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SHIFTING LEGAL LANDSCAPES: THE EVOLUTION AND FUTURE OF CUSTOMARY LAND RIGHTS RECOGNITION IN INDONESIA

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Abstract

This research explores the legal and political dynamics surrounding the recognition of customary land rights in Indonesia, from the Dutch colonial era to the post-Reformation period. The recognition of customary rights, a concept introduced by van Vollenhoven and later refined by Ter Haar, has evolved through various legal frameworks influenced by shifting political regimes. During the colonial period, Dutch policies acknowledged customary rights, particularly in indigenous areas like Riau and Jambi, though often in a limited and exploitative manner. Post-independence, however, the recognition of customary rights became more complex. The Old Order regime adopted a repressive stance, recognizing customary rights under strict conditions to avoid separatism, while the New Order further diminished these rights in favor of state land control, particularly for corporate interests. The Reform era introduced a somewhat more inclusive yet still restrictive approach to customary land rights, with legal frameworks acknowledging them in principle but often sidelining their practical application in favor of development agendas. This study analyzes these shifting policies using Nonet and Selznick's framework of repressive, autonomous, and responsive law, concluding that Indonesia's legal approach to customary rights has been predominantly repressive, with brief periods of responsiveness during certain regulatory changes. Looking forward, the research argues for a shift toward a responsive legal policy that actively involves indigenous communities in the legislative process and provides a clear, inclusive, and sustainable framework for recognizing and protecting customary land rights. Such a shift would be crucial in addressing the historical and ongoing marginalization of indigenous peoples in land-related issues, fostering a more equitable and participatory legal environment.

Keywords: Customary Rights; Recognition of Customary Law; Legal Policy; Agrarian Reform; Responsive Law.

A. Introduction

In customary law literature, the term customary rights is used to translate the concept of *beschikkingrecht* introduced by van Vollenhoven and later developed by his student, Ter Haar (Haar, 2001; Davidson et al., 2010; Fauzi, 2003). Its term is commonly used in legislation and by most experts in customary and agrarian laws (Hadikusuma, 2003; Wignjodipoero, 1989; Soemardjono, 2008). Meanwhile, other experts in customary law, such as Soepomo, use the term as *hak pertuanan* (Soekanto & Taneko, 1986), as well as M.M. Djojodigoeno and Sudiyat use the term as *hak purba*. As is well known, the term *ulayat* rights originally comes from the Minangkabau region. According to Narullah Datuk Perpatih Nan Tuo, (1999), customary rights are defined as the power or authority possessed by a customary law community over a certain area or space. This territory constitutes the living environment of its citizens, allowing them to utilize

the benefits of natural resources for their survival. This authority arises from the physical and spiritual relationships inherited from their ancestors, passed down through generations, and conveyed to future generations. Herman Soesangobeng (2012) defines the customary right into two meanings, broad and narrow. Narrow meaning, customary rights are only considered as the indigenous people's rights over the land. Meanwhile broad meaning, customary rights are interpreted as the indigenous people's right over the entire property and all kinds of indigenous assets.

The essence of customary rights (*hak ulayat*) within the Minangkabau community, as highlighted by Mochtar Naim, extends beyond being merely an economic asset or wealth. These rights carry several significant functions, as observed Hohmann (2018), Firstly, they have a Historical and Magico-Religious function, as they are passed down through an unbroken generational lineage from the ancestors who founded the nagari (village or territory). Secondly, they embody Social Justice, as these rights are equally shared by all community members or the entire nagari. Lastly, they serve as an Inter-Generational Reserve, where customary rights not only belong to the current generation but are also intended as rights (or reserves) for future generations, ensuring the continuity of the community's connection to its land and heritage (Heryant et al., 2020). According to Ter Haar (2001), customary rights exist throughout the Indonesian archipelago, with notable exception being the Banggai Islands (Central Sulawesi) and Ngada, Flores (East Nusa Tenggara). The objects of *beschikkingsreht* include land, waterways (rivers, coastal waters), and wild plants (trees, fruit trees, trees for carpentry), as well as wild animals (Haar, 2001). However, the geographical scope of these rights has its limits. As stated by van Vollenhoven and quoted by Soetardjo Kartohadikoesoemo (1953), on large islands, such as West Irian (now Papua), Kalimantan, and Sumatra, customary rights do not cover vacant land between villages, which is often referred to as *niemandsgrond* or ownerless land. This aligns with Mochtar Naim (1978) observation that in Minangkabau, customary rights cover villages, rice fields, fields, customary forests, and the rest is state forest.

Syahyuti (2006) outlines several key characteristics of customary land rights, particularly in the Minangkabau society. Firstly, customary land rights are not subject to absolute control; the land remains communal property, owned by the nagari, tribe, or clan, with residents only holding the right to use and enjoy it. Secondly, the control over land is inclusive, meaning outsiders may use it with the community's recognition, and the land returns to the customary law community when no longer in use. Thirdly, the land is inalienable; it cannot be bought or sold, and in Minangkabau, land can only be mortgaged. Finally, the value of labor takes precedence over land; a person can maintain control over land as long as they cultivate it productively, with human effort considered more valuable than the land itself.

Bushar Muhammad (1991) suggests that a reciprocal relationship between customary rights and individual land rights. These rights are complementary, expanding or contracting depending on the intensity of land cultivation by individuals. The more intensive the individual's relationship with the land (through cultivation), the less powerful the customary rights become over that plot. Conversely, if the individual's relationship with the land becomes less intensive because the land is abandoned or neglected, then the land will gradually return to the control of the customary law community's customary rights.

Empirical data from the Indigenous Peoples Alliance of the Archipelago (AMAN) in 2024 highlights a significant disparity. While the total area of claimed customary land is 30.1 million hectares, 2.8 million hectares are still in conflict with the government and corporations. Alarmingly, the government officially recognises only 4.850 million hectares of customary land and 265.250 hectares of designated customary forests. This level of recognition appears discriminatory when compared to the concessions granted to corporations. AMAN data from 2021 shows that 35 million hectares have been granted to corporations, yet only 89.000 hectares have been formally recognised for the indigenous community by the Ministry of Agrarian Affairs and

Spatial Planning/National Land Agency and the Ministry of Forestry and Environment (Aliansi Masyarakat Adat Nusantara (AMAN), 2024).

This article differs from Arizona's paper, which discuss the recognition of indigenous people based on the Constitutional Court decision (Arizona & Cohen, 2024). The same issue is also discussed by Fallada and Fuentes, which addresses the relationship between the recognition of customary law communities, constitutional court decisions, and aspects of environmental protection (Fallada-García-Valle, 2024; Fuentes, 2016). It is separate from Techera's view, which discusses the relationship between the recognition of customary law communities and the environment (Techera, 2010). It also differs from the article by (Xanthaki, 2007), which focuses more on the relationship between the recognition of customary law and the principle of self-determination, focusing on the authority of customary law communities to manage their own territories.

The author is interested in examining the legal politics of legislation related to the recognition of customary rights, because Mahfud MD mentioned that law is a political product as the formalisation or crystallisation of political wills that interact and compete with each other (Mahmodin, 2006; Syaukani & Thohari, 2004). To analyse the legal politics of each government regime from Dutch colonialism to post-Reformation, the analytical tools of Nonet and Selznick (2016) were utilised to distinguish between types of law, namely repressive law, autonomous law, and responsive law. Repressive law is a type of law that serves as an instrument of repressive power. Autonomous law is a type of law that functions as a separate institution capable of taming repression and protecting its own integrity (Fredriksson, 2020).

In other words, autonomous law serves the law itself. Meanwhile, responsive law refers to a type of law that acts as a facilitator of various responses to social needs and aspirations. Adapting Nonet and Selznick, legal politics can be categorized into three types, namely repressive legal politics, whose legal products take the form of repressive law, autonomous legal politics whose legal products take the form of autonomous law, and responsive legal politics based on legal products take the form of responsive law.

B. Method

This study employed the doctrinal method, a form of legal research that focuses on literature studies by examining legal norms, principles, and doctrines related to the recognition of customary rights (Shukla, 2023). This approach is highly relevant to the core issue addressed: the legal and political dynamics governing the recognition of customary rights for indigenous peoples from the Dutch East Indies era through the Indonesian period. Therefore, this study emphasised the analysis of legislation to examine how the dynamics of the legal politics of recognition of customary rights in Indonesia have evolved over time.

Within the framework of the doctrinal method, two specific approaches were utilised: a statute approach and a conceptual approach. The statute approach involves a review of *the Regerings Reglement* 1854, the *Agrarische Wet* 1870, the *Agrarische Besluit* 1870, Law Number 5 of 1960 or UUPA, and the 1945 Constitution of the Republic of Indonesia. Meanwhile, the conceptual approach was used by exploring theories related to the recognition of customary rights. By using these two approaches, it is expected that the complexity of the political and legal issues surrounding the recognition of customary rights in Indonesia can be analysed properly, thereby bringing new solutions for customary law communities in Indonesia.

C. Results and Discussion

1. Legal Politics of Customary Rights during Dutch Colonialism

During the Dutch colonial period in Indonesia, the recognition of customary rights was directly or indirectly regulated by at least three key pieces of legislation: *the Regerings Reglement*

1854, *Agrarische Wet* 1870, and *Agrarische Besluit* 1870. In 1831, King Willem I decreed that both short and long-term lease rights to uncultivated land could be granted to European plantation administrators. This was subject to the condition that the land lease permits did not conflict with or harm or prejudice the rights of the native community. This effectively allowed Europeans to exploit land, particularly forest land that appeared unused by indigenous people. This condition, however, harmed indigenous people, who were the real owner of the land, resulting in poverty and oppression (Laing, 2020). These actions prompted indigenous protests because their rights to clear forests, cultivate cleared land, cut wood, collect forest products, and use grazing areas were denied and unrecognised (Termorshuizen-Arts, 2010).

In response to these protests, an investigation was conducted by Jean C. Baud, Governor-General of the Dutch East Indies (1833-1836). The investigation proved the indigenous people's claims. The colonial government, under Baud, acknowledged that granting land rights to large plantation companies had affected land over which the local community had customary rights (Aditya & Al-Fatih, 2023). Furthermore, the investigation found that on the densely populated island of Java, indigenous rights existed throughout the entire island (Rachman & Masalam, 2017). Consequently, in 1835, a new stipulation mandated that any future granting of land rights to private companies must be preceded by a thorough investigation of the rights held by the indigenous people (Arizona et al., 2019). The results of this investigation, which contained the principle of protection for the indigenous community known as the "Baud Formula," were incorporated into Article 62, paragraph 3, of *the 1854 Regerings Reglement*. This article stipulated that the Governor-General could grant long-term land leases, with the exception that this provision *did not include land cultivated* for the indigenous community's own needs, such as agricultural land or land used for grazing, or land that, for one reason or another was part of the village's assets or jointly owned by the indigenous community (Termorshuizen-Arts, 2010).

Following extensive research conducted across 808 villages in Java, the *Agrarische Wet* of 1870 (S. 1870 No. 55, dated April 9, 1870) was issued, forming part of Article 51 of the *Indische Staatsregeling* (IS). The *Agrarische Wet* addressed several key issues concerning land use and ownership. Firstly, it prohibited the Governor-General from selling land, although this restriction did not extend to narrow plots of land intended for urban or village expansion, or land designated for commercial enterprises such as non-agricultural businesses and handicrafts. Additionally, while the Governor-General retained the right to lease land in accordance with applicable law, this did not apply to land cleared by indigenous peoples, land used for grazing livestock, or land within village boundaries for other communal purposes. The leases granted under the Agrarische Wet were subject to a maximum term of 75 years. Furthermore, when granting such rights, the Governor-General was required to respect the land rights of indigenous peoples. The law also prohibited the Governor-General from taking possession of land that had been cleared or used by indigenous communities, or land used for grazing or falling within village boundaries, unless it was for public purposes as outlined in Article 113, and with appropriate compensation. In cases where indigenous peoples owned land, they were granted *eigendom* rights, including the right to sell to both indigenous and non-indigenous individuals. Finally, any leasing of land by indigenous peoples to non-indigenous parties had to be conducted in accordance with the applicable legal framework (Slaats & Rajagukguk, 2007).

Even though *the Agrarische Wet* was issued to help Dutch capital owners to acquire land, with this regulation, the Dutch East Indies government still respected the existence of land controlled by indigenous communities with customary rights (Soetjipto, 2022). This is evident in the third and sixth paragraphs of *the Agrarische Wet,* which state that the Governor-General cannot control land cleared by indigenous people or land for grazing livestock or land under village control.

However, the enactment of *the Agrarische Wet* 1870 did not immediately satisfy the liberals faction in the Dutch East Indies administration. This dissatisfaction stemmed from two reasons: (a) according to the Civil Code (*Burgerlijk* Wetboek), only the owner (*eigenaar*) could grant land

rights to others; (2) *the Agrarische Wet* 1870 did not explicitly name the government as the owner of the land. Therefore, the liberals eventually forced the government to formally declare itself the owner of the land, with the exception of land that could be proven to be *eigendom* and *agrarische eigendom.* This effort culminated in the issuance of Royal Decree (*Agrarische Besluit)* No. 118 on July 20, 1870 (Simarmata, 2012). One of the provisions expected by the liberals was finally realized in Article 1 of *the Agrarische Besluit,* which reads (Slaats & Rajagukguk, 2007):

> *With the exception of land covered by paragraphs 5 and 6 of Article 51 of the Indische Staatsregeling van Netherlandsche Indie, all land without provable rights becomes the property of the state.*

Article 1 of the *Agrarische Besluit* refers to the domein principle (*domein beginsel*) or domein declaration (*domein verklaring*). Initially, this principle was applied only to Java and Madura through Article 20 of S.1870 No.118. However, the *domein verklaring* was later extended to areas outside Java and Madura through S.1875 No.119a. These declarations covered extensive territories and were subsequently referred to as the *algemene domein verklaring* (general domein verklaring) (Hidayat et al., 2018). In addition to the general declaration, a special domain declaration was also introduced. This declaration asserted that all vacant land, including state land, was excluded only if it was claimed by the people based on their right to clear the land. This specific domain declaration applied to the regions of Sumatra, Manado, and South/East Kalimantan and is outlined in S.1874 No.94f, S.1877 No.55, and 1888 No.58 (Mertokusumo, 1988).

According to Logemann, as quoted by Bushar Muhammad (1991), the *domein verklaring* is considered a legal fiction. Crucially, it did not negate customary property rights but rather subordinated them to state property (*staatsdomein*) By *the domein verklaring,* customary property rights are constructed as a kind of Indonesian property right (*Indonesisch zakelijk recht)* that is imposed on state property rights, such as *erfpacht* or *opstal*, which encumber *eigendom.* State property encumbered with customary property rights is called *onvrij landsdomein (*unfree state property), while state property not encumbered with customary property rights is called *vrij landsdomein.* Uncultivated land (*woeste grond)* is typically considered as free state property, and the government can grant it as *erfpacht* to private plantations (Fahmi, 2024).

Some agrarian observers have mistakenly assumed that Article 1 of *the Agrarische Besluit* meant that all land whose rights cannot be proven automatically became state land. However, a careful reading of Article 1 shows clear exceptions to land that could be claimed as state property, namely: the Governor-General respects the land rights of the indigenous people (paragraph 5 of Article 51 IS) and that the Governor-General cannot take control of land that has been cleared by indigenous peoples or land for grazing livestock or land under the control of villages (paragraph 6 of Article 51 IS).

Furthermore, exceptions were also found in the special domain statement applicable outside Java, which excluded land owned by indigenous peoples based on their right to clear it. In essence, customary rights continue to exist, such as customary ownership rights, the right to collect forest products, rights of use, rights of pledge, and rights of lease (Muhammad, 1991). In other words, *the domein verklaring* only applied to the rights that remained after the state's right of ownership was reduced by all the rights of the indigenous community (customary law community) over the land.

The crucial issue that unanswered by Article 1 of *the Agrarische Besluit,* was which community rights should be recognised and separated from the state's scope of control over land, thus becoming a matter of legal interpretation. This centred on whether these rights applied only to areas that were permanently and sustainably managed or whether they also include land claimed by indigenous communities even if it is not continuously cultivated (Fuentes, 2023). In other words, this interpretation concerned what was referred to as free state land (*vrij domein)* and non-free state land (*onvrij domein*). Free state land is land that is not subject to any land rights, either

customary rights or rights based on *the Burgerlijk Wetboek* (Civil Code). Non-free state land is land that is still subject to customary rights or rights based on the *Burgerlijk* Wetboek (Termorshuizen-Arts, 2010).

Regarding this matter, there are two schools of thought on *the domein verklaring,* namely the Utrecht School with its interpretation *of vrij domein* (free state land) and the Leiden School led by Van Vollenhoven with its interpretation of *onvrij domein* (unfree state land). The Utrecht School interprets *the domein verklaring* broadly, arguing that the state can do as it pleases with *vrij domein,* including uncultivated land and forest land. In practice, these rights only include those referred to in the Civil Code and what are known as agrarian property rights (*agrarische eigendomrecht)* and indigenous/traditional property rights (*inlandsche bezitrecht)*, which must be registered and certified as property rights. According to Marjanne Termorshuizen-Arts (2010), the rights of the indigenous community are not seen as "rights" but rather as "interests" that are considered a favour or a helping hand from the government and not as an obligation. Meanwhile, the Leiden School, which interpreted *the domein verklaring* narrowly, stated that *onvrij domein* was *domein* land over which other people also had rights.

To determine village-owned land in Java and Madura, the Dutch East Indies government issued *Staatsblad* No. 79 of 1874. This regulation provided a definitive interpretation of what constituted a village area, including: communal grazing land, land cleared by Indonesians for their own use and not left abandoned, as well as yards, roads, sacred land, burial grounds, mosque land, and all open spaces and public buildings within the inhabited part of the village. The clearing of other lands required permission from the government (Slaats & Rajagukguk, 2007).

For areas outside Java and Madura, regulations on uncultivated land were not introduced until around 1930. Even though the authorities promised to recognize the rights of the native community over cultivated land, and also promised to extend this to uncultivated land, which was included in *the Agrarische Besluit,* none of these promises were ever properly implemented. In practice, especially since the issuance of *the Domeinnota* in 1912, officials in the field frequently interpreted the provisions narrowly (Termorshuizen-Arts, 2010). Communal rights of villages or individual indigenous peoples over land were considered to apply only to land that was continuously cultivated, and even limited to land owned by an individual holdings (Termorshuizen-Arts, 2010). This is a result of the broad interpretation (*vrij landsdomein)* of *the Domein Verklaring,* which states that the state has authority in almost all matters to control (especially to grant or *uitgeven* rights to land to third parties) all land that is not continuously cultivated/used by indigenous communities (vacant land or land that is considered abandoned).

In summary, the Dutch East Indies government recognised customary land rights only to the extent of land that had been cleared and cultivated and included within the jurisdiction of villages or indigenous communities. In addition, customary land rights were also not included in the category of state land (*landsdomein*) based on *the domein verklaring* or at least included in non-free state land. Indeed, this recognition was unsatisfactory, as stated by van Vollenhoven above, because the scope of customary rights also included cultivated land and uncultivated land (reserve land in the form of forests or *woeste grond)*.

Despite the general restrictions, formal decrees recognising specific customary territories were occasionally issued, demonstrating *de jure* recognition in certain areas. For instance, the Dutch East Indies, customary rights were recognized in writing by decree, as seen in the recognition of the Depati Djentik hamlet of the *Anak Dalam Batin Sembilan* tribe by the Dutch in the form of a decree from De Controleur van Moeara Tembesi dated November 20, 1940 (Maulana, 2013). The Dutch government, through Riau Resident Decree No. 82 dated March 20, 1919, also recognized customary forests in the form of 26 prohibited forests and grazing lands belonging to the Talang Mamak tribe (Anggoro, 2010; Tim Redaksi, 2016). Similarly, the customary law community on Kisar Island, Southwest Maluku Regency, also still keeps a decree from Queen Juliana regarding the recognition of the territory of the community living on the island. The

recognition of customary rights, both directly and indirectly, contained in various regulations as mentioned above can be shown in the Table 1.

Table 1.
Recognition of Customary Rights During the Dutch Colonial Period

Type of Regulation	Substance of Recognition	Pattern of Recognition	Legal Policy
Regerings Reglement 1854	Article 62 paragraph 3: The Governor-General may grant long-term land leases in accordance with the provisions of the ordinance, the exception that this provision did not include land cultivated for the personal use of the indigenous community, such as agricultural land or land used for grazing, or land that for one reason or another is part of the wealth of the village or jointly owned by the indigenous community.	There are no conditions that restrict indigenous/native communities and no procedures for recognizing customary rights.	Autonomous
Agrarische Wet (Article 51 IS)	- In granting such rights, the General-Governor- shall respect the land rights of the indigenous people. - The General-Governor may not take possession of land that has been cleared by indigenous peoples, or land that is commonly used by the community for grazing livestock or is included within village boundaries for other purposes, except for purposes that fall within the category of public interest, based on Article 113 and for the legal basis for the establishment of plantations under higher orders, appropriate compensation must be provided	There are no conditions limiting customary/indigenous communities and no procedures for recognizing customary rights	Autonomous
Agrarische Besluit 1870	Article 1: With the exception of the lands covered in paragraphs 5 and 6 of Article 51 of the *Indische Staatsregeling van Netherlandsche Indie,* all lands that do not have provable rights become the state property.	There are no conditions restricting customary/indigenous communities and no procedures for recognizing customary rights.	Autonomous

Source: Author's Analysis Results

Referring to the three types of regulations from the Dutch colonial regime, it is evident that the legal policy of recognizing customary rights is characterized by autonomous legal policy, meaning that the Dutch colonial government acknowledged customary rights to cultivated land and land reserves that remained under village control.

a. Legal Policy on the Recognition of Customary Rights from Independence to The Reform Period

After Indonesia gained independence on August 17, 1945, the Republic of Indonesia adopted the 1945 Constitution, which does not explicitly address customary rights. However, the recognition of such rights is implicitly acknowledged in the Explanation of Article 18, which states that within the territory of the Indonesian State, there are approximately 250 *zelfbesturendelandchappen* and *volksgemeenschappen*, including villages in Java and Bali, regions in Minangkabau, and villages and clans in Palembang, among others. These areas, with their own distinct structures, are considered special regions. The Republic of Indonesia acknowledges their status, and all state regulations concerning these regions will take into account their original rights.

Although there is no explicit recognition of customary rights, the author agrees with T.O Ihromi (1999) who said that Article 18 of the 1945 Constitution and its explanation clearly imply that long before the Republic of Indonesia was proclaimed, within the regions that later became part of the territory of the Republic of Indonesia, various communities had emerged with their own existence and normative regulations, developed internally within the communities concerned (Husbani, 1999). In scientific literature, the term for the rules that developed and were maintained in these communities is customary law. The rules resulting from this internal process cover various areas of life, including regulations concerning the ownership and control of different natural resources (Porsanger & Virtanen, 2019). Explicit recognition of customary rights first appeared in Law No. 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as the Basic Agrarian Law) of Article 3 of the Basic Agrarian Law stipulates the following:

> *Bearing in mind the provisions of Articles 1 and 2, the exercise of customary rights and similar rights of customary law communities, insofar as they still exist in reality, must be in such a way that it is in accordance with the national and state interests, which are based on national unity, and must not conflict with higher laws and regulations.*

One of the drafters of the UUPA, Boedi Harsono (2007), said that certainty regarding the existence of customary rights could only be obtained by examining the specific circumstances of a given customary law community when a dispute resolution. He further stated the lack of detailed regulation by the UUPA drafters, stating that such regulation would hinder the scientific development of customary rights, which were perceived as naturally waning. In addition, the drafters of the UUPA also had a negative perception of the existence of customary rights, which can be found in General Explanation II, point 3 of the UUPA, which stated that customary rights often hindered regional development.

Upon closer examination, Article 3 of the UUPA reveals a conditional acceptance of customary rights with the following conditions: (1) as long as they still exist in reality, (2) in accordance with the interests of the nation and state, (3) based on national unity, (4) not in conflict with higher laws and regulations. Thus, the recognition of customary rights in Article 3 of the UUPA indicates a half-hearted or *pseudo legal recognition*, contrasting sharply with the necessity of recognizing indigenous people. Such recognition is necessary for multiple interconnected reasons, including: it acts as a reparation for historic injustices, empowers their self-determination, enhances resource management, fosters societal equity, and celebrates cultural diversity (Sarkki et al., 2023).

Regarding the recognition of customary rights, Satjipto Rahardjo (2006, 2007) used a potent analogy, describing the situation as “putting a goat (customary law) in a tiger’s cage (state law)” (Rosyida & Bisariyadi, 2005). He suggested that legal experts often formulate highly normative laws without sufficient anthropological and sociological awareness, making the eventual subjugation of customary law by state law inevitable. In line with Satjipto Rahardjo's opinion, Soetandyo Wignjosoebroto stated that the four requirements, both *ipso facto* and *ipso jure*, would be easily interpreted as a requested recognition. The burden of proof of the community itself,

leaving the power of unilateral recognition solely with the central government (Wignjoesbroto, 1995) (Rosyida & Bisariyadi, 2005).

For an anthropological perspective, Amri Marzali (2012) criticised the UUPA's conceptualization of customary rights, stating, "The concept of customary rights in the UUPA does not seem to have been derived from comprehensive studies of all types of indigenous communities throughout Indonesia". He suggested that the concept of customary rights in the UUPA seems to have been taken from observations of settled *wet rice cultivation* communities in Java and Sumatra, overlooking the diverse land tenure systems of semi-permanent *shifting cultivation* communities, such as in Kalimantan and Papua. In 2024, the seizure of customary lands reached 2.8 million hectares, always accompanied by acts of criminalization and violence. Twenty thousand members of indigenous legal communities were displaced as a result of the Nusantara Capital City project. The Indigenous Peoples Alliance (AMAN) recorded 687 agrarian conflicts over the past 10 years in customary areas covering 11.07 million hectares.(Aliansi Masyarakat Adat Nusantara, 2024).

Amri Marzali's assertion that the formulation of the UUPA (Basic Agrarian Law) was primarily based on research conducted by the UGM Agrarian Section in Central Java and East Java during 1955-1956 (Notonagoro, 1984) holds considerable weight, as it reflects the limited scope of the study that informed the legal framework. The UUPA, which sought to unify land tenure laws across Indonesia, failed to adequately address the specific needs and conditions of indigenous communities, especially when it comes to recognizing customary land rights. Achmad Sodiki (2013) pointed out that applying the same law to diverse circumstances is just as unjust as applying different laws to identical circumstances. This critique highlights a fundamental flaw in the UUPA's approach to customary land rights, as it imposed a uniform set of regulations that did not account for the varied cultural, social, and economic realities of indigenous communities both within and outside Java.

The recognition of customary land rights by the state, as outlined by the UUPA, is a model of conditional recognition. This framework reveals two key issues. First, it underscores the dominance of the state over indigenous communities. By establishing conditions for the recognition of customary rights, the state negates the ability of these communities to fully participate in policy-making and the legal processes that affect their land and resources. In this context, customary law communities are not seen as equal stakeholders but are instead subject to state-imposed limitations and regulations. Second, state domination is justified under the guise of securing natural resources and preventing the fragmentation of national unity. While these justifications are framed in terms of national interest, they often disregard the historical rights and self-determination of indigenous peoples.

This state-centered approach is in stark contrast to international legal principles, such as those set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP emphasizes the right of indigenous peoples to self-determination, a right that remains largely unaddressed in Indonesia's policy landscape. The Indonesian government's reluctance to adopt these international principles more fully is indicative of its broader interest in controlling land and resources, often at the expense of indigenous communities. This reluctance stems from the state's desire to maintain control over valuable natural resources, which are often located on indigenous lands. Consequently, the potential for real autonomy and self-governance among indigenous populations is undermined.

The lack of full recognition of indigenous peoples' rights, both domestically and internationally, exacerbates their current plight in Indonesia. Regulatory inadequacies continue to deny indigenous communities the legal protections they deserve, while historical grievances related to land dispossession and cultural erasure remain unresolved. The government's failure to honor both domestic and international legal commitments further compounds these issues. Moreover, the limited participation of indigenous communities in the decision-making processes

that affect their land, culture, and livelihoods ensures that their voices remain marginalized. This persistent exclusion contributes to the cycle of injustice and inequity that indigenous peoples face in Indonesia today.

Furthermore, the discussion of the draft UUPA was also not conducted democratically in the sense that there was no public participation, as evident in the provisions of the DPG GR rules of procedure, which placed the emphasis of the discussion on closed (secret) commission hearings (Arnstein, 1969). In addition, the UUPA discussion was carried out in a short period of time, requiring only three sessions, namely on September 12, 13, and 14 (Harsono, 2007).

Following the transition to the New Order, which prioritized an economic growth paradigm, customary law communities were given no legal space. Instead, customary rights were systematically eroded and legally undermined for the sake of national development. The enactment of Law No. 5 of 1967 on Forestry marked a turning point, initiating conflicts between customary law communities controlling forests and the government/investors granted Forest Concession Rights (HPH).

To ensure the success of state revenue from HPH investors, a Head of the East Kalimantan Regional Office of the National Land Agency said that, according to research conducted around 1974/1975 in East Kalimantan Province, customary rights had long since ceased to exist, possibly since the arrival of the local kingdoms (Singarimbun, 2010). Similarly, the Head of the Regional Office of the National Land Agency in Irian Jaya Province (now Papua) warned that recognizing customary rights would be as dangerous as recognizing the power of small states within the Unitary State of the Republic of Indonesia, given that the customary law associations in this province were originally autonomous customary governments (Ruwiastuti, 2000). Thus, under the New Order, the legal policy toward customary rights was repressive because the government assumed that there was only state land and no more customary land. In summary, the above description can be summarized in Table 2.

Table 2.
Differences in the Recognition of Customary Rights in the 1945 Constitution and the UUPA

Legislation	Substance	Pattern	Political Character of the Law
1945 Constitution	Does not explicitly recognize the existence of customary rights. However, it is implicitly contained in the Explanation of Article 18 of the 1945 Constitution.	The pattern has not yet apparent because the recognition of customary rights is not explicitly stated.	The political character of the law has not apparent.
Law No. 5 of 1960 (UUPA)	Article 3 of the UUPA recognizes customary rights subject to conditions regarding their existence and implementation.	Pattern of recognition with conditions regarding its existence and implementation.	Repressive, the existence of customary rights is determined unilaterally by the authorities.

Source: Author's Analysis Results

b. The Legal Policy of Recognition of Customary Rights after Reform

Boedi Harsono (2003), an expert in agrarian law and one of the drafters of the UUPA, stated that customary rights would not be specifically regulated, as they tend to weaken over time. However, without clear regulations, the UUPA lacks proper guidelines for addressing issues related to customary rights. Despite this, the conflict surrounding customary rights has not subsided, particularly after the Reformation era, and continues to be a prominent issue today. In

response to these ongoing conflicts, the government issued Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 5 of 1999 on June 24, 1999. This regulation provided specific guidelines for resolving issues related to the customary rights of indigenous peoples, henceforth referred to as PMA No. 5/1999. This regulation was significant as it was the first legal and technical definition of customary rights issued by the government. According to PMA No. 5/1999, customary rights are defined as the authority held by certain indigenous communities, as recognized by customary law, over a specific area that forms the living environment for their members. These rights allow the community to utilize natural resources, including land, within the designated area to support their survival and livelihood. This authority stems from a deep-rooted, physical, and spiritual relationship between the community and the land, passed down through generations without interruption. This definition emphasizes the longstanding connection between indigenous communities and their ancestral lands, highlighting both the physical and spiritual significance of these rights. It also underscores the importance of preserving these rights to ensure the continued survival and wellbeing of indigenous peoples, as they are integral to their cultural identity and way of life.

Under PMA No. 5/1999, the existence of customary rights is determined through research conducted by local governments, involving customary law experts, customary law communities, NGOs, and relevant agencies. This research team is responsible for examining three criteria: the existence of customary land rights, the presence of customary laws that govern the management, control, and use of customary land rights, and the ongoing relationship between the community and the land. The success of recognizing customary land rights depends heavily on the political will of the local government.

The composition of the team, which includes experts in customary law, members of customary law communities, and NGOs, aims to ensure objectivity in the research process. This inclusive approach allows for a thorough examination of the issue from multiple perspectives. Therefore, the legal policy outlined in PMA No. 5/1999 reflects a responsive legal policy character, meaning the recognition of customary rights is not burdened by excessive requirements and is carried out by a representative and balanced team.

Unfortunately, despite the well-structured regulation, the recognition of customary rights has not been widely embraced by local governments. Only a few instances of customary rights recognition have occurred, including regulations such as Kampar Regency Regulation No. 12 of 1999, Lebak Regency Regulation No. 32 of 2001, Nunukan Regency Regulation No. 3 of 2004, West Sumatra Regulation No. 16 of 2008, and Central Kalimantan Governor Regulation No. 13 of 2009. These limited recognitions suggest that while the regulatory framework exists, the implementation and acknowledgment of customary rights remain inconsistent and often hindered by local political dynamics.

Regulation of the Minister of Agrarian Affairs No. 5/1999 was eventually revoked with the issuance of Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 9 of 2015 concerning Procedures for Determining Communal Rights to Land of Indigenous Peoples and Communities Located in Certain Areas (hereinafter PMATR No. 9/2015). This newer regulation introduced the concept of *communal rights*, defined as collective ownership rights over land held by a customary law community, or joint ownership rights granted to communities residing in forest zones or plantation areas. The shift from the earlier framework to a formal recognition of communal rights marked a significant change in Indonesia's land governance approach, as it attempted to create a legal pathway for communities—particularly those living in remote or resource-rich territories—to secure recognition of their long-standing relationships with land. However, PMATR No. 9/2015 quickly attracted responses and critiques from scholars and practitioners. Maria S. W. Sumardjono (2015) was among the most prominent critics, arguing that customary rights should not be equated with land rights in the sense understood under Indonesia's national land law framework. Because customary rights refer more to a

sociocultural relationship with land rather than to a legally defined property title, she argued that the state should not issue formal land certificates for such rights. Sumardjono's criticism points to a deeper conceptual tension: whether customary land relations can—or should—be absorbed into Indonesia's modern land administration system without erasing the distinct nature of adat-based tenure.

Beyond these conceptual debates, PMATR No. 9/2015 also raises questions about the scope of customary rights, which the present author argues are fundamentally limited to a private dimension, such as shared rights within an extended family or among members of a lineage group. Examples include communal holdings in West Sumatra, where land is considered the property of a matrilineal clan rather than the personal asset of any individual. These forms of communal tenure are deeply embedded in social structures and cultural values, and they function less as state-recognized land rights than as customary mechanisms for sustaining social cohesion and resource stewardship. Recognizing the complexity of verifying such relationships, the regulation requires an assessment conducted by the *IP4T Team*, a multisectoral group consisting of local government officials, customary law experts, members of the customary law community concerned, and representatives of non-governmental organizations. The task of this team is to determine whether a community meets the criteria for recognition and whether the land claimed can legitimately be categorized as communal land under the regulation. Their involvement underscores the intricate balance between legal formalization and cultural authenticity: while the regulation aims to provide legal certainty, it must simultaneously avoid imposing rigid bureaucratic standards that undermine the fluidity and diversity of Indonesia's customary land systems. In this sense, the implementation of PMATR No. 9/2015 remains both a legal and cultural negotiation, revealing the challenges of reconciling modern land administration with Indonesia's pluralistic traditions of land governance.

Although the composition of this team was nominally objective due to the inclusion of non-governmental elements, the underlying policy was problematic. The pattern of recognition of customary rights is not burdensome because it does not require prior recognition by the customary law community. The implementation of PMATR No. 9/2015 in the Tengger customary law community in Ngadisari Village, Probolinggo Regency, shows that communal rights certificates appear on land owned by individuals, even though the customary rights land is jointly owned by all villagers. Thus, the legal policy on the existence of customary rights according to PMATR No. 9/2015 is repressive in nature as it negates customary rights and replaces them with communal rights. After the issuance of PMATR No. 9/2015, there was a reaction from experts in agrarian and customary law, and this regulation was subsequently revoked and replaced by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 10 of 2016 concerning Procedures for Determining Communal Rights over Land of Customary Law Communities and Communities Located in Certain Areas (hereinafter referred to as PMATR No. 10/2016). This regulation is not much different from PMATR No. 9/2015; in fact, communal rights are not only granted to customary law communities but also to communities, cooperatives, village units, and other community leaders. From a legal policy perspective, PMATR No. 10/2016 is repressive in nature, just like the previous regulation.

Subsequently, under the administration of President Joko Widodo, the government issued Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 18 of 2019 (PMATR No. 18/2019). Unlike PMA No. 5/1999, which directly recognized the existence of customary rights without being preceded by the existence of customary law communities, PMATR No. 18/2019 stipulates that customary rights will be recognized on the condition that the recognition of customary law communities as stipulated in Minister of Home Affairs Regulation No. 52 of 2014 concerning Guidelines for the Recognition and Protection of Customary Law Communities (hereinafter referred to as Permendagri No. 52/2014) must also be fulfilled first (Asshidiqqie, 2005).

The difficulty in recognizing customary law communities in Permendagri No. 52/2014 stems

from the composition of the Customary Law Community Committee, which is responsible for investigating the existence of customary law communities. This committee consists of five people, all drawn from the local government. This differs from PMA No. 5/1999 and PMATR No. 10/2016, whose committee structures include members from outside the local government, namely customary law communities, customary law experts, and NGOs. From the perspective of local indigenous acceptance (PADS), the process of recognizing customary law communities and their rights involves substantial financial burdens for research and the committee. Given that granting investment permits to external parties is financially more appealing, local government often choose to ignore customary rights. This neglect frequently leads to conflicts between investors and customary law communities over land claims. A notable example is the high-profile dispute involving the Dayak customary law community in Laman Kinipan, Central Kalimantan, and PT. Sawit Mandiri Lestari, which led to the arrest of Efendi Buhing, the head of the Dayak customary law community (Yahya, 2020). Thus, PMATR No. 18/2019 does not facilitate the recognition of customary rights of indigenous peoples, but rather makes it more difficult. This shows that the legal policy on the recognition of customary rights in PMATR No. 18/2019 is a repressive legal policy, as it lengthens the recognition procedure and makes indigenous peoples vulnerable to criminalization.

PMATR No. 18/2019 was deemed inconsistent with legal developments and community needs, leading to its replacement by Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 14 of 2024 concerning the Administration of Land and Registration of Customary Land of Indigenous Peoples (hereinafter referred to as PMATR No. 14/2024). Under this latest regulation, the recognition of customary rights is not preceded by the recognition of customary law communities by local governments. Instead, an inventory and identification were carried out by the directorate general in charge of land registration and can be assisted by local governments, universities, and customary institutions designated by local governments. Thus, recognition was taken over by the central government, and if desired, the aforementioned institutions could be involved. The results of the identification by the Directorate General of Land Registration were submitted to the Land Office for verification and subsequent registration. The strange thing about PMATR No. 14/2024 is that customary land rights that have been recorded in the Customary Land Register can be submitted to the Minister for management rights. This provision indicates that there is a legal effort to slowly transfer customary land rights to other parties, further complicating the recognition of the existence of customary rights. PMATR No. 14/2024 also shows that the legal policy is still repressive by providing a trap for management rights applications. In summary, the legal products and legal policy of customary rights recognition after the Reformation can be presented in Table 3.

Table 3.
Post-Reformation Legal Policy

Legislation	Substance	Pattern of Recognition	Characteristics of Legal Policy
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 5 of 1999.	The existence of customary rights was examined by a committee consisting of government officials, MHA, customary law experts, and NGOs.	Unconditional existence of MHA, stipulated by local district regulations.	Responsive
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 9 of 2015.	Customary rights were replaced by communal rights.	Conditional recognition for customary law communities. Customary rights were replaced with communal land rights.	Autonomous-Repressive

Legislation	Substance	Pattern of Recognition	Characteristics of Legal Policy
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 10 of 2016.	Customary rights replaced by communal rights.	Conditional recognition for customary law communities. Customary rights were replaced with communal rights.	Autonomous-Repressive
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 18 of 2019.	Customary rights could be registered at the local Land Office.	Conditional recognition for customary law communities and their customary land rights.	Autonomous-Repressive
Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 14 of 2024.	Customary rights could be registered with the Directorate General of Land Registration. Land under customary rights could be applied for Management Rights.	Conditional recognition for customary law communities and their customary land rights.	Autonomous-Repressive

Source: Author's Analysis Results

The protection of Indigenous Peoples in Indonesia remains significantly inadequate in the post-Reformation era, primarily due to a complex interplay of socio-political, legal, and institutional challenges. At the heart of this issue is the pervasive lack of political will to protect Indigenous rights, coupled with the continued prioritization of developmental policies that largely benefit corporate interests over the rights of these communities. This is particularly evident in industries such as mining and logging, where industrial projects frequently encroach on Indigenous ancestral lands, disregarding the rights of the people who have lived there for generations (Salim et al., 2025).

One of the most pressing challenges is the fragmented legal framework governing Indigenous rights in Indonesia. Although there are laws in place that theoretically protect Indigenous communities, their implementation is inconsistent, and the legal protection they afford is often ineffective. Beyond these legal inadequacies, deeper issues such as historical injustices and entrenched social dynamics continue to shape the treatment of Indigenous peoples in Indonesia. Many communities, particularly those in remote or marginalized areas, lack access to basic education and economic opportunities. This socio-economic gap weakens their ability to advocate for their rights and perpetuates cycles of poverty and disenfranchisement.

Moreover, institutional racism and a pervasive bureaucratic attitude often marginalize Indigenous knowledge and practices. In many cases, these traditional systems of governance and resource management are dismissed as outdated or inferior to state-centric policies. This institutional bias further exacerbates the alienation of Indigenous communities, whose cultural rights are increasingly overshadowed by neoliberal economic policies that prioritize resource exploitation and economic growth. As a result, Indigenous Peoples often find their land and cultural heritage under threat, as policies geared toward industrialization ignore or undermine their rights and ways of life.

The lack of effective political and legal commitment to protecting Indigenous rights in Indonesia has been a critical factor in the continued marginalization of these communities during the Reformation era. Systemic legal inadequacies, combined with socio-economic disparities and a general neglect of Indigenous governance systems, have hindered meaningful progress. These challenges are reflected in the limited participation of Indigenous peoples in governance structures, where their voices are often relegated to advisory roles rather than being given real decision-making power. Even when mechanisms for inclusion, such as consultations or representation, exist, they are frequently ineffective in ensuring meaningful participation or the protection of Indigenous rights.

For example, although the principles of Free, Prior, and Informed Consent (FPIC) are outlined in international frameworks, their implementation in Indonesia has been inadequate. Indigenous communities often face significant hurdles in asserting their rights, primarily due to the lack of effective mechanisms for enforcement. This gap between theoretical rights and actual practice leads to further exclusion from key decisions regarding land use, resource extraction, and development projects that directly impact their lives. The failure to bridge this gap contributes to the underrepresentation of Indigenous peoples in critical discussions and decisions, perpetuating a cycle of marginalization and disenfranchisement.

Thus, the situation of Indigenous communities in Indonesia is one of ongoing struggle, shaped by a combination of legal flaws, socio-economic exclusion, and systemic neglect. These challenges have resulted in the continued vulnerability of Indigenous lands and rights, which remain under constant threat from state-driven developmental agendas and corporate interests. The need for meaningful reform that recognizes and upholds the rights of Indigenous peoples remains crucial in addressing these issues (Tamma & Duile, 2020; Iriyani et al., 2024; (Zurba & Papadopoulos, 2021; Munafia, 2024; Ketaren & Prawira, 2024).

D. Conclusion

The political dynamics surrounding the recognition of customary land rights have fluctuated significantly across different regimes, from the Dutch colonial period to the post-Reformation era. During the Dutch colonial period, legal policy regarding the recognition of customary rights was relatively responsive, as the Dutch still acknowledged the existence and implementation of customary rights of indigenous peoples, such as the Rimba Puaka of the Talang Mamak tribe in Riau and the customary rights of the Rimba/Anak Dalam tribe in Jambi. However, legal policy after independence, up until the Reformation, was different. During the Old Order regime, the policy was repressive, recognizing customary rights under certain conditions due to concerns about separatism. However, there was no real implementation of these rights, as the state was still focused on defending its sovereignty.

During the New Order regime, the legal policy on the recognition of customary rights became even more repressive, as customary rights were not acknowledged at all. Any land that was not classified as customary land was considered state land, which could be leased to investors. In the Reform era, the legal policy on customary land rights was characterized as autonomous-repressive. While the recognition of customary rights was included in various laws and regulations, it still maintained a repressive nature, especially when government-led investment initiatives, such as the Job Creation Law and the National Strategic Project involving the food estate in Merauke, were in play.

Looking ahead, the future legal policy for the recognition of customary rights, aligned with transitional justice, must be a responsive legal policy. This requires a fundamental shift from repressive policies by providing the broadest possible space for customary law communities to actively participate in the formulation of laws and regulations. The state must also take affirmative action by creating specific legislation that offers special treatment to customary law communities as marginalized and vulnerable groups. This action is essential to ensure that these communities achieve parity with others and are able to live prosperously.

A responsive legal policy would involve creating legislation that recognizes customary rights by providing opportunities for stakeholder participation, simplifying requirements and procedures, establishing reasonable timeframes, and implementing a production-sharing contract scheme. Therefore, the formulation of future legislation should involve citizen participation, engaging all relevant parties in the recognition of customary rights. The substance of this legislation should feature simple requirements, clear timeframes, and straightforward procedures. Such recognition is vital to ensure that the acknowledgment of customary rights does not fall behind the issuance of land-use rights to investors. Furthermore, a production-sharing contract scheme should be

regulated as a mutually beneficial symbiosis between customary law communities and investors, aiming to prevent conflict and ensuring the sustainability of customary rights.

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