

Legal Certainty of Recognition of Customary Land in the National Legal System

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Recognition of customary land has been accommodated in the Basic Agrarian Law (UUPA), but its implementation within the national legal system still faces challenges of dualism and legal uncertainty. This study aims to analyze the legal challenges of recognizing customary rights for indigenous communities and formulate comprehensive solutions to ensure legal certainty. The research method used is normative juridical with a statutory and conceptual approach. The results indicate that legal uncertainty stems from overlapping sectoral regulations (such as the Forestry Law, the Mining Law, and the Job Creation Law), biased indicators of the existence of customary rights, and the recognition mechanism in Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 14 of 2024, which tends to be constitutive and bureaucratic because it requires a Regional Regulation (Perda). Consequently, the communal rights of indigenous communities are often marginalized by investment interests and national strategic projects. This study concludes that legal certainty can only be achieved through regulatory reconstruction that shifts the recognition paradigm to a declarative-confirmatory one, accelerates the ratification of the Indigenous Peoples Law, and integrates digital mapping of indigenous territories into the One Map Policy.

Keywords: Legal Certainty, Customary Land, Indigenous Peoples, National Legal System.

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1. Introduction

Indonesia is a state based on the rule of law with unique characteristics because it recognizes legal pluralism, including the existence of customary law and customary land rights (Shebubakar & Raniah, 2023). Constitutionally, Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia guarantees the unity of customary law communities and their traditional rights as long as they remain viable and in accordance with societal developments (Krismantoro, 2022). At the operational level, Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) also recognizes customary rights in Article 3, provided they must not conflict with national and state interests. The existence of these norms demonstrates the state's commitment to protecting the living space of customary law communities by recognizing their land tenure rights (Veronika & Winanti, 2021).

However, in practice, the recognition of customary land within the national legal system still faces significant legal uncertainty. The characteristics of national land law, which tends toward the unification of Western law, often discredit the communal-religious nature of customary land (Cahyaningrum, 2022). The recognition requirement stipulated in the Basic Agrarian Law (UUPA), which stipulates that customary land must exist as long as it exists, has become a highly vulnerable clause. The absence of a single, objective parameter for determining the existence of an indigenous community weakens the position of customary land, making it vulnerable to unilateral conversion by state authorities (Ismi, 2013).

This situation is exacerbated by overlapping sectoral regulations governing natural resources in Indonesia. Laws and regulations in the areas of forestry, mining, and plantations often operate independently without

integrating the rights of indigenous communities (Sukirno, 2010). Customary land rights are often considered an obstacle to economic investment and large-scale infrastructure development. Due to this poor legal synchronization, customary territories are often unilaterally claimed as state land or granted concession permits to private corporations without Free, Prior, and Informed Consent (Soraya & Handayani, 2025).

The real impact of this legal uncertainty is the massive rise in structural agrarian conflicts involving indigenous communities, the government, and the private sector. Based on empirical data reports, customary land disputes rank significantly on the map of agrarian conflicts in Indonesia (Aksinudin, 2023). Indigenous communities not only lose their economic rights to the land that is their source of livelihood but also the cultural and spiritual identity inherent in these ancestral lands. The absence of certification or formal legal documents recognized by the state puts indigenous communities at a disadvantage when facing legal challenges in court (Hendriana & Hardjo, 2025).

The current administrative mechanism for customary land registration is also considered overly bureaucratic and costly (Simanjuntak, 2025). While Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 14 of 2024 concerning Customary Land Registration has been issued, its implementation in the regions remains hampered by complex administrative requirements, such as the requirement for a Regional Regulation (Perda) prioritizing the establishment of customary communities. This lengthy bureaucratic process contradicts the spirit of expeditious legal protection needed by indigenous communities in remote areas (Wulandari & Handayani, 2025).

Several previous studies have extensively discussed the existence of indigenous communities, but the majority of these studies have focused solely on sociological aspects or general human rights protection (Girinatha & Putri, 2024; Indri & Irianto, 2025). There is a research gap specifically examining the dogmatic weaknesses of customary land management within a positive normative legal framework and how to reconstruct inclusive land registration regulations. Therefore, this research aims to fill this gap by emphasizing the legal certainty of customary land registration.

Based on this background, the purpose of this research is to analyze the legal challenges posed by the recognition of customary land within the current national legal system. Furthermore, this research also aims to formulate a concept for the reconstruction of ideal agrarian regulations to ensure just legal certainty for customary law communities. The results of this research are expected to provide theoretical contributions to the development of national agrarian law and practical recommendations for policymakers in developing more responsive land regulations.

2. Method

The type of research used in this study is normative legal research or doctrinal legal research. This research focuses on the inventory, synchronization, and assessment of legal principles and legal systems related to the recognition of customary land within the national legal system (Soekanto, 2027). The research approach applied includes a statute approach to examine the consistency of agrarian regulations, and a conceptual approach to analyze the doctrine of legal certainty and communal rights of indigenous peoples.

The primary data sources in this study are secondary data consisting of three legal materials: primary, secondary, and tertiary legal materials. Primary legal materials include regulatory instruments such as the 1945 Constitution of the Republic of Indonesia, Law No. 5 of 1960 (UUPA), Law No. 6 of 2023 (Job Creation Law), and implementing regulations such as Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency No. 14 of 2024 concerning Registration of Customary Land. Secondary legal materials were sourced from legal textbooks, accredited scientific journals, previous research reports,

and relevant scientific articles. Meanwhile, tertiary legal materials included the Great Dictionary of the Indonesian Language and legal dictionaries to provide operational definitions of legal terms.

The legal materials were collected through library research, systematically identifying, classifying, and recording legal documents based on their respective topics. After all legal materials were collected, qualitative data analysis was conducted using the syllogistic method through deductive reasoning (Barus, 2013). This analysis process began by presenting the major premise, which is an abstract positive legal norm regarding the legal certainty of land registration, and then connecting it with the minor premise, which is the fact of inconsistencies in regulations regarding the recognition of customary land, to produce a conclusion or new legal discovery that is prescriptive in nature to address the research problem.

3. Result And Discussion

Legal Problems and Regulatory Inconsistencies in the Recognition of Customary Land in the National Legal System

The existence of customary land in the Indonesian legal system is caught in a persistent normative paradox. On the one hand, the constitution, through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, expressly states that the state recognizes and respects customary law communities and their traditional rights. However, this constitutional guarantee is embedded in a conditional clause, namely "as long as they remain alive and in accordance with societal developments and the principles of the Unitary State of the Republic of Indonesia." This conditional phrase then becomes the root of all legal uncertainty, as it grants the state absolute authority to interpret the life or death of an indigenous community and its customary land rights.

At the organic law level, this recognition is enshrined in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). The legal standing of national land is based on customary law, but the application of customary rights is limited by national and state interests. The UUPA views customary land rights with an ambivalent paradigm: their existence is recognized but their scope is simultaneously restricted to prevent them from hindering the unification of land law. As a result, the fulfillment of customary land rights is often placed in a subordinate position when confronted with development interests pursued in the name of the state.

The fundamental problem within this dogmatic legal system is the emergence of legal dualism post-UUPA. The unification of national land law, biased toward Western law, seeks to impose an individualistic-liberal and written concept of land ownership. This characteristic is highly contradictory to the fundamental nature of customary land, which is communal-religious, collective, and unwritten. The imposition of Western administrative concepts on this traditional tenure system has caused the existence of customary land to gradually erode and lose its legal legitimacy under positive state law.

This inconsistency is further exacerbated by the presence of various sectoral regulations that govern natural resources in a partial and self-serving manner. Laws in the areas of forestry, mining, energy, and plantations often operate independently, ignoring the existence of customary land rights protected by the UUPA. For example, under forestry law, customary forest areas are often unilaterally claimed as State Forests. This unilateral action automatically cuts off physical access and revokes the civil rights of indigenous communities to their ancestral lands, which have been managed for generations.

Furthermore, the enactment of Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law further widens the gap in legal uncertainty. This law promotes ease of doing business through simplification of business permits and

land acquisition for the public interest. Under this scheme, accelerated land acquisition and the establishment of a Land Bank often ignore the existence of uncertified communal rights. Customary land lacking formal documentation is vulnerable to being categorized as abandoned or free state land, ready to be allocated for corporate concessions.

This situation gives rise to what is known as the paradox of existence requirements, where the state demands administrative proof of rights that predate the state itself. The phrase "as long as it still exists" in agrarian law has become a bureaucratic trap for indigenous communities. The parameters for measuring the existence of an indigenous community are unilaterally determined by the government through rigid and formalistic indicators. As a result, when indigenous communities experience modernization or changes in lifestyle, the state easily claims that they have been dissolved and their customary rights are declared null and void.

From a state administrative law perspective, the current mechanism for recognizing customary rights remains trapped in a constitutive-bureaucratic paradigm. Rights to customary land are only considered legally existing after an official decree has been issued by a state administrative official. This paradigm is flawed because customary rights are inherent and historical and should be recognized through a declarative-confirmatory approach. As a result of this constitutive system, until a decree or regional regulation establishes their status, indigenous communities are positioned as having no rights to their own land.

These administrative obstacles have become even more apparent with the issuance of Regulation No. 14 of 2024 by the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency concerning Customary Land Registration. Although this regulation was formulated with good intentions to provide certainty of rights, its implementation has hit a dead end. This ministerial regulation still requires the establishment of customary law communities through a Regional Regulation (Perda) or a Decree of the Regional Head before the land registration process can be processed by the Land Office.

This absolute requirement for a Perda creates a very strong barrier for customary law communities in various regions. The legislative process for establishing Perda at the district or provincial level is notoriously slow, fraught with interference from local political interests, and requires significant budgetary costs. As a result, many indigenous communities whose territories are threatened by industrial expansion are unable to access this land registration protection because their local governments are reluctant or delay issuing Perda recognizing indigenous communities.

The lack of synchronization between government institutions also complicates the complexities of customary land management in Indonesia. The National Land Agency (BPN), the Ministry of Environment and Forestry (KLHK), and the Ministry of Home Affairs have differing sectoral egos and reference maps when determining customary land boundaries. Customary land rights maps submitted by communities often overlap with forest area maps owned by the KLHK or Cultivation Rights (HGU) concession maps issued by the BPN. This unclear spatial data integration creates legal uncertainty regarding which institution has the most authority to protect these land rights.

The real implication of this weak legal protection is the escalation of massive and prolonged structural agrarian conflicts in various regions of Indonesia. Based on empirical data from various non-governmental organizations, land disputes involving indigenous peoples account for a high percentage of cases. These conflicts generally follow a similar pattern: unilateral claims by companies holding plantation or mining concessions on land traditionally believed to be the customary land of local communities. Most of these disputes end in forced evictions and the criminalization of indigenous peoples attempting to defend their living space.

In the dispute resolution process in the courts, indigenous peoples consistently have the weakest legal standing. Judges in formal courts tend to adhere to a rigid legal positivism, where the only recognized proof of ownership is a written certificate issued by the state. The unwritten nature of customary law, which relies on collective memory and natural signs, is often disregarded and deemed to have no valid evidentiary value. This procedural injustice in the courtroom confirms that the national judicial system has not yet grasped the essence of substantive justice in upholding customary law.

Beyond the loss of economic rights, the most fatal impact of this legal uncertainty is the degradation of culture and the destruction of the social identity of indigenous communities. For indigenous communities, customary land is not merely a material economic commodity but an integral part of their belief system, spirituality, and communal self-esteem. When customary land is converted into industrial areas, the value system, customary law, and local wisdom related to environmental sustainability are also destroyed. The state has indirectly forcibly separated indigenous communities from the spiritual space that is the lifeblood of their culture.

Based on all the legal problems above, it can be identified that the current national legal system fails to provide fair legal certainty for customary land. This uncertainty is fueled by imperfect legal structures, overlapping regulatory substance, and the capitalist-positivist legal culture of law enforcement officials. If these regulatory and synchronization weaknesses are allowed to persist without fundamental improvements, the traditional rights of indigenous communities to their customary lands are threatened with complete erasure from the national spatial planning legal map.

Table 1. Matrix of Legal Problems and Inconsistencies in Customary Land Regulations

No	Component Problem	Condition / Das Sollen	Reality / Das Sein	Impact Legal & Practical
1	Guarantee Constitution	Confession absolute to room community living space law custom (Article 18B paragraph 2 of the 1945 Constitution).	Confession hampered by clause conditional " as long as Still alive and well current development ".	The country has authority absolute determine life or death right customs in a way unilateral.
2	Legal Paradigm	Land law national based law communalistic - religious customs (Article 3 UUPA).	Unification law forced leading to an individualistic, liberal, and written western system.	Characteristics original land customary law eliminated Because considered No fulfil standard modern la.
3	Regulation Sectoral	Harmonization arrangement source Power nature for justice social for all the people.	Sectoral ego inter -laws (Forestry, Mining, Plantations, and the Job Creation Law) are running partial.	Customary territory prone to claimed unilateral as "State Forest" or allocated to the Land Bank.
4	Nature of Confession	Confession nature Declarative-Confirmative (state only confirm rights that have been There is since Formerly).	Confession nature Constitutive- Bureaucratic (rights new considered There is after There is formal state regulations).	Before there is a decree/ regional regulation official, society customs considered No own rights (no right) to the land Alone.
5	Obstacle Bureaucracy	Convenience registration land customary law in	Registration land at the BPN is mandatory	Regional Regulation process is very slow,

No	Component Problem	Condition / Das Sollen	Reality / Das Sein	Impact Legal & Practical
		accordance Spirit Regulation of the Minister of ATR/BPN No. 14 of 2024.	attach Regional Regulation (Perda) determination public customs.	expensive and full of intervention political local, so that registration become congested.
6	Data Integration	One map integrated national (One Map Policy) includes all customary areas.	Overlapping overlap map reference inter-agency (BPN, KLHK, and Ministry of Home Affairs).	Corporate Land Use Rights (HGU) Certificate often rising above map of indigenous territories that have not been recorded.
7	Settlement Dispute	Impartial and capable justice catch justice substantial / legal No written.	Judges in formal courts tend to adhere to Rigid Legal Positivism (only confess proof certificate).	Indigenous peoples always lost in a way law in court Because no own proof formal letter / document.

Just Agrarian Regulatory Reconstruction: Towards Declarative Legal Certainty for Customary Land Rights

The failure of the national legal system to protect customary land, as outlined in the previous chapter, underscores the urgency of fundamental regulatory reconstruction. The most crucial initial step in this reconstruction is a legal paradigm shift regarding the model for recognizing customary land rights. The state must abandon the constitutive-bureaucratic paradigm, which currently positions customary rights as existing only after being established by state administrative officials. Instead, the national legal system must adopt a declarative-confirmatory paradigm, in which the state positions itself not as the creator of rights, but as an institution that merely confirms and records traditional rights that have historically been inherent in indigenous communities long before the nation's founding.

This paradigm shift from constitutive to declarative is in line with the responsive legal theory proposed by Philippe Nonet and Philip Selznick. Law should not be positioned as a rigid instrument serving solely bureaucratic or market interests, but rather must be sensitive to the needs of social justice in society. By implementing a declarative approach, the existence of customary land is immediately recognized by law once the sociological characteristics of indigenous communities are met on the ground. This step will automatically break down the administrative barriers that have disadvantaged indigenous communities and instantly restore their legal standing before positive law.

However, this paradigm shift will be meaningless without a strong legal umbrella and a high degree of legislative hierarchy. Therefore, an urgent agenda for the reconstruction of national agrarian law is the ratification of the Law on Indigenous Law Communities (UU MHA). This special law functions as a *lex specialis*, standing above ministerial or regional regulations. The MHA Law must include standardized indicators for the existence of indigenous communities that are uniform, objective, and inclusive at the national level, so that interpretation of the recognition articles is no longer biased or open to multiple interpretations.

The MHA Law is designed to cut through the bureaucratic hurdles that have plagued indigenous communities, particularly regarding the obligation to establish Regional Regulations (Perda). Through this law, the mechanism for recognizing indigenous communities and their customary lands can be achieved through a fast, low-cost, and confirmatory administrative registration process at the ministerial level, eliminating the need to wait for the legislative process of regional regulations (Perda) in the Regional

People's Representative Council (DPRD), which is rife with local transactional political interests. This procedural reform will provide instant and progressive legal protection for indigenous territories currently under threat from industrial expansion.

The next, equally crucial, reconstruction step is to harmonize and synchronize overlapping sectoral regulations. All laws governing the use of natural resources, such as the Forestry Law, the Mining Law, the Plantation Law, and the Job Creation Law, must be aligned vertically and horizontally with the principle of equitable land law unification. The principle of Free, Prior, and Informed Consent (FPIC), or prior, informed consent without coercion, must be adopted as a mandatory norm in every article of land acquisition or concession permit granting. Through this clause, private corporations and government agencies cannot annex customary territories without written agreement and fair compensation for local indigenous communities.

In addition to improving the legal substance, this reconstruction must also address the legal structure by strengthening national land institutions. The Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) needs to establish a special directorate or deputy office specifically handling the registration, mapping, and resolution of communal/customary land conflicts. This institution must be staffed with human resources possessing multidisciplinary competencies, not only mastering positive law and geodetic techniques, but also understanding legal anthropology, rural sociology, and the characteristics of Indonesian customary law.

In the current era of technological transformation, the technical aspects of customary land registration administration must also be reconstructed through the use of integrated digital systems. The One Map Policy, managed by the Geospatial Information Agency (BIG), must require all ministries to integrate maps of customary territories into a single national spatial database. This mapping process must be carried out in a participatory manner, directly involving indigenous communities to ensure the accuracy of their territories' natural boundaries. Once digital maps of customary land are locked into the national geodetic system, the land registration system will automatically reject any encroachment or the issuance of new overlapping Land Use Rights (HGU) certificates over the area.

Furthermore, the format of customary land title certificates issued by the National Land Agency (BPN) also needs to be reformed to align with the communal-religious characteristics of customary law. Customary land registration should not be directed towards the commodification or individualization of customary land, leading to the distribution of individual ownership certificates. The legal document issued must be a Communal Rights Certificate in the name of the customary community association represented by its customary leaders. This certificate must contain an absolute clause stating that the customary land is inalienable, meaning it cannot be traded, cannot be pledged as collateral to a bank, and cannot be confiscated by law, to ensure the sustainability of the living space for future generations.

This reconstruction concept also offers a solution for the Land Bank, established under the derivative regulations of the Job Creation Law. Regulatory arrangements must ensure that the Land Bank's assets are strictly prohibited from originating from unregistered customary lands or those currently under dispute. Agrarian reform policies must be prioritized over the Land Bank's capital accumulation targets. This way, customary land is protected from being categorized as "abandoned land" or "free state land," vulnerable to exploitation for National Strategic Projects (PSN).

Law enforcement in the courtroom also requires a reconstruction of the legal culture of law enforcement officials, particularly the judicial corps. Prospective judges' legal education must be enriched with an understanding of the doctrine of substantial justice, so they are no longer trapped in rigid and clerical legal positivism. When adjudicating customary land disputes, judges must be bold in making legal breakthroughs

through legal discovery (*rechtsvinding*) methods by exploring the unwritten legal values inherent in indigenous communities. Informal evidence such as oral histories, customary structures, and natural boundaries must be considered equally valid to written documentary evidence.

To ensure effective conflict resolution outside the courts, the government needs to institutionalize a customary mediation mechanism integrated with the formal justice system (court-connected mediation). Internal and external land conflicts involving indigenous communities should be resolved primarily through deliberation and consensus within local customary institutions, prioritizing the principles of restorative justice. The results of this customary peace agreement will be issued a *fatwa* (religious decree) by the District Court, giving it legally binding executive power. This step will not only reduce the backlog of cases in court but also maintain social harmony in the regions.

From an international legal perspective, this reconstruction of national agrarian regulations also demonstrates Indonesia's compliance with its global commitment to protecting the rights of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) explicitly obliges member states to provide legal recognition, protection, and restoration to lands, territories, and resources traditionally owned or occupied by indigenous peoples. Harmonizing national law with the standards of this international instrument will enhance the credibility of Indonesia's human rights enforcement globally.

At a macro level, the implementation of this equitable regulatory reconstruction will create a much more stable, secure, and sustainable investment climate. Clear legal certainty regarding the status of customary land will eliminate the risk of social resistance and bloody conflicts on the ground, which have historically been detrimental to investors. Businesses will receive clarity regarding which areas are free from customary claims, as well as the legal procedures for establishing land use partnerships with local indigenous communities without resorting to forced evictions.

Ultimately, the primary goal of this restructuring of agrarian regulations is to achieve social justice for all Indonesians, as mandated by the fifth principle of Pancasila. Land should not be viewed merely as a factor of economic production or a commercial commodity circulating in the hands of a handful of capitalists. For indigenous communities, land represents their identity, honor, and a spiritual bridge connecting them to their ancestors and the future of their children and grandchildren. Through solid legal certainty, the state is present to restore the dignity, sovereignty, and rights to living space that have been stolen by unequal legal modernization.

4. Conclusion

Based on the analysis, this study concludes that the guarantee of legal certainty for the recognition of customary land in the current national legal system has not been optimally realized. The fundamental problem stems from inconsistencies in sectoral regulations, the paradox of biased requirements for the existence of indigenous communities, and land administration mechanisms that tend to be constitutive-bureaucratic. Although the government has issued the latest regulations, such as Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency Number 14 of 2024 concerning the Registration of Customary Land, these implementing regulations still encounter structural obstacles due to the requirement for Regional Regulations (*Perda*) to determine indigenous communities. As a result, the communal rights of indigenous communities are in an inferior legal position and are vulnerable to being marginalized by interests in investment expansion, land acquisition through Land Banks, and national strategic projects. To address these legal problems, the national legal system requires regulatory reconstruction through responsive and equitable agrarian law reform. This reform must shift the recognition paradigm from constitutive-bureaucratic to declarative-confirmative, in which the state only confirms

historical traditional rights that are inherently inherent in indigenous communities. Urgent concrete steps that require immediate implementation include accelerating the ratification of the Law on Indigenous Communities as a *lex specialis*, as well as the participatory integration of digital maps of indigenous territories into the national database (One Map Policy). Through the issuance of inalienable Communal Rights Certificates, indigenous communities' rights to living space can be permanently protected from potential future structural agrarian conflicts.

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