

Protecting Indigenous Communities in Indonesia: Reconciling Customary Rights, Human Rights, and State Obligations

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Abstract. Indonesia is home to thousands of customary law communities, or *masyarakat hukum adat*, whose collective identity, territorial claims, and normative orders long predate the modern nation-state, yet whose legal status under national law remains persistently unsettled and contested at the level of practice. This article critically examines the tension between constitutional recognition of *masyarakat hukum adat* under Article 18B(2) and Article 28I(3) of the 1945 Constitution and the fragmented, sector-specific, and often discretionary manner in which that recognition is operationalized across forestry, agrarian, and village-governance legislation. Employing normative-juridical legal research supported by a qualitative, case-oriented review of Constitutional Court jurisprudence, statutory instruments, and international human rights standards, the article traces how Constitutional Court Decision No. 35/PUU-X/2012 reshaped the legal category of "customary forest" without resolving the antecedent and more fundamental question of who qualifies as a legally recognized customary law community. It further situates Indonesia's domestic framework against binding and non-binding international instruments, none of which Indonesia has yet fully incorporated into enforceable domestic obligations toward indigenous and customary peoples. The analysis demonstrates that constitutional recognition without an enabling national law functions as conditional and administratively revocable inclusion rather than a secure legal entitlement, leaving customary communities exposed to extractive investment, agrarian conflict, displacement, and criminalization. The article concludes that reconciling customary rights with human rights and state obligations requires the long-delayed enactment of a comprehensive law on *masyarakat adat*, harmonization of overlapping sectoral regulations, and a rights-based interpretation of the state's constitutional mandate to protect traditional communities consistent with their continued existence and evolving circumstances.

Keywords: Customary Rights; Indigenous Peoples; Human Rights; State Obligations.

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1. Introduction

Indonesia's constitutional order rests on an uneasy compromise between the ideal of a unitary nation-state and the empirical reality of an archipelago inhabited by an extraordinarily diverse constellation of customary law communities, each governed by its own *adat* norms concerning land, kinship, resource use, and dispute resolution. Advocacy coalitions and civil-society networks that track land-based conflicts have documented a persistent and recurring pattern of disputes between customary communities and holders of forestry, plantation, and mining concessions, disputes that continue to accumulate even as the state professes constitutional commitment to indigenous recognition.¹ This gap between the constitutional

¹Forest Watch Indonesia, "Pengesahan RUU Masyarakat Adat pada 2025: Menanti Tindakan Nyata DPR dan Pemerintah kepada Masyarakat Adat," December 18, 2024, <https://fwi.or.id/menanti-pengesahan-ruu-masyarakat-adat-pada-2025/>.

promise of recognition and the everyday experience of dispossession, informality, and legal uncertainty is the central problem this article investigates.

The starting point for any legal analysis of indigenous protection in Indonesia is Article 18B(2) of the 1945 Constitution, which provides that the state recognizes and respects units of masyarakat hukum adat together with their traditional rights, so long as these remain alive and are consistent with the development of society and the principle of the Unitary State of the Republic of Indonesia (Negara Kesatuan Republik Indonesia).² This clause, read together with Article 28I(3), which obliges the state to respect cultural identity and the rights of traditional communities in accordance with the progress of civilization, is often described as the constitutional gateway to indigenous protection. Yet the very structure of Article 18B(2) embeds three qualifying conditions—continued existence ("masih hidup"), conformity with societal development, and conformity with the unitary state principle—that transform recognition from an unconditional entitlement into a conditional, administratively determined status. Recognition is not self-executing; it must be verified, typically through a regional regulation (peraturan daerah) or a decision of a regent or mayor, before a community's customary rights become legally cognizable for most practical purposes, including the gazettal of customary forest.

The single most consequential judicial intervention in this field remains Constitutional Court Decision No. 35/PUU-X/2012, in which the Court held that provisions of Law No. 41 of 1999 on Forestry classifying customary forest (hutan adat) as a category of state forest were unconstitutional, and that customary forest should instead be classified as forest located within customary territory rather than automatically falling under state control.³ The decision was widely celebrated as a watershed for indigenous land rights because it detached customary forest, at least doctrinally, from the expansive category of state forest that had for decades formed the legal basis for forestry concessions, plantation licenses, and mining permits overlapping with customary territories. However, more than a decade of implementation experience shows that the ruling did not, by itself, dismantle the antecedent bureaucratic requirement that a community first be formally recognized as a masyarakat hukum adat—typically through a regional regulation—before its customary forest can be excised from the state forest estate and registered in its name. The Constitutional Court resolved a downstream classification problem while leaving the upstream recognition bottleneck largely intact, a structural feature that this article examines in detail.

Sectoral legislation compounds this fragmentation. Law No. 5 of 1960 on Basic Agrarian Principles acknowledges hak ulayat, the communal right of customary communities over land within their territory, but subordinates its exercise to national and state interests and to

²Constitution of the Republic of Indonesia of 1945 (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945), art. 18B(2) and art. 28I(3).

³Constitutional Court of the Republic of Indonesia, Decision No. 35/PUU-X/2012 concerning Judicial Review of Law No. 41 of 1999 on Forestry, May 16, 2013.

conformity with legislation of a higher order, leaving considerable room for administrative discretion in determining whether a given community's ulayat right still exists in practice.⁴ Law No. 41 of 1999 on Forestry, even after the 2012 Constitutional Court ruling, continues to condition the recognition of customary forest on prior recognition of the community as a legal subject.⁵ Law No. 6 of 2014 on Villages introduces the category of *desa adat* (customary village) as an alternative institutional vehicle through which customary communities may obtain a measure of formal status, but conversion from an ordinary administrative village to a *desa adat* has proceeded exceedingly slowly and remains concentrated in a handful of provinces.⁶ Minister of Home Affairs Regulation No. 52 of 2014 sets out a multi-stage procedural pathway for recognizing *masyarakat hukum adat*—identification, verification and validation, and finally, determination through a regional regulation—that in principle standardizes the process but in practice has produced highly uneven results across Indonesia's more than five hundred regencies and cities, since it depends entirely on local political will and administrative capacity.⁷

The consequences of this fragmentation are well documented in the legal literature. Comparative regional studies show that the pace, quality, and even the criteria used to recognize customary law communities differ markedly from one province to the next, producing a patchwork of protection in which the same customary community would enjoy dramatically different legal security depending on which side of a provincial or regency boundary its territory happens to fall.⁸ Some regions have adopted comprehensive regional regulations on *masyarakat hukum adat* that pre-emptively map customary territories, while many others have issued no implementing regulation at all, leaving communities to seek recognition claim-by-claim, a process that can take years and frequently fails.⁹ Twelve years after Constitutional Court Decision No. 35/PUU-X/2012, only a modest fraction of Indonesia's estimated customary forest area has actually been formally gazetted as *hutan adat*, a gap that advocacy organizations and legal commentators attribute directly to the absence of a comprehensive national law on *masyarakat adat* and to the continued reliance on the cumbersome, region-by-region recognition procedure.¹⁰

⁴Republic of Indonesia, Law No. 5 of 1960 on Basic Agrarian Principles (Undang-Undang Pokok Agraria), art. 3.

⁵Republic of Indonesia, Law No. 41 of 1999 on Forestry, as amended, in light of Constitutional Court Decision No. 35/PUU-X/2012.

⁶Republic of Indonesia, Law No. 6 of 2014 on Villages, arts. 96-111 concerning *desa adat*.

⁷Republic of Indonesia, Minister of Home Affairs Regulation No. 52 of 2014 on Guidelines for Recognition and Protection of *Masyarakat Hukum Adat*.

⁸Asmadi Lubis et al., "The Development of Recognition and Protection of the Customary Rights of Indigenous Peoples in Indonesia," *KnE Social Sciences* (2024), <https://doi.org/10.18502/kss.v8i21.14717>.

⁹Aprilia Stefany Leliak, "Strengthening Legal Protection of Indigenous Peoples' Customary Land Rights In Indonesia's Disruption Era," *LITIGASI* (2026), <https://doi.org/10.23969/litigasi.v26i2.20032>.

¹⁰"12 Tahun Putusan MK 35, Janji yang Belum Tuntas untuk Masyarakat Adat," *Kompas.id*, May 27, 2025, <https://www.kompas.id/artikel/en-12-tahun-putusan-mk-35-janji-yang-belum-tuntas-untuk-masyarakat-adat>.

Legislative efforts to close this gap have a long and largely unsuccessful history. A draft law on masyarakat hukum adat has been included, dropped, and reinstated in the House of Representatives' National Legislation Program (Program Legislasi Nasional, Prolegnas) repeatedly since 2010, without ever reaching enactment.¹¹ Renewed advocacy in late 2024 pushed the bill back onto the priority Prolegnas list for 2025, with legislators publicly committing to accelerate deliberation and to involve the national indigenous peoples' alliance and civil-society coalitions in the drafting process.¹² Yet as of the most recent parliamentary hearings, the bill remains unresolved, with the House's legislative body setting a further target of enactment before the end of 2026—a target that, given the bill's fourteen-year legislative history, is treated with considerable skepticism by affected communities and the organizations that represent them.¹³

The domestic picture cannot be understood in isolation from Indonesia's posture toward international human rights and indigenous rights instruments. Indonesia has ratified neither the International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples, nor has it formally incorporated the United Nations Declaration on the Rights of Indigenous Peoples into binding domestic law, even though Indonesia voted in favor of the Declaration's adoption at the UN General Assembly.¹⁴ Indonesian officials have historically resisted the international "indigenous peoples" (masyarakat adat/penduduk asli) framework on the ground that, following decolonization, all ethnic groups within the unitary state are considered equally indigenous to the archipelago, a position that legal scholars have criticized as analytically inconsistent with the state's own constitutional recognition of masyarakat hukum adat as a distinct category bearing distinct traditional rights.¹⁵ Comparative doctrinal work demonstrates that the conceptual gap between Indonesia's domestic category of masyarakat hukum adat and the international legal category of indigenous peoples is considerably narrower than official rhetoric suggests, and that ratifying Convention No. 169 or

¹¹"Percepat Pembahasan RUU Masyarakat Adat yang Mandek 14 Tahun," Kompas.id, November 23, 2024, <https://www.kompas.id/artikel/percepat-pembahasan-ruu-masyarakat-adat-yang-mandek-14-tahun>.

¹²"DPR Janji Sahkan RUU Masyarakat Adat pada 2025," Tempo.co, November 19, 2024, <https://www.tempo.co/politik/dpr-janji-sahkan-ruu-masyarakat-adat-pada-2025-1170686>.

¹³"Satu Dekade Lebih RUU Masyarakat Adat Belum Ada Kepastian," Mongabay Indonesia, May 3, 2026, <https://mongabay.co.id/2026/05/03/satu-dekade-lebih-ruu-masyarakat-adat-belum-ada-kepastian/>; see also "RUU Masyarakat Adat Jadi Landasan Aturan yang Lebih Komprehensif," DPR RI, June 12, 2026, <https://www.dpr.go.id/kegiatan-dpr/berita/RUU-Masyarakat-Adat-Jadi-Landasan-Aturan-yang-Lebih-Komprehensif-65983>.

¹⁴Chairul Fahmi, "Protecting Indigenous Collective Land Property in Indonesia under International Human Rights Norms," *Journal of Southeast Asian Human Rights* 6, no. 1 (2022): 1-25, <https://doi.org/10.19184/jseahr.v6i1.30242>.

¹⁵Chairul Fahmi et al., "Defining Indigenous in Indonesia and Its Applicability to the International Legal Framework on Indigenous People's Rights," *Journal of Indonesian Legal Studies* 8, no. 2 (2023), <https://doi.org/10.15294/jils.v8i2.68419>.

domesticating the Declaration's norms would strengthen rather than destabilize the constitutional architecture already in place.¹⁶

Indonesia's experience is not unique within the region, but it is distinctive in the depth of its ambivalence. Comparative analysis of indigenous rights frameworks across Asia notes that the Philippines, through its Indigenous Peoples Rights Act, and Nepal, as the only Asian state to have ratified ILO Convention No. 169, represent relatively more advanced models of statutory recognition, against which Indonesia is more often described as a case of partial recognition coupled with unresolved legislative effort.¹⁷ This comparative positioning is instructive: it suggests that the obstacles Indonesia faces are not primarily conceptual or definitional, since both the Philippine and Nepalese frameworks demonstrate that a constitutional commitment to indigenous or customary rights can be translated into justiciable statutory entitlements, but are instead rooted in the specific institutional choice to leave the recognition function fragmented across sectoral ministries and regional governments rather than consolidated in a single, rights-protective statute.

These unresolved tensions are not merely theoretical. They surface concretely wherever customary territories intersect with large-scale, state-endorsed development. The relocation of Indonesia's national capital to a new city in East Kalimantan, Nusantara (IKN), has already generated documented disputes over customary land claims that predate the project's announcement, illustrating how national strategic projects can proceed on the basis of formal land-use planning instruments while customary claims remain administratively unresolved.¹⁸ Broader empirical research on natural resource governance shows that indigenous communities located near forestry, plantation, and extractive concessions face heightened vulnerability precisely because the legal instruments meant to protect them—constitutional recognition, the 2012 Constitutional Court ruling, and sectoral regulations—operate as discretionary, sequential gateways rather than as a unified, rights-based protective floor.¹⁹ Detailed case studies of palm oil expansion further show that legal recognition, even where nominally granted, does not reliably translate into an enforceable right capable of being asserted against a private company holding a state-issued concession, producing what has been described as a persistent "emptiness of rights" in the lived experience of affected communities.²⁰

¹⁶Chairul Fahmi, "The Application of International Cultural Rights in Protecting Indigenous Peoples' Land Property in Indonesia," *AlterNative: An International Journal of Indigenous Peoples* 20 (2024): 157-166, <https://doi.org/10.1177/11771801241235261>.

¹⁷Yahya Ahmad Zein et al., "Indigenous, Diversity, and the Future of Human Rights: Comparative Reflections from Asia," *Journal of Human Rights, Culture and Legal Systems (JHCLS)* 5, no. 2 (2025): 581-607.

¹⁸Nina Mulyani and Rita Alfiana, "Conflicts over Customary Rights of Indigenous Communities in The National Capital City Development Project," *International Journal of Science and Environment (IJSE)* (2026), <https://doi.org/10.51601/ijse.v6i1.346>.

¹⁹A. Karso, "Natural Resources Governance and the Vulnerability of Indigenous Communities in Indonesia," *Frontiers in Political Science* (2025), <https://doi.org/10.3389/fpos.2025.1601480>.

²⁰Ward Berenschot, Ahmad Dhiaulhaq, Afrizal, and Otto Hospes, *Kehampaan Hak: Masyarakat vs Perusahaan Kelapa Sawit di Indonesia* (Jakarta: Yayasan Obor, 2023).

The human stakes underlying this legal analysis are considerable. National advocacy networks that monitor land-based conflicts have documented dozens of disputes affecting customary territories over the past decade alone, spanning forestry concessions, plantation expansion, mining operations, and infrastructure projects, with affected communities reporting displacement, loss of access to subsistence resources, and, in a number of documented instances, the use of security forces to enforce concession boundaries against community members asserting customary claims.²¹ These are not isolated or anomalous episodes; they recur with sufficient regularity, and across sufficiently diverse regions of the archipelago, that they are more accurately understood as the predictable consequence of a legal architecture that recognizes customary rights in principle while withholding, at almost every practical juncture, the administrative and judicial means by which those rights could be timely and reliably enforced. It is this architecture, its origins, and its potential reform that occupy the remainder of this article.

The scale of what remains unresolved should not be understated. Village-level conversion from an ordinary administrative village (*desa*) to a customary village (*desa adat*) under Law No. 6 of 2014 was intended to give customary communities an alternative, arguably more accessible, institutional pathway to formal recognition, since *desa adat* status confers village-level governmental authority, budgetary allocation, and a formal seat within Indonesia's tiered system of local government. In practice, however, the number of villages that have completed this conversion remains a small fraction of the total number of communities that self-identify as *masyarakat hukum adat*, and the conversion process itself requires many of the same prior determinations—verification of customary territory, customary institutions, and customary law—that make forestry and agrarian recognition so slow. The *desa adat* pathway has therefore functioned less as an alternative route around the recognition bottleneck than as a second application of the same bottleneck under a different administrative label, a point of confluence between village law, agrarian law, and forestry law that this article returns to in the discussion of legislative harmonization below.

Against this backdrop, this article asks two interrelated questions. First, how has the interaction between constitutional recognition, Constitutional Court jurisprudence, and fragmented sectoral legislation shaped the practical legal status of *masyarakat hukum adat* in Indonesia? Second, how might Indonesia's domestic legal order be reconciled with international human rights norms and state obligations so as to provide customary communities with a more secure, coherent, and enforceable framework of protection? The article proceeds as follows. Part Two sets out the normative-juridical research method employed. Part Three presents the results and discussion in two sub-sections: the first examines the constitutional and statutory architecture of recognition and its practical fragmentation, and the second examines

²¹Forest Watch Indonesia, "Pengesahan RUU Masyarakat Adat pada 2025: Menanti Tindakan Nyata DPR dan Pemerintah kepada Masyarakat Adat," December 18, 2024, <https://fwi.or.id/menanti-pengesahan-ruu-masyarakat-adat-pada-2025/>.

how customary rights might be reconciled with international human rights norms and the state's corresponding obligations to respect, protect, and fulfil those rights. Part Four concludes with recommendations for legislative and administrative reform.

2. Research Methods

This article employs normative-juridical (yuridis-normatif) legal research, a method appropriate to doctrinal inquiries that examine the coherence, hierarchy, and internal consistency of legal norms rather than the empirical behavior of social actors.²² The research combines three complementary approaches commonly used in Indonesian legal scholarship: the statutory approach (pendekatan perundang-undangan), which examines the relevant hierarchy of legislation from the 1945 Constitution down to ministerial regulations; the case approach (pendekatan kasus), which analyzes Constitutional Court Decision No. 35/PUU-X/2012 and subsequent implementing practice as a central doctrinal event; and the conceptual approach (pendekatan konseptual), which draws on legal scholarship to clarify contested concepts such as masyarakat hukum adat, hak ulayat, and indigenous peoples under international law.

Primary legal materials consist of the 1945 Constitution of the Republic of Indonesia, Law No. 5 of 1960 on Basic Agrarian Principles, Law No. 41 of 1999 on Forestry, Law No. 6 of 2014 on Villages, Minister of Home Affairs Regulation No. 52 of 2014, Constitutional Court Decision No. 35/PUU-X/2012, and the principal international instruments relevant to indigenous and customary peoples' rights, namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Declaration on the Rights of Indigenous Peoples, and International Labour Organization Convention No. 169.

Secondary legal materials comprise peer-reviewed journal articles published predominantly between 2020 and 2026 in Indonesian and international law journals, scholarly books, and doctoral and graduate legal research addressing customary rights, indigenous peoples' protection, and natural resource governance in Indonesia. These are supplemented by credible institutional and journalistic reporting—drawn from national newspapers, legal-aid coalitions, and environmental monitoring organizations—used strictly to establish the current legislative status of the draft law on masyarakat adat and the practical implementation record of Constitutional Court Decision No. 35/PUU-X/2012, matters not yet fully settled in the peer-reviewed literature given their contemporaneous nature.

The materials collected were analyzed using a qualitative, descriptive-analytical technique. Legal norms were first mapped hierarchically to identify points of overlap, contradiction, and gap between constitutional, statutory, and regulatory provisions governing masyarakat hukum adat. These norms were then evaluated against the interpretive holding of Constitutional Court Decision No. 35/PUU-X/2012 and against the substantive content of the

²²Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005).

international human rights instruments identified above, in order to assess the degree of normative coherence—or its absence—across the domestic and international layers of protection. Finally, the findings were synthesized to formulate the reform recommendations presented in the conclusion.

This study is subject to limitations inherent in doctrinal legal research. It does not include primary field data, ethnographic observation, or interviews with affected customary communities, and it therefore cannot independently verify the lived experience of recognition or non-recognition at the village level; for such empirical texture, the article relies on and cites existing socio-legal and empirical studies. The analysis is also necessarily time-bound: because the draft law on masyarakat adat remains under active parliamentary deliberation, subsequent legislative developments occurring after the completion of this research may alter aspects of the legal landscape described here.

3. Result and Discussion

3.1 Constitutional Recognition, Statutory Fragmentation: The Unsettled Legal Status of Masyarakat Hukum Adat

The conditional structure of Article 18B(2) of the 1945 Constitution is the analytical starting point for understanding why recognition of masyarakat hukum adat in Indonesia has remained so uneven. Unlike an unconditional guarantee, the provision recognizes customary law communities and their traditional rights only "so long as they remain alive" and only insofar as they are "in accordance with the development of society" and "the principles of the Unitary State of the Republic of Indonesia." Each of these three qualifiers functions as an interpretive gate through which state authorities—usually at the district or provincial level—determine, largely at their own discretion, whether a given community satisfies constitutional recognition. Because no single national body is charged with authoritatively verifying these criteria, the practical effect has been to devolve the recognition function to more than five hundred regencies and cities, each applying its own, often informal, standards.

Empirical mapping of this devolved recognition process confirms substantial regional disparity. Comparative studies of implementing regional regulations show that provinces with strong indigenous advocacy networks and supportive local executives—parts of Sumatra, Kalimantan, and eastern Indonesia among them—have produced comprehensive regional regulations that proactively map customary territories and streamline the recognition of constituent communities, whereas many other regions have issued no implementing regulation whatsoever, leaving communities to pursue recognition individually through lengthy administrative and, not infrequently, judicial channels.²³ Recent doctrinal analysis of the development of recognition and protection frameworks confirms that this administrative

²³Utami Yustihassana Untoro, Nova Konny Umboh, and Rinaldi Agusta Fahlevie, "The Role of the State in Recognising the Customary Rights of Indigenous Peoples," *Jurnal Mahkamah: Kajian Ilmu Hukum dan Hukum Islam* (2024), <https://doi.org/10.25217/jm.v9i1.4618>.

unevenness has hardened into a durable structural feature of Indonesian customary land law rather than a transitional phase awaiting harmonization.²⁴ Similarly, contemporary work on strengthening legal protection of customary land rights in what is described as Indonesia's "disruption era" argues that rapid land-based investment, digitalization of land administration, and infrastructure expansion are outpacing the state's capacity, or willingness, to complete the recognition process community by community.²⁵

Constitutional Court Decision No. 35/PUU-X/2012 must be read against this backdrop of devolved and uneven recognition. The decision arose from a judicial review petition filed by the Indigenous Peoples' Alliance of the Archipelago (Aliansi Masyarakat Adat Nusantara, AMAN) and several customary communities, challenging provisions of the 1999 Forestry Law that classified all forest not held under a proven individual property right—including customary forest—as state forest by default. The Constitutional Court agreed that this default classification was constitutionally untenable, holding that customary forest is forest located within the territory of a customary law community and is not, in principle, state forest.²⁶ Early doctrinal commentary described the decision as reversing a colonial-era legal architecture, tracing the *domein verklaring* (declaration of state domain) principle inherited from Dutch agrarian law through to the 1999 Forestry Law's own state-forest presumption, and arguing that the ruling restored to customary law communities a right that had never truly been extinguished but merely suppressed by successive statutory regimes.²⁷

The doctrinal significance of the ruling, however, has proven considerably easier to state than to operationalize. Subsequent forest-policy scholarship shows that the excision of customary forest from the state forest estate continues to require, as a legal precondition, that the claimant community first be formally recognized as a *masyarakat hukum adat* through a regional regulation—precisely the devolved, discretionary process examined above.²⁸ Recent policy-forum analysis of Indonesia's planned forestry law amendment argues that indigenous forest rights now stand "at a crossroads," cautioning that legislative revision of the Forestry Law could either finally harmonize the sector with the 2012 ruling or, alternatively, entrench new procedural obstacles that further delay the gazettal of customary forest.²⁹ Regional case evidence corroborates this concern: research on West Papua's two decades of decentralization shows that even in a province with a distinct special autonomy framework explicitly favorable to customary forest recognition, the pace of formal gazettal has remained slow and highly

²⁴Lubis et al., "The Development of Recognition and Protection."

²⁵Leliak, "Strengthening Legal Protection."

²⁶ Constitutional Court Decision No. 35/PUU-X/2012; see also Faiq Tobroni, "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012)," *Jurnal Konstitusi* 10, no. 3 (2013): 461-482.

²⁷Tobroni, "Menguatkan Hak Masyarakat Adat."

²⁸M.A.K. Sahide, A. Abdullah, and M. Moeliono, "Policy Forum: Indigenous Forest Rights at a Crossroads? A Critical Look at Indonesia's Planned Forestry Law Amendment," *Forest Policy and Economics* 185 (2026): 103730, <https://doi.org/10.1016/j.forpol.2026.103730>.

²⁹Sahide, Abdullah, and Moeliono, "Policy Forum."

dependent on shifting political alignments between provincial authorities, district governments, and the national Ministry of Environment and Forestry.³⁰

Fragmentation is not confined to forestry. Agrarian law presents a parallel structure of conditional recognition. Article 3 of the Basic Agrarian Law of 1960 acknowledges hak ulayat as continuing to exist "insofar as in reality it still exists," subject to national and state interests and to legislation of a higher order—wording that closely mirrors, and indeed historically anticipated, the conditional formula later adopted in Article 18B(2) of the post-reform Constitution. Comparative research on the relationship between state law and customary law demonstrates that this parallel conditionality across the agrarian and constitutional texts has produced overlapping and sometimes contradictory tests for the same underlying question—whether a customary community and its territorial rights still exist—applied inconsistently by land offices, forestry authorities, and local governments who rarely coordinate their respective determinations.³¹ Detailed studies of the drafting history of proposed traditional-legal-community legislation confirm that resolving precisely this overlap between agrarian, forestry, village, and constitutional recognition criteria has been one of the most persistent points of legislative deadlock in successive drafts of the national law on masyarakat adat.³²

Land conflicts arising from this fragmented framework are neither isolated nor abating. Documented disputes between Dayak customary communities and state-recognized land users in Kalimantan illustrate how overlapping claims—customary tenure recognized informally by adat institutions, but never registered under national land law—routinely collide with concessions and land titles issued under the formal cadastral system, leaving customary claimants in a structurally weaker evidentiary position whenever a dispute reaches a civil court applying positive land law rather than adat.³³ Comparable dynamics have been documented in Maluku, where customary communities asserting rights over forest resources have struggled to obtain state recognition and respect commensurate with their historical use and stewardship of those resources, notwithstanding constitutional and statutory language that ostensibly protects them.³⁴ Even in Bali, where adat institutions retain unusually strong social and religious authority, recent human rights analysis finds that customary communities' practical enjoyment

³⁰W.R.I. Sopaheluwakan, S.M. Fatem, P.M. Kutaneegara, and A. Maryudi, "Two-Decade Decentralization and Recognition of Customary Forest Rights: Cases from Special Autonomy Policy in West Papua, Indonesia," *Forest Policy and Economics* 151 (2023): 102951, <https://doi.org/10.1016/j.forpol.2023.102951>.

³¹Asnawi Mubarak, Absori, Harun, and Sheela Jayabalan, "The Relationship of State Law and Customary Law," *Jurnal Jurisprudence* (2023), <https://doi.org/10.23917/jurisprudence.v13i2.2914>.

³²Mustika Mega Wijaya et al., "Protection of the Rights of Traditional Communities in the Ownership of Traditional Land Rights for Public Interests (Study of the Drafting of Traditional Legal Community Legislation)," *International Journal of Multicultural and Multireligious Understanding* (2024), <https://doi.org/10.18415/ijmmu.v11i2.5579>.

³³Diva Rafi Anjani et al., "Customary Land Conflicts Between Dayak Indigenous Law and State Law in Indonesia," *Awang Long Law Review* (2026), <https://doi.org/10.56301/awl.v8i2.2045>.

³⁴J. Matuankotta and Eric Stenly Holle, "State Recognition and Respect for the Rights of Customary Law Communities in the Maluku Islands Region in the Exploitation of Forest Resources," *SASI* (2022), <https://doi.org/10.47268/sasi.v28i1.852>.

of protection depends heavily on the alignment—or misalignment—between adat institutions and formal provincial and district governance structures, rather than on the constitutional guarantee alone.³⁵

Perhaps the most visible contemporary illustration of these unresolved tensions is the relocation of Indonesia's capital to Nusantara in East Kalimantan. Legal analysis of conflicts arising from the national capital development project documents disputes in which customary land claims, some predating Indonesian independence, have come into direct tension with the government's land acquisition and spatial-planning instruments for the new capital, with affected communities reporting inadequate consultation and compensation processes that fail to engage adequately with adat land tenure as a distinct legal category rather than merely an informal social fact to be extinguished through administrative land clearing.³⁶ This case exemplifies a broader theoretical debate in the literature over whether Indonesia's approach to customary land conflicts should be reframed through the lens of agrarian justice—emphasizing structural redistribution and recognition of historical dispossession—rather than through the narrower lens of individualized legal recognition that currently dominates Indonesian practice.³⁷ Comparative governance research reinforces this critique, arguing that land-reform rationalities embedded in Indonesia's regulatory instruments often "provoke" rather than resolve land politics, because they formalize some claims while implicitly delegitimizing others that fail to fit the recognition procedure's evidentiary requirements.³⁸

Legislative reform remains the most direct route out of this fragmentation, yet its trajectory has been marked by repeated delay. A comprehensive law on masyarakat hukum adat—variously drafted since 2010 as the Rancangan Undang-Undang tentang Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat and, more recently, reframed by civil-society coalitions as the Rancangan Undang-Undang Masyarakat Adat—has been included in the House of Representatives' National Legislation Program in multiple parliamentary terms without ever advancing to enactment. Advocacy coalitions renewed pressure for the bill's passage at the close of 2024, securing its reinstatement on the 2025 priority legislative list, with the House's Legislation Body publicly committing to complete deliberation and to consult the national indigenous alliance and affected communities directly.³⁹ As recently as 2026, however, the House's Legislation Body was still describing the bill as a foundation for future

³⁵Anak Agung Linda Cantika et al., "Protection of Human Rights on The Life of Indigenous Communities in Bali," *Journal of Sustainable Development Science* (2026), <https://doi.org/10.46650/jsds.8.1.1834.53-68>.

³⁶Mulyani and Alfiana, "Conflicts over Customary Rights."

³⁷Ahmad Dhiaulhaq and J. McCarthy, "Indigenous Rights and Agrarian Justice Framings in Forest Land Conflicts in Indonesia," *The Asia Pacific Journal of Anthropology* 21 (2020): 34-54, <https://doi.org/10.1080/14442213.2019.1670243>.

³⁸J.F. McCarthy, A. Dhiaulhaq, S. Afiff, and K. Robinson, "Land Reform Rationalities and Their Governance Effects in Indonesia: Provoking Land Politics or Addressing Adverse Formalisation?" *Geoforum* 132 (2022): 92-102, <https://doi.org/10.1016/j.geoforum.2022.04.008>.

³⁹Forest Watch Indonesia, "Pengesahan RUU Masyarakat Adat pada 2025"; Tempo.co, "DPR Janji Sahkan RUU Masyarakat Adat."

comprehensive regulation and setting a further target of enactment before the end of 2026, a full sixteen years after the bill first entered the legislative agenda—a delay that legal commentators and affected communities alike regard as emblematic of the state's persistently ambivalent commitment to translating constitutional recognition into enforceable statutory protection.⁴⁰

Institutional findings from Indonesia's own National Commission on Human Rights (Komnas HAM) corroborate the pattern documented in the academic literature. Between 2014 and 2016, Komnas HAM conducted its first-ever National Inquiry specifically devoted to the rights of masyarakat hukum adat over their territories within forest areas, an investigative mechanism deliberately designed to address the underlying, systemic causes of recurrent land conflicts rather than adjudicating disputes case by case. The Inquiry found that the Ministry of Forestry's designation of roughly sixty percent of Indonesia's land area as state forest zone had, for decades, been carried out without meaningful consultation with the customary communities whose territories fell within those zones, and it documented human rights violations against customary communities across every region of the archipelago from Sumatra to Papua, in some cases rising to the level of gross violations.⁴¹ Among its recommendations, the Inquiry called for the withdrawal of security forces from company concessions located within customary territories and for a fundamental review of large-scale agricultural and plantation licensing that overlapped with unresolved customary claims—recommendations whose only partial implementation in the years since underscores how far institutional acknowledgment of the problem has outpaced actual legal and administrative remedy.

A further layer of complexity arises from the coexistence, in several regions, of the desa adat pathway examined in the introduction alongside the sectoral forestry and agrarian recognition pathways, each administered by a different ministry and, not infrequently, arriving at different conclusions about the same community's status. A community might, for instance, be formally recognized as a desa adat by its regional government for purposes of village governance and budgetary allocation, while its application for customary forest status remains pending before the Ministry of Environment and Forestry for want of a separate, forestry-specific verification process, or while its underlying land claim remains unresolved before the National Land Agency under agrarian law. Because Indonesian administrative law generally treats each ministry's determinations as legally autonomous rather than mutually binding, a community can find itself simultaneously recognized for one purpose and unrecognized for another, a fragmentation that the comparative literature identifies as one of the clearest

⁴⁰"RUU Masyarakat Adat Jadi Landasan Aturan yang Lebih Komprehensif," DPR RI, June 12, 2026; Mongabay Indonesia, "Satu Dekade Lebih RUU Masyarakat Adat."

⁴¹Tim Inkuiri Nasional Komnas HAM, *Inkuiri Nasional Komisi Nasional Hak Asasi Manusia: Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan* (Jakarta: Komisi Nasional Hak Asasi Manusia, 2016).

illustrations of why sectoral harmonization, rather than incremental sectoral reform, is the appropriate response.⁴²

The practical consequences of this gap extend beyond unresolved land claims to encompass direct risks to the physical safety and legal liberty of customary community members themselves. Empirical research on natural resource governance documents that indigenous and customary land defenders who resist encroachment by forestry, plantation, or mining operations frequently face criminal prosecution under trespass, forestry, or public-order statutes, a pattern that inverts the protective logic of Article 18B(2) by treating assertions of customary right as unlawful interference with a third party's formally licensed activity rather than as the exercise of a constitutionally recognized entitlement.⁴³ Comparative land-use policy research reaches a parallel conclusion, finding that across the multiple regions it examined, the communities best able to convert constitutional recognition into secure tenure were disproportionately those with access to sustained external legal and financial support from non-governmental organizations, rather than those whose claims were objectively any stronger under the applicable recognition criteria—an outcome that raises serious equity concerns about a recognition system that functions, in practice, as a resource-intensive contest rather than a rights-based entitlement.⁴⁴

The stakes of this unresolved framework are rising rather than receding, as global climate policy increasingly channels finance toward forest conservation in ways that directly implicate customary territories. Indonesia's participation in results-based payment schemes for reduced deforestation, and the broader expansion of carbon-offset and nature-based-solution projects across forested regions, depend heavily on the same customary forest areas whose formal legal status remains unresolved under the framework examined above.⁴⁵ Where a customary community's territory has not yet been gazetted as hutan adat, carbon revenue, conservation partnership agreements, and associated benefit-sharing arrangements are typically negotiated with, and disbursed through, state forestry authorities or private project developers rather than the customary community itself, replicating at the level of climate finance the same exclusion from formal legal standing that has long characterized timber, plantation, and mining concessions. Recent forest-policy scholarship warns that without accelerated recognition, the expansion of climate-related forest finance risks becoming a further avenue through which customary communities are treated as objects of forest governance rather than as rights-holders entitled to a direct and legally secured stake in decisions, and in revenues, arising from the management of their own ancestral territories.⁴⁶

⁴²Asnawi Mubarak, Absori, Harun, and Sheela Jayabalan, "The Relationship of State Law and Customary Law," *Jurnal Jurisprudence* (2023), <https://doi.org/10.23917/jurisprudence.v13i2.2914>.

⁴³Karso, "Natural Resources Governance."

⁴⁴Hidayat, Hospes, and Termeer, "Uneven Recognition."

⁴⁵Karso, "Natural Resources Governance and the Vulnerability of Indigenous Communities in Indonesia."

⁴⁶Sahide, Abdullah, and Moeliono, "Policy Forum: Indigenous Forest Rights at a Crossroads?"

Taken together, the constitutional text, the 2012 Constitutional Court ruling, and the sectoral statutes examined above reveal a legal architecture that recognizes masyarakat hukum adat in principle while withholding, through layered procedural conditions, the practical means by which that recognition becomes legally secure. Recognition functions less as a status automatically attaching to a community that meets objective criteria than as a discretionary administrative outcome contingent on local political will, institutional capacity, and the persistence of the claimant community itself. The next sub-section examines how this domestic architecture measures against international human rights norms and the state obligations those norms generate, and what a more coherent reconciliation between the two might require.

3.2 Reconciling Customary Rights with International Human Rights Norms and State Obligations

International human rights law offers a normative vocabulary that Indonesia's domestic framework has only partially absorbed. Indonesia ratified the International Covenant on Civil and Political Rights through Law No. 12 of 2005 and the International Covenant on Economic, Social and Cultural Rights through Law No. 11 of 2005, thereby assuming binding treaty obligations that include the right of all peoples to self-determination and to freely dispose of their natural wealth and resources, as well as the right to take part in cultural life.⁴⁷ Neither Covenant was drafted with customary or indigenous communities specifically in mind, yet both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have long interpreted these instruments as extending meaningful protection to indigenous and tribal peoples' relationship with their traditional lands, resources, and cultural practices. Because these two Covenants are already part of binding Indonesian law by virtue of ratification, they arguably supply an under-utilized domestic legal basis for customary rights claims that does not depend on the still-unratified, more specialized instruments discussed below.

Those more specialized instruments remain, by contrast, outside Indonesia's binding domestic legal order. The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, articulates rights to self-determination, to free, prior and informed consent before the approval of projects affecting indigenous lands, and to the recognition, restitution, and compensation for lands and resources historically taken without such consent.⁴⁸ International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries similarly obliges ratifying states to recognize the rights of ownership and possession that indigenous and tribal peoples have over the lands they

⁴⁷International Covenant on Civil and Political Rights, ratified by Republic of Indonesia, Law No. 12 of 2005; International Covenant on Economic, Social and Cultural Rights, ratified by Republic of Indonesia, Law No. 11 of 2005.

⁴⁸United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (September 13, 2007).

traditionally occupy, and to establish effective procedures for identifying such lands.⁴⁹ Indonesia has done neither: it has not ratified Convention No. 169, and it has not enacted implementing legislation that would give the Declaration binding domestic effect, notwithstanding its affirmative vote for the Declaration's adoption. Recent doctrinal analysis of the urgency of ratifying Convention No. 169 argues that ratification would not create wholly new obligations so much as consolidate and make justiciable protections that Indonesian law already gestures toward in fragmented form, while also equipping domestic courts with a clearer international benchmark against which to measure the adequacy of national recognition procedures.⁵⁰

The Indonesian government's longstanding reluctance to adopt the international "indigenous peoples" framework rests substantially on the argument that, because the entire population of the archipelago is considered indigenous following the end of colonial rule, a legal category singling out particular communities as "indigenous" in the international sense is definitionally inapplicable to Indonesia and could even be seen as politically destabilizing to the unitary state. Careful comparative doctrinal analysis of this position, however, concludes that the concept of *masyarakat hukum adat* already embedded in Indonesia's own Constitution shares the substantive core of the international legal definition of indigenous peoples—continuity with pre-colonial or pre-state societies, distinct social, economic, and political institutions, and a special relationship with ancestral lands and resources—so that the government's objection is best understood as a political choice rather than a genuine conceptual incompatibility.⁵¹ A related body of scholarship examining the application of international cultural rights to Indonesian customary land claims similarly argues that the state's obligation to protect the cultural rights of *masyarakat hukum adat* under Article 28I(3) of the Constitution should be interpreted in harmony with, rather than in isolation from, Indonesia's obligations under the ratified human rights Covenants discussed above.⁵²

A rights-based reconciliation of this kind requires distinguishing among the state's three distinct types of obligation recognized in international human rights law: the obligation to respect, which prohibits the state itself from interfering with customary communities' enjoyment of their lands, resources, and cultural practices; the obligation to protect, which requires the state to prevent third parties, including private concession holders, from interfering with those rights; and the obligation to fulfil, which requires the state to take positive legislative, administrative, and budgetary measures to give practical effect to the rights in question. Mapped onto the Indonesian context, the persistent gap between constitutional

⁴⁹International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), art. 14.

⁵⁰Muhaimin Bahriansyah Bandjar, Josina Augustina Yvonne Wattimena, and Wilshen Leatemala, "Urgensi Ratifikasi International Labour Organization 169 Sebagai Bentuk Perlindungan Hukum Terhadap Masyarakat Adat," *TATOHI: Jurnal Ilmu Hukum* 4, no. 4 (2024): 228-240, <https://doi.org/10.47268/tatohi.v4i4.2429>.

⁵¹Fahmi et al., "Defining Indigenous in Indonesia."

⁵²Fahmi, "The Application of International Cultural Rights."

recognition and practical protection examined in the preceding sub-section is most acute at the level of the obligation to protect and the obligation to fulfil. The state has, on the whole, refrained from directly dismantling customary institutions—satisfying, in a minimal sense, the obligation to respect—but it has been considerably less successful at preventing third-party concession holders from encroaching on customary territories, and it has been slowest of all in fulfilling its obligation to enact the comprehensive legislative and administrative measures, chiefly the still-pending law on masyarakat adat, that would make recognition automatic, predictable, and judicially enforceable rather than discretionary.

Comparative regional and transnational scholarship situates Indonesia's difficulties within a broader pattern common to indigenous peoples straddling international borders. Research on state responsibility and transnational protection for indigenous peoples along the Indonesia–Papua New Guinea border argues that customary communities whose ancestral territories and kinship networks span an international boundary face compounded legal uncertainty, since neither state's domestic recognition framework was designed with cross-border customary territories in mind, and neither state's bilateral arrangements currently provide a coordinated mechanism for jointly protecting such communities' rights.⁵³ This transnational dimension illustrates that reconciling customary rights with human rights and state obligations is not purely a matter of domestic statutory reform; it may also require Indonesia to engage more actively with regional and bilateral human rights cooperation mechanisms, particularly in border regions where customary kinship and territorial networks do not track the boundaries of the modern state.

Historical and colonial-era legal legacies further complicate this reconciliation project. Doctrinal-historical research on the state's continued assertion of authority over indigenous land traces this authority directly to the Dutch colonial *domein verklaring* principle, under which all land not proven to be individually owned under Western property law was declared to belong to the colonial state, a principle substantially preserved—rather than repudiated—by post-independence agrarian and forestry legislation.⁵⁴ This lineage matters for reconciliation because it suggests that closing the gap between Indonesian domestic law and international human rights norms is not simply a matter of adding new statutory language, but of dismantling an inherited presumption—that land not affirmatively proven to be privately or customarily owned defaults to state ownership—that runs directly counter to the presumption embedded in international instruments such as ILO Convention No. 169 and the UN Declaration, both of which start from the premise that indigenous and customary land rights exist independently of formal state recognition and merely await appropriate legal acknowledgment.

⁵³T. Reumi and S. Sujadi, "State Responsibility and Transnational Protection for Indigenous Peoples in Indonesia–Papua New Guinea," *Veredas do Direito* (2026), <https://doi.org/10.18623/rvd.v23.5139>.

⁵⁴Chairul Fahmi et al., "The State's Business Upon Indigenous Land in Indonesia: A Legacy from Dutch Colonial Regime to Modern Indonesian State," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 3 (2024), <https://doi.org/10.22373/sjhh.v8i3.19992>.

The principle of free, prior and informed consent (FPIC), articulated most fully in Article 32 of the UN Declaration on the Rights of Indigenous Peoples and reflected in the consultation obligations of ILO Convention No. 169, offers a further concrete standard against which Indonesian practice can be measured.⁵⁵ Under this principle, states must consult and cooperate in good faith with indigenous and customary communities, through their own representative institutions, before approving any project affecting their lands, territories, or resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources. Indonesian licensing practice for forestry, plantation, and mining concessions, by contrast, generally requires only administrative-level social and environmental impact consultation, which is neither equivalent to, nor legally structured to guarantee, the substantive consent-seeking process envisioned by the FPIC standard. Incorporating an FPIC-equivalent requirement into Indonesian concession-licensing procedure—whether through the pending law on masyarakat adat or through amendment of sectoral forestry, plantation, and mining regulations—would directly address the state's obligation to protect customary communities from third-party encroachment identified above, without requiring wholesale adoption of the international instruments in their entirety.

A further, distinctly constitutional avenue for reconciliation lies in reading Article 18B(2) itself less restrictively. Constitutional analysis of the human rights of indigenous peoples in Indonesia argues that the qualifying phrase "in accordance with the development of society" should not be read as a license for indefinite administrative discretion, but rather as an evolving, dynamic standard that must itself be interpreted consistently with Indonesia's binding treaty obligations under the Covenants on Civil and Political, and Economic, Social and Cultural Rights—obligations that, as noted above, already form part of Indonesian law.⁵⁶ Under this interpretive approach, a regional government's failure or refusal to issue an implementing regulation recognizing an otherwise-qualifying customary community would itself constitute a failure of the state's constitutional and treaty obligations, opening a potential avenue for constitutional or administrative litigation independent of the still-unenacted comprehensive law on masyarakat adat. Complementary analysis of ulayat rights from a human rights perspective reaches a similar conclusion, arguing that the communal, non-individualized character of ulayat land rights should be treated as entitled to human rights protection in its own right, rather than being forced into the individualized property paradigm inherited from colonial and early post-independence agrarian law.⁵⁷

⁵⁵United Nations Declaration on the Rights of Indigenous Peoples, art. 32; ILO Convention No. 169, arts. 6 and 15.

⁵⁶"Human Rights of Indigenous People in Indonesia: A Constitutional Approach," *Journal of East Asia and International Law* (2022), <https://doi.org/10.14330/jeail.2022.15.2.10>.

⁵⁷Zahroni and Faisal Santiago, "Ulayat Rights in A Human Rights Perspective," in *Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education, ICLSSEE 2021* (Jakarta, March 6, 2021), <https://doi.org/10.4108/eai.6-3-2021.2306456>.

None of this suggests that domestic constitutional reinterpretation alone can substitute for legislative action. The comprehensive law on masyarakat adat remains indispensable because only primary legislation can authoritatively resolve the definitional inconsistencies among the Basic Agrarian Law, the Forestry Law, the Village Law, and Minister of Home Affairs Regulation No. 52 of 2014 identified in the preceding sub-section, establish a single national registry of recognized customary communities and territories, and provide for judicial or quasi-judicial remedies when local governments unreasonably delay or refuse recognition. What the human rights framework contributes, in the interim, is an interpretive resource: a set of already-binding treaty obligations, together with the non-binding but internationally authoritative standards of the Declaration and Convention No. 169, that can inform how courts, administrative agencies, and the legislature itself interpret the open-textured qualifying conditions in Article 18B(2) while the comprehensive law remains pending. Reconciliation, in other words, is best understood not as a single legislative event but as an ongoing interpretive and institutional project in which constitutional doctrine, treaty obligations, and eventual statutory reform must operate in tandem.

State obligations toward customary communities are not discharged solely through legislative and judicial action directed at the state's own conduct; they extend, under the obligation to protect, to the regulation of private conduct as well. The United Nations Guiding Principles on Business and Human Rights, while not specific to indigenous or customary peoples, articulate a corporate responsibility to respect human rights independent of a state's own willingness or capacity to enforce that respect, including through human rights due diligence in the acquisition and operation of land concessions.⁵⁸ Applied to the Indonesian context, this framework suggests that forestry, plantation, and mining companies operating within or near customary territories bear an independent responsibility to identify, prevent, and mitigate adverse impacts on customary land and resource rights, a responsibility that exists regardless of whether the affected community has yet completed Indonesia's own, often protracted, formal recognition procedure. Embedding a due-diligence requirement of this kind into Indonesia's concession-licensing framework—for example, by conditioning the issuance or renewal of forestry, plantation, and mining permits on a documented assessment of overlapping customary claims—would supply a further, business-facing mechanism for narrowing the gap between constitutional recognition and effective protection, operating in parallel with, rather than as a substitute for, the legislative and judicial reforms discussed above.

Reconciliation also has a distinctly gendered dimension that the literature increasingly emphasizes and that this article's largely institutional focus should not obscure. Customary institutions, being self-governing bodies rooted in inherited social hierarchies, do not automatically distribute the benefits of land rights recognition equally between men and women within the same community; women's customary rights to inherit, manage, or

⁵⁸UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04 (2011), principles 11-15.

independently hold land within adat structures are, in many regions, considerably more constrained than men's, a dynamic that both the Komnas HAM National Inquiry and subsequent human rights commentary have identified as an area requiring dedicated attention rather than an assumption that formal recognition of the community as a whole automatically translates into equal enjoyment of rights by all of its members.⁵⁹ A rights-based reconciliation of customary law with Indonesia's human rights obligations, including its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women, therefore cannot treat the customary community as an undifferentiated legal unit; it must also attend to how recognition is structured internally, so that strengthening customary institutions against external encroachment does not simultaneously entrench internal inequities that themselves implicate the state's human rights obligations.

The judiciary has an underexplored role to play in this interim period. Constitutional complaint mechanisms, judicial review of implementing regulations, and ordinary civil litigation over land tenure all offer avenues through which courts could apply the interpretive approach outlined above, yet comparative doctrinal analysis observes that Indonesian courts have generally been reluctant to treat administrative inaction on customary recognition as independently justiciable, tending instead to defer to the discretionary character of the regional regulation process even where that inaction persists for many years.⁶⁰ Cultivating a more assertive judicial posture—one that treats prolonged, unexplained administrative delay in recognizing an evidently qualifying community as itself inconsistent with the state's constitutional and treaty obligations—would not require new legislation and could meaningfully narrow the gap between recognition in principle and protection in practice while the comprehensive law on masyarakat adat remains pending.

4. Conclusion

This article has examined the persistent gap between Indonesia's constitutional recognition of masyarakat hukum adat and the fragmented, discretionary manner in which that recognition is translated into enforceable legal protection. Article 18B(2) of the 1945 Constitution recognizes customary law communities only conditionally, and the absence of a comprehensive national law implementing that recognition has left the task of verification to more than five hundred regional governments applying inconsistent standards and, in many cases, no standard at all. Constitutional Court Decision No. 35/PUU-X/2012 corrected a significant doctrinal error by removing customary forest from the default category of state forest, yet its practical effect has been constrained by the continued, unresolved requirement

⁵⁹Tim Inkuiri Nasional Komnas HAM, Inkuiri Nasional Komisi Nasional Hak Asasi Manusia; Republic of Indonesia, Law No. 7 of 1984 on Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.

⁶⁰Fahmi et al., "Defining Indigenous in Indonesia"; "Human Rights of Indigenous People in Indonesia: A Constitutional Approach."

that a community first obtain formal recognition before its customary forest can be excised from the state forest estate—precisely the bottleneck that a comprehensive national law was designed, but has so far failed, to remove. At the international level, Indonesia's non-ratification of ILO Convention No. 169 and its non-incorporation of the UN Declaration on the Rights of Indigenous Peoples into binding domestic law leave customary communities without access to the more specialized international protections available to indigenous peoples elsewhere, even though Indonesia's own constitutional category of *masyarakat hukum adat* shares the substantive core of the international legal definition. Indonesia's ratification of the International Covenants on Civil and Political, and Economic, Social and Cultural Rights nonetheless supplies an existing, binding, and currently under-utilized legal foundation for interpreting the state's obligations to respect, protect, and fulfil customary communities' rights, pending more specialized legislative and treaty reform.

References

- Anjani, Diva Rafi, Imelda Hasibuan, Ahmad Nahfani, and Aryo Subroto. "Customary Land Conflicts Between Dayak Indigenous Law and State Law in Indonesia." *Awang Long Law Review* (2026). <https://doi.org/10.56301/awl.v8i2.2045>.
- Bandjar, Muhaimin Bahriansyah, Josina Augustina Yvonne Wattimena, and Wilshen Leatemia. "Urgensi Ratifikasi International Labour Organization 169 Sebagai Bentuk Perlindungan Hukum Terhadap Masyarakat Adat." *TATOHI: Jurnal Ilmu Hukum* 4, no. 4 (2024): 228-240. <https://doi.org/10.47268/tatohi.v4i4.2429>.
- Berenschot, Ward, Ahmad Dhiaulhaq, Afrizal, and Otto Hospes. *Kehampaan Hak: Masyarakat vs Perusahaan Kelapa Sawit di Indonesia*. Jakarta: Yayasan Obor, 2023.
- Cantika, Anak Agung Linda, Gede Yusa, Putu Gede Arya Sumerta Yasa, and Sagung Putri M.E. Purwani. "Protection of Human Rights on The Life of Indigenous Communities in Bali." *Journal of Sustainable Development Science* (2026). <https://doi.org/10.46650/jsds.8.1.1834.53-68>.
- Constitutional Court of the Republic of Indonesia. Decision No. 35/PUU-X/2012 concerning Judicial Review of Law No. 41 of 1999 on Forestry. May 16, 2013.
- Dhiaulhaq, Ahmad, and J. McCarthy. "Indigenous Rights and Agrarian Justice Framings in Forest Land Conflicts in Indonesia." *The Asia Pacific Journal of Anthropology* 21 (2020): 34-54. <https://doi.org/10.1080/14442213.2019.1670243>.
- Fahmi, Chairul. "Protecting Indigenous Collective Land Property in Indonesia under International Human Rights Norms." *Journal of Southeast Asian Human Rights* 6, no. 1 (2022): 1-25. <https://doi.org/10.19184/jseahr.v6i1.30242>.
- Fahmi, Chairul. "The Application of International Cultural Rights in Protecting Indigenous Peoples' Land Property in Indonesia." *AlterNative: An International Journal of Indigenous Peoples* 20 (2024): 157-166. <https://doi.org/10.1177/11771801241235261>.
- Fahmi, Chairul, Azka Amalia Jihad, Akihisa Matsuno, Faisal Fauzan, and Peter-Tobias Stoll. "Defining Indigenous in Indonesia and Its Applicability to the International Legal Framework on Indigenous People's Rights." *Journal of Indonesian Legal Studies* 8, no. 2 (2023). <https://doi.org/10.15294/jils.v8i2.68419>.

- Fahmi, Chairul, Peter-Tobias Stoll, Shabarullah, Malahayati Rahman, and S. Syukri. "The State's Business Upon Indigenous Land in Indonesia: A Legacy from Dutch Colonial Regime to Modern Indonesian State." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 3 (2024). <https://doi.org/10.22373/sjhk.v8i3.19992>.
- Forest Watch Indonesia. "Pengesahan RUU Masyarakat Adat pada 2025: Menanti Tindakan Nyata DPR dan Pemerintah kepada Masyarakat Adat." December 18, 2024. <https://fwi.or.id/menanti-pengesahan-ruu-masyarakat-adat-pada-2025/>.
- Hidayat, A., O. Hospes, and Christian Termeer. "Uneven Recognition: A Comparative Study of Indigenous Communities' Struggle for Securing Customary Land Rights in Indonesia." *Land Use Policy* (2026). <https://doi.org/10.1016/j.landusepol.2026.108061>.
- "Human Rights of Indigenous People in Indonesia: A Constitutional Approach." *Journal of East Asia and International Law* (2022). <https://doi.org/10.14330/jeail.2022.15.2.10>.
- International Labour Organization. *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*. 1989.
- Karso, A. "Natural Resources Governance and the Vulnerability of Indigenous Communities in Indonesia." *Frontiers in Political Science* (2025). <https://doi.org/10.3389/fpos.2025.1601480>.
- "12 Tahun Putusan MK 35, Janji yang Belum Tuntas untuk Masyarakat Adat." *Kompas.id*, May 27, 2025. <https://www.kompas.id/artikel/en-12-tahun-putusan-mk-35-janji-yang-belum-tuntas-untuk-masyarakat-adat>.
- "Percepat Pembahasan RUU Masyarakat Adat yang Mandek 14 Tahun." *Kompas.id*, November 23, 2024. <https://www.kompas.id/artikel/percepat-pembahasan-ruu-masyarakat-adat-yang-mandek-14-tahun>.
- Leliak, Aprilia Stefany. "Strengthening Legal Protection of Indigenous Peoples' Customary Land Rights In Indonesia's Disruption Era." *LITIGASI* (2026). <https://doi.org/10.23969/litigasi.v26i2.20032>.
- Lubis, Asmadi, Runtung, M. Kaban, and Edy Ikhsan. "The Development of Recognition and Protection of the Customary Rights of Indigenous Peoples in Indonesia." *KnE Social Sciences* (2024). <https://doi.org/10.18502/kss.v8i21.14717>.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group, 2005.
- Matuankotta, J., and Eric Stenly Holle. "State Recognition and Respect for the Rights of Customary Law Communities in the Maluku Islands Region in the Exploitation of Forest Resources." *SASI* (2022). <https://doi.org/10.47268/sasi.v28i1.852>.
- McCarthy, J.F., Ahmad Dhiaulhaq, S. Afiff, and K. Robinson. "Land Reform Rationalities and Their Governance Effects in Indonesia: Provoking Land Politics or Addressing Adverse Formalisation?" *Geoforum* 132 (2022): 92-102. <https://doi.org/10.1016/j.geoforum.2022.04.008>.
- Mongabay Indonesia. "Satu Dekade Lebih RUU Masyarakat Adat Belum Ada Kepastian." May 3, 2026. <https://mongabay.co.id/2026/05/03/satu-dekade-lebih-ruu-masyarakat-adat-belum-ada-kepastian/>.
- Mubarok, Asnawi, Absori, Harun, and Sheela Jayabalan. "The Relationship of State Law and Customary Law." *Jurnal Jurisprudence* (2023). <https://doi.org/10.23917/jurisprudence.v13i2.2914>.
- Mulyani, Nina, and Rita Alfiana. "Conflicts over Customary Rights of Indigenous Communities in The National Capital City Development Project." *International Journal*

- of Science and Environment (IJSE) (2026). <https://doi.org/10.51601/ijse.v6i1.346>.
- Porro, Stivani Marantika, Ali Imron, and Wika Yudha Shanty. "Perlindungan Hukum Hak Tradisional Masyarakat Hukum Adat Terhadap Tindakan Individualisasi Tanah Ulayat Untuk Tujuan Komersial." *Bhirawa Law Journal* (2021). <https://doi.org/10.26905/blj.v2i1.5857>.
- Republic of Indonesia. Constitution of the Republic of Indonesia of 1945 (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945).
- Republic of Indonesia. Law No. 5 of 1960 on Basic Agrarian Principles (Undang-Undang Pokok Agraria).
- Republic of Indonesia. Law No. 41 of 1999 on Forestry.
- Republic of Indonesia. Law No. 11 of 2005 on Ratification of the International Covenant on Economic, Social and Cultural Rights.
- Republic of Indonesia. Law No. 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights.
- Republic of Indonesia. Law No. 6 of 2014 on Villages.
- Republic of Indonesia. Minister of Home Affairs Regulation No. 52 of 2014 on Guidelines for Recognition and Protection of Masyarakat Hukum Adat.
- Reumi, T., and S. Sujadi. "State Responsibility and Transnational Protection for Indigenous Peoples in Indonesia-Papua New Guinea." *Veredas do Direito* (2026). <https://doi.org/10.18623/rvd.v23.5139>.
- "RUU Masyarakat Adat Jadi Landasan Aturan yang Lebih Komprehensif." DPR RI, June 12, 2026. <https://www.dpr.go.id/kegiatan-dpr/berita/RUU-Masyarakat-Adat-Jadi-Landasan-Aturan-yang-Lebih-Komprehensif-65983>.
- Sahide, M.A.K., A. Abdullah, and M. Moeliono. "Policy Forum: Indigenous Forest Rights at a Crossroads? A Critical Look at Indonesia's Planned Forestry Law Amendment." *Forest Policy and Economics* 185 (2026): 103730. <https://doi.org/10.1016/j.forpol.2026.103730>.
- Sopaheluwakan, W.R.I., S.M. Fatem, P.M. Kutanegara, and A. Maryudi. "Two-Decade Decentralization and Recognition of Customary Forest Rights: Cases from Special Autonomy Policy in West Papua, Indonesia." *Forest Policy and Economics* 151 (2023): 102951. <https://doi.org/10.1016/j.forpol.2023.102951>.
- Tempo.co. "DPR Janji Sahkan RUU Masyarakat Adat pada 2025." November 19, 2024. <https://www.tempo.co/politik/dpr-janji-sahkan-ruu-masyarakat-adat-pada-2025-1170686>.
- Tobroni, Faiq. "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012)." *Jurnal Konstitusi* 10, no. 3 (2013): 461-482.
- United Nations General Assembly. Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, U.N. Doc. A/RES/61/295. September 13, 2007.
- Untoro, Utami Yustihassana, Nova Konny Umboh, and Rinaldi Agusta Fahlevie. "The Role of the State in Recognising the Customary Rights of Indigenous Peoples." *Jurnal Mahkamah: Kajian Ilmu Hukum dan Hukum Islam* (2024). <https://doi.org/10.25217/jm.v9i1.4618>.
- Wijaya, Mustika Mega, Yenny Febrianty, M. Mustaqim, Angga Perdana, Sapto Handoyo Dp, and Tuti Susilawati Kartadimadja. "Protection of the Rights of Traditional Communities in the Ownership of Traditional Land Rights for Public Interests (Study of the Drafting

- of Traditional Legal Community Legislation)." *International Journal of Multicultural and Multireligious Understanding* (2024). <https://doi.org/10.18415/ijmmu.v11i2.5579>.
- Tim Inkuiri Nasional Komnas HAM. *Inkuiri Nasional Komisi Nasional Hak Asasi Manusia: Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*. Jakarta: Komisi Nasional Hak Asasi Manusia, 2016.
- Republic of Indonesia. Law No. 7 of 1984 on Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.
- United Nations Human Rights Council. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. HR/PUB/11/04. New York and Geneva: United Nations, 2011.
- Zahroni, and Faisal Santiago. "Ulayat Rights in A Human Rights Perspective." In *Proceedings of the 1st International Conference on Law, Social Science, Economics, and Education, ICLSSEE 2021*. Jakarta, March 6, 2021. <https://doi.org/10.4108/eai.6-3-2021.2306456>.
- Zein, Yahya Ahmad, et al. "Indigenous, Diversity, and the Future of Human Rights: Comparative Reflections from Asia." *Journal of Human Rights, Culture and Legal Systems (JHCLS)* 5, no. 2 (2025): 581-607.