Jurnal*, 4(1), 1–22. (2023).

²²11 Tahun Putusan MK, Pengakuan Wilayah Adat Masih Berbelit. *Betahita.id*. (2024).

²³Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012). *Jurnal Konstitusi*, 10(3). (2013).

32 of 2009 concerning Environmental Protection and Management recognizes local wisdom and traditional knowledge of indigenous peoples as one of the considerations in the formulation of environmental protection and management policies, while in the coastal and marine sectors, the marine customary rights of indigenous peoples have also received recognition, although the scope of the regulations is not as broad as the recognition of land customary rights.²⁴ This expansion of cross-sector recognition indicates a positive trend in national legal policy to increasingly accommodate the diversity of forms of relationships between customary law communities and natural resources, no longer limited to relationships with land and forests alone, but also encompassing water areas that are traditionally managed through certain customary law mechanisms.

However, the broad scope of cross-sectoral recognition does not necessarily guarantee harmonization between regulations. The criteria and procedures for recognizing indigenous peoples regulated in the forestry sector differ from those regulated in the land sector, as do those in the environmental and marine sectors. Therefore, a recognized indigenous peoples unit in one sector does not necessarily automatically have its rights recognized in other sectors. This fragmentation of regulations creates repeated administrative burdens for indigenous peoples, as they must submit separate recognition applications for each type of natural resource they wish to manage, rather than obtaining comprehensive recognition of their customary rights over their customary territories. This situation further emphasizes the urgency of the presence of an umbrella law capable of harmonizing the criteria and procedures for recognizing indigenous peoples across sectors, so that the rights recognition process can proceed more efficiently and without repeatedly burdening indigenous peoples.²⁵

Another aspect that needs to be considered in the context of the recognition of indigenous legal communities is the role of the judiciary, particularly the Constitutional Court, as the guardian of the constitution that consistently broadens the interpretation of the rights of indigenous legal communities through its various decisions. In addition to Decision Number 35/PUU-X/2012 concerning the status of customary forests, the Constitutional Court in various other decisions also emphasized that the conditions for recognition of indigenous legal communities must be interpreted contextually, namely as long as the indigenous legal community is actually still alive and developing in accordance with the dynamics of society, not merely based on formal written evidence that is often difficult to fulfill for indigenous communities whose laws are unwritten. The active role of the Constitutional Court in broadening this constitutional interpretation shows that the judiciary can be one of the channels of correction for the slowness of the legislative institution in drafting laws that specifically protect the rights of indigenous legal communities. However, relying solely on jurisprudence as a basis for legal protection still has limitations, because court decisions are basically casuistic in nature and can only be implemented after a request for judicial review, so they cannot replace the function of laws which are generally regulatory and applicable to all customary law communities in Indonesia.

Regional comparisons also show that the fiscal and political capacity of local governments influence the speed of the recognition process for indigenous communities. Regions with local revenues that are more dependent on extractive sectors such as forestry, plantations, and mining tend to be more cautious, even reluctant, in issuing

²⁴Perindungan Hukum Terhadap Hak-Hak Masyarakat Hukum Adat Dalam Pengelolaan Sumber Daya Alam di Wilayah Pesisir dan Laut. Fakultas Hukum Universitas Pattimura. (2023).

²⁵ Gilbert, J. (2023). Creating synergies between international law and rights of nature. *Transnational Environmental Law*, 12(3), 671-692. doi:10.1017/S2047102523000195

formal recognition for indigenous communities, for fear that this will reduce the area available for investment. Conversely, regions whose economies are less dependent on the extractive sector are relatively more open to granting recognition to indigenous communities, due to the minimal potential for fiscal conflict between the recognition of indigenous communities' rights and regional revenues from natural resource investment. This pattern of fiscal dependence demonstrates that the issue of indigenous community recognition is not merely a juridical-normative issue, but is also intertwined with regional economic-political interests that must be taken into account in formulating policies to strengthen the institutional framework for recognizing indigenous communities going forward.

Based on the above description, it can be concluded that the national legal framework has essentially provided a sufficiently strong foundation for the recognition and protection of the rights of indigenous peoples, from the constitutional level to implementing regulations in various sectors. Constitutional Court Decision No. 35/PUU-X/2012 in particular has provided a significant paradigmatic correction to the understanding of the status of customary forests, while the Village Law has also strengthened the institutional basis of indigenous peoples at the local level. However, this legal framework remains fragmented because it is spread across various different sectoral laws, relies heavily on lengthy administrative verification processes, and is heavily influenced by the political will of local governments in issuing formal recognition. This situation then forms the background for the discussion in the next sub-chapter regarding the challenges of implementing the protection of indigenous peoples' rights amidst the rapid flow of investment and national development.

Challenges and Effectiveness of Protecting the Rights of Indigenous Communities in the Utilization of Natural Resources in the Era of Investment and Development

Since the enactment of Law No. 11 of 2020 concerning Job Creation, which was subsequently re-established through Law No. 6 of 2023, the orientation of Indonesia's natural resource legal policy has shifted increasingly toward ease of doing business and accelerating investment. This shift is reflected in the simplification of the risk-based business licensing system through a single electronic licensing system, which on the one hand accelerates the investment process but on the other hand has the potential to reduce the public participation stage that previously provided a space for indigenous communities to voice objections or provide approval for business plans in their customary territories. Prior to this change, a number of legal and technical issues in the resolution of land rights, supervision, and environmental management in the mineral and coal mining sector had long been a source of disputes between mining business permit holders and indigenous communities holding customary rights.²⁶ Provisions that delegate the resolution of land rights to mining business permit holders often place indigenous communities in a weak bargaining position, as the process of negotiating compensation or compensation takes place asymmetrically between large corporations and indigenous communities with minimal access to information and legal assistance.

One normative instrument that ideally can guarantee the meaningful involvement of indigenous communities in the process of granting business permits is the principle of free, prior, and informed consent, better known as Free, Prior, and Informed Consent (FPIC). This principle was first developed in international legal instruments, specifically the United Nations Declaration on the Rights of Indigenous Peoples, which requires that all indigenous peoples' consent must be given voluntarily without coercion, intimidation,

²⁶Analisis Yuridis Prinsip Free, Prior, Informed Consent dalam Penyelenggaraan Kegiatan Pertambangan Minerba di Indonesia. *El-Iqtishady: Jurnal Hukum Ekonomi Syariah*, 7(2). (2025).

or manipulation, through a process directed by the community concerned.²⁷ The free element means that the community gives its consent without pressure from any party and has the freedom to choose its own representatives, the prioritization element means that consent is obtained before a policy or business activity is implemented, while the informed element requires the community to obtain complete and transparent information before making its decision.²⁸ International Labor Organization Convention No. 169 also emphasizes the importance of this principle in the context of development projects that have the potential to threaten the rights of indigenous peoples, although Indonesia has not yet ratified the convention into its national law.

In the national legal system, the principle of FPIC has not been fully and specifically regulated for indigenous communities. Instead, it is only partially reflected in a number of regulations relating to community participation in general. Government Regulation Number 22 of 2021 concerning the Implementation of Environmental Protection and Management, for example, requires the involvement of affected communities in the preparation of Environmental Impact Analysis documents through the announcement of business plans and public consultations. However, this provision does not specifically regulate the right of consent or refusal for indigenous communities as holders of customary rights.²⁹ This specific normative vacuum causes the implementation of FPIC in practice to be highly dependent on the good faith of both the corporation and the licensing agency, making it vulnerable to being reduced to a mere socialization formality without the substance of real consent.³⁰ Various reports from civil society organizations even show that claims of FPIC implementation by corporations often only take the form of one-way socialization activities, not a dialogical process that provides space for indigenous communities to truly reject a business plan in their customary territory.

The weak implementation of the FPIC principle is clearly reflected in the dispute filed by representatives of the Awyu indigenous community in South Papua against the Papua Province Investment and One-Stop Integrated Services Agency at the Jayapura State Administrative Court. The object of the lawsuit is the environmental feasibility decision for the planned development of an oil palm plantation and palm oil processing plant covering tens of thousands of hectares in Boven Digoel Regency, with one of the arguments of the lawsuit being that the plaintiff, as the customary land rights owner, was never involved in the process of drafting the environmental document.³¹ This case concretely illustrates how the absence of binding and specific FPIC norms often results in the rights of indigenous communities to determine the fate of natural resource utilization in their own territories being ignored in the licensing process for large-scale businesses. A similar phenomenon also occurred in the dispute over andesite mining for the Bener Dam in Wadas Village, which sparked community resistance because it was deemed not to have gone through an adequate consultation process and provided consent to the directly affected communities.³² Both cases demonstrate a recurring pattern: large-scale development or investment projects designated as national strategic projects tend to be

²⁷Apa itu Free, Prior, and Informed Consent?. Amnesty International Indonesia. (2022).

²⁸Akselerasi Hukum Adat: Penerapan Prinsip Free, Prior, Informed Consent (FPIC) bagi Masyarakat Adat. Yustitiabelen. (2023).

²⁹Peran Pengadilan dalam Perlindungan Masyarakat Adat Melalui Penerapan Prinsip Free, Prior, Informed Consent. Hukumonline.com. (2025).

³⁰Penguatan Prinsip Free, Prior and Informed Consent (FPIC) dalam Perlindungan Hak Tanah Masyarakat Adat. BHL Jurnal. (2024).

³¹Peran Pengadilan dalam Perlindungan Masyarakat Adat Melalui Penerapan Prinsip Free, Prior, Informed Consent. Hukumonline.com. (2025).

³²Analisis Yuridis Prinsip Free, Prior, Informed Consent dalam Penyelenggaraan Kegiatan Pertambangan Minerba di Indonesia. El-Iqtishady: Jurnal Hukum Ekonomi Syariah, 7(2). (2025).

prioritized over fulfilling the rights of participation and consent of indigenous communities and other affected communities.

Another issue that weakens the effectiveness of protecting the rights of indigenous peoples is the unequal power relations between indigenous peoples, on the one hand, and the state and corporations holding business permits, on the other. This imbalance is evident in the limited access of indigenous peoples to technical information regarding the environmental impacts of a business plan, the limited capacity of indigenous institutions to negotiate on equal terms with large corporations, and the weak bargaining position of indigenous peoples in decision-making processes affecting their own livelihoods. Studies examining the implementation of FPIC in the forestry, mining, and other development projects concluded that the lack of norms, inconsistencies between regulations, weak legal recognition, and the imbalance of power between indigenous communities and the state and corporations are the main obstacles to implementing the principle of free and informed consent.³³ This finding aligns with empirical conditions in various regions, where the business licensing process is often completed long before local customary communities are aware of any planned business activities in their customary territories.

In response to these various issues, a number of studies recommend the need to accelerate the ratification of the Law on Customary Law Communities as a comprehensive legal umbrella, accompanied by the preparation of regional regulations regarding customary land in various regions, as well as the active involvement of customary law communities in every stage of the investment licensing process in customary areas.³⁴ Without comprehensive legal reform and a strong political commitment from the government, the implementation of the principle of free and informed consent is feared to remain merely symbolic and fail to provide substantive protection for the rights of indigenous peoples to natural resources. In addition to strengthening regulations, it is also necessary to strengthen indigenous peoples' access to justice mechanisms, including expanding the recognition of the legal standing of indigenous peoples in filing state administrative lawsuits and environmental lawsuits, as has been practiced in a number of cases in Papua and Central Java, as a form of correction to the imbalance in power relations that indigenous peoples have experienced.

Another equally significant challenge is the lack of synchronization between national-scale investment policies that are given national strategic project status and the obligation to protect the rights of indigenous peoples at the local level. In practice, national strategic project status is often interpreted as a justification for expediting the licensing and land acquisition process, including in areas traditionally controlled by indigenous peoples for generations. Consequently, the public consultation process, which should provide a space for the submission of objections and compensation negotiations, is instead rushed and lacking in substance. As a result, rather than being an instrument of protection, national strategic project status often weakens the bargaining position of indigenous peoples in negotiations with the government and project initiating corporations. This tension underscores the need to evaluate the policy for accelerating national strategic projects to ensure that they continue to include adequate mechanisms for protecting the rights of indigenous peoples, rather than using the project's strategic status as an excuse to ignore the obligation to involve affected communities.

On the other hand, strengthening the institutional capacity of indigenous communities themselves is also a crucial factor in determining the effectiveness of

³³Penguatan Prinsip Free, Prior and Informed Consent (FPIC) dalam Perlindungan Hak Tanah Masyarakat Adat. BHL Jurnal. (2024).

³⁴Penguatan Prinsip Free, Prior and Informed Consent (FPIC) dalam Perlindungan Hak Tanah Masyarakat Adat. BHL Jurnal. (2024).

available legal protection. Many indigenous communities substantially meet the recognition criteria, yet lack the organizational capacity to manage the administrative process of recognition, develop participatory maps of their customary territories, or conduct equal negotiations with the government and corporations. This capacity limitation is often exacerbated by the lack of ongoing legal assistance, leaving indigenous communities heavily dependent on the assistance of non-governmental organizations, whose numbers and reach are limited compared to the vastness of customary territories spread throughout Indonesia. Therefore, strengthening the institutional capacity of indigenous communities, whether through community legal education, participatory mapping assistance, or strengthening customary institutions as legal entities capable of acting independently, needs to be an integral part of the future reform agenda for protecting the rights of indigenous communities.

From an intergenerational justice perspective, the current weak protection of indigenous peoples' rights to natural resources also has implications for the sustainability of the rights of future generations. Indigenous territories that have been converted into forestry, plantation, or mining concessions are generally difficult to restore to their original function, thus potentially leading future generations of indigenous peoples to lose access to natural resources that should be the collective heritage of their ancestors. These intergenerational losses are often overlooked in environmental feasibility analyses and compensation negotiations, which generally only consider the short-term material losses experienced by the indigenous peoples' generations living at the time the business permit was issued. Therefore, the principle of intergenerational justice should be an important consideration in every decision-making process regarding the use of natural resources in indigenous territories, so that legal protection is not only oriented towards short-term interests but also takes into account the sustainability of indigenous peoples' rights for future generations.

The role of mass media and civil society organizations is also a crucial variable influencing the effectiveness of the protection of indigenous peoples' rights in practice. Cases that receive extensive media coverage, such as the dispute involving the Awyu tribe and the rejection by residents of Wadas Village, tend to garner greater public attention and pressure on the government and corporations, thus opening up opportunities for resolutions that better align with the interests of indigenous peoples. Conversely, many similar disputes in remote areas escape public attention due to limited media access and advocacy support, leading to protracted resolutions without adequate resolution for the affected indigenous peoples. This lack of visibility emphasizes that the effectiveness of legal protection should not depend solely on external factors such as media attention, but must be ensured through legal mechanisms that apply equally to all indigenous peoples, regardless of the level of media exposure of their cases.

As a further note, efforts to strengthen the protection of the rights of indigenous peoples also require consideration of alternative dispute resolution mechanisms that are more appropriate to the social character of indigenous peoples themselves. Dispute resolution through formal justice channels, while important as a last resort, is often time-consuming, expensive, and requires an understanding of legal procedures that indigenous peoples do not always master. Therefore, strengthening mediation and deliberation mechanisms that equally involve local governments, customary institutions, and corporations can be a faster alternative and more in line with the collective values held by indigenous peoples, without overriding their right to continue pursuing formal legal channels if these deliberation mechanisms do not produce fair results. The combination of strengthening alternative dispute resolution mechanisms and enhancing

access to formal justice will ultimately determine the extent to which available legal protection is truly accessible and beneficial to indigenous peoples on the ground.

Based on the above description, it can be said that the effectiveness of protecting the rights of indigenous peoples to natural resources in the era of investment and national development is still far from adequate. The jurisprudential progress achieved through Constitutional Court Decision No. 35/PUU-X/2012 and the recognition of participation rights in various environmental regulations have not been matched by norms that expressly guarantee the right to consent of indigenous peoples in the licensing process for the use of natural resources. This condition is exacerbated by the orientation of investment policies that tend to prioritize the acceleration of the licensing process over the fulfillment of the right to meaningful participation for indigenous peoples, resulting in various agrarian conflicts in indigenous territories continuing to recur from one region to another. Therefore, more comprehensive legal reform measures are needed, not only at the normative level through the accelerated ratification of special laws on indigenous peoples, but also at the implementation level through the internalization of the principle of free consent into all business licensing processes that intersect with indigenous territories in Indonesia. In closing, it should be emphasized that the issue of protecting the rights of indigenous peoples to natural resources is essentially a reflection of a country's commitment to the principles of social justice and respect for the legal diversity that exists within its society. The extent to which the state is able to balance the interests of economic development with respect for the rights of indigenous peoples will significantly determine the sustainability of the relationship between the state and indigenous peoples in the future, as well as serve as a benchmark for the realization of agrarian justice, which has long been a shared ideal in the development of Indonesian national law.

CONCLUSIONS

The Indonesian national legal framework has provided a relatively strong foundation for the recognition and protection of the rights of indigenous legal communities over natural resources, ranging from constitutional recognition in Article 18B paragraph (2) of the 1945 Constitution and the recognition of customary rights in the Basic Agrarian Law to the Constitutional Court's Decision Number 35/PUU-X/2012, which confirms that customary forests are not part of state forests. However, this legal framework remains fragmented due to inconsistencies among sectoral regulations, lengthy administrative verification processes, and its dependence on the political will of local governments in granting formal recognition to indigenous legal communities. At the implementation level, the effectiveness of legal protection is further challenged by investment expansion and ease-of-doing-business policies that have not been adequately balanced by explicit guarantees for the application of the principle of free, prior, and informed consent (FPIC) in natural resource licensing processes. Various cases, including disputes involving the Awyu indigenous community in South Papua and the residents of Wadas Village, demonstrate that normative gaps, unequal power relations, and limited access to justice continue to pose significant structural obstacles to the substantive protection of indigenous peoples' rights.

For land administration authorities and indigenous communities, the proposed hybrid integration model provides a practical framework for balancing legal certainty and the protection of customary values in the digital era. The active involvement of indigenous communities in the digitization of customary land data, combined with the digital documentation of customary agreements, may strengthen both evidentiary value

and participatory land governance. Furthermore, continuous digital literacy programs and institutional collaboration between customary institutions and land authorities are essential to ensure that digital transformation enhances, rather than diminishes, the effectiveness of customary land dispute resolution mechanisms. Strengthening participatory approaches in land governance may also contribute to improving access to justice and ensuring that technological developments are aligned with the constitutional mandate to protect the rights of indigenous legal communities.

REFERENCE

- 11 Tahun Putusan MK, Pengakuan Wilayah Adat Masih Berbelit. (2024). Betahita.id.
- Akbar, M., Permana, M. D., & Rusli, H. (2023). The Progressive Legal Perspective of Legal Justice in Customary Dispute Resolution Related to Natural Resources. *Jurnal IUS Kajian Hukum Dan Keadilan*, 11(2), 225-236. <https://doi.org/10.29303/ius.v11i2.1252>
- Akselerasi Hukum Adat: Penerapan Prinsip Free, Prior, Informed Consent (FPIC) bagi Masyarakat Adat. (2023). Yustitiabelen.
- Amnesty International Indonesia. (2022). Apa itu Free, Prior, and Informed Consent?. Diakses dari <https://www.amnesty.id>.
- Analisis Yuridis Prinsip Free, Prior, Informed Consent dalam Penyelenggaraan Kegiatan Pertambangan Minerba di Indonesia. (2025). El-Iqtishady: Jurnal Hukum Ekonomi Syariah, 7(2).
- Buana, A. P., & Mamonto, M. A. W. W. (2023). The Role of Customary Law in Natural Resource Management: A Comparative Study between Indonesia and Australia. *Golden Ratio of Mapping Idea and Literature Format*, 3(2), 167-186. <https://doi.org/10.52970/grmilf.v3i2.400>
- Clarke, P., & Jupiter, S. D. (2010). Law, custom and community-based natural resource management in Kubulau District (Fiji). *Environmental Conservation*, 37(1), 98-106. doi:10.1017/S0376892910000354
- Fahmi, C. (2024). The application of international cultural rights in protecting Indigenous peoples' land property in Indonesia. *AlterNative: An International Journal of Indigenous Peoples*, 20(1), 157-166. <https://doi.org/10.1177/11771801241235261>
- Gilbert, J. (2023). Creating synergies between international law and rights of nature. *Transnational Environmental Law*, 12(3), 671-692. doi:10.1017/S2047102523000195
- Hukum Properti. (2025). Pengakuan Hutan Adat: Komitmen Negara Terhadap Perlindungan Hak-Hak Masyarakat Hukum Adat di Indonesia. Diakses dari <https://hukumproperti.com>.
- Ikhtisar Putusan Perkara Nomor 35/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan. (2013). Mahkamah Konstitusi Republik Indonesia.
- Istanto, Y., Surya, F. A., Wardhani, L. C., & Setiyowati, F. J. (2025). The Urgency of Recognizing and Protecting the Rights of Customary Law Communities to Natural Resources in Mining Management: A Review of the Perspective of Islamic Law. *Al Maqashidi: Jurnal Hukum Islam Nusantara*, 8(1), 117-134. <https://doi.org/10.32665/almaqashidi.v8i1.4595>
- Mahkamah Konstitusi Republik Indonesia. (2013). Putusan Nomor 35/PUU-X/2012 tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan.
- Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012). (2013). Jurnal Konstitusi, 10(3).

- Pengakuan Dan Perlindungan Hak Atas Tanah Masyarakat Hukum Adat di Kawasan Hutan. (2021). Sekolah Tinggi Pertanahan Nasional.
- Pengakuan Dan Perlindungan Terhadap Masyarakat Hukum Adat Dalam Pemanfaatan Sumber Daya Alam di Provinsi Jambi. (2023). *Datin Law Jurnal*, 4(1), 1–22.
- Penguatan Prinsip Free, Prior and Informed Consent (FPIC) dalam Perlindungan Hak Tanah Masyarakat Adat. (2024). *BHL Jurnal*.
- Peran Pengadilan dalam Perlindungan Masyarakat Adat Melalui Penerapan Prinsip Free, Prior, Informed Consent. (2025). *Hukumonline.com*.
- Perlindungan Dan Pengakuan Hak Ulayat Masyarakat Adat. (2022). *Rule of Law Review (RLR) Journal*.
- Prasetya, R. (2023). LEGAL PROTECTION OF INDIGENOUS PEOPLE'S RIGHTS IN THE UTILIZATION OF NATURAL RESOURCES. *Communale Journal*, 1(3), 204-214. <https://doi.org/10.22437/communale.v1i3.30356>
- Republik Indonesia. (1945). Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Republik Indonesia. (1960). Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria. Lembaran Negara Republik Indonesia Tahun 1960 Nomor 104.
- Republik Indonesia. (1999). Undang-Undang Nomor 41 Tahun 1999 tentang Kehutanan, sebagaimana telah diubah dengan Undang-Undang Nomor 6 Tahun 2023.
- Republik Indonesia. (2009). Undang-Undang Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup.
- Republik Indonesia. (2014). Undang-Undang Nomor 6 Tahun 2014 tentang Desa.
- Republik Indonesia. (2020). Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja.
- Republik Indonesia. (2021). Peraturan Pemerintah Nomor 22 Tahun 2021 tentang Penyelenggaraan Perlindungan dan Pengelolaan Lingkungan Hidup.
- Republik Indonesia. (2023). Undang-Undang Nomor 6 Tahun 2023 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2022 tentang Cipta Kerja Menjadi Undang-Undang.
- Sahkan RUU Masyarakat Adat. (2026). Free Prior Informed Consent (FPIC) bagi Masyarakat Adat. Diakses dari <https://sahkanruumasyarakatadat.id>.
- Sempo, V. (2024). Hak Masyarakat Hukum Adat di Tengah Modernisasi Ditinjau dari Pasal 18B Ayat (2) Undang-Undang Dasar 1945. *Lex Privatum*.
- Tan, D. (2021). Metode Penelitian Hukum: Mengupas dan Mengulas Metodologi dalam Menyelenggarakan Penelitian Hukum. *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial*, 8(8).