

The Participation within Indigenous Land management: Developments and Challenges of Indigenous Communities Protection



Gde Made Swardhana^{a*}, Suviwat Jenvitchuwong^b

^a Faculty of Law, Universitas Udayana, Denpasar, Indonesia.

^b Faculty of Law, Thammasat University, Bangkok, Thailand.

* corresponding author: gdmade_swardhana@unud.ac.id

ARTICLE INFO

ABSTRACT (10PT)

Article history

Received: January 21, 2023

Revised: May 23, 2023

Accepted: June 20, 2023

Keywords

Customary Right;
Indigenous Communities;
Land Right;
Participation;
Protection;

In customary law communities, established land has a deep meaning and is integral to cultural identity and social life. However, customary land rights often face serious problems. This study aims to analyze the protection of customary land rights in Indonesia and Thailand, identify the factors causing the problem, and describe the latest developments in efforts to protect these rights. This study focuses more on normative legal research. The normative juridical method is intended to explain various laws and regulations related to the mechanism for recognizing customary law communities with a statutory approach. The result of this research is a list of factors that influence the problem of protecting customary land rights in Indonesia and Thailand, such as the existence of legal dualism in land management, conflicts of interest between indigenous peoples and the state, and unclear boundaries of customary land territories. Then, the impact of the problematic protection of customary land rights on customary law communities is legal uncertainty regarding the protection of customary land, a decline in the welfare of customary law communities, and inequality and discrimination against indigenous and tribal peoples.



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1. Introduction

The customary law communities and customary land rights have a very important role in maintaining the continuity of culture, identity, and traditional life in various regions of the world. Indigenous peoples, as a group attached to a distinctive culture and customs, have lived and interacted with land and natural resources since ancient times.¹ Ulayat land rights are collective rights owned by customary law communities over the land they inhabit and manage. Human rights

¹ Mohammad Jamin and others, 'The Impact of Indonesia's Mining Industry Regulation on the Protection of Indigenous Peoples', *Hasanuddin Law Review*, 9.1 (2023), 88–105 <https://doi.org/10.20956/halrev.v9i1.4033>

provide moral guarantees so that humans can live properly as human beings who are glorified by the Most Merciful God.²

The 1945 Constitution of the Republic of Indonesia shows that the obligations of the State have been clearly outlined in three main obligations, which include respecting, protecting, and fulfilling the basic rights and freedoms of citizens³. Therefore, this matter in the context of indigenous peoples needs to be placed in the principles of just and civilized humanity as stated in the fifth principle of Pancasila. The constitution recognizes the existence of indigenous peoples, however, until now no regulation specifically regulates customary law communities related to their rights.⁴

Associated with the spirit of the Indonesian state, this is stated in the Preamble to the 1945 Constitution which accepts universal human rights views. This is reflected in the sentence "that in fact, independence is the right of all nations and therefore, colonialism in the world must be abolished because it is not following humanity and justice". The word "that in fact" in Paragraph I of the Preamble to the 1945 Constitution implies the meaning of the Indonesian people's view of human rights with a "natural" character, which therefore also contains universal basic principles. The same can also be found in the international-global context.⁵

The recognition of the rights of indigenous peoples is constitutionally recognized in the 1945 Constitution in Article 18B paragraph (2) which states: "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law."⁶ The consequence of the existence of the concept of recognition as a direct derivative of the concept of the rule of law is that, if there is the existence of indigenous peoples and their rights and interests that conflict with the interests of the state, or even if there are customary law rules that are contrary to the positive law rules of the state in the legislation, then the existence of

² Mohammad Jamin and Abdul Kadir Jaelani, 'Legal Protection of Indigenous Community in Protected Forest Areas Based Forest City', *Bestuur*, 10.2 (2022), 198–212 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v10i2.66090>

³ Septya Hanung Surya Dewi, I Gusti Ayu Ketut Rachmi Handayani, and Fatma Ulfatun Najicha, 'Kedudukan Dan Perlindungan Masyarakat Adat Dalam Mendiami Hutan Adat', *Jurnal Legislatif*, 2020, 79–92 <https://doi.org/https://doi.org/10.20956/jl.v4i1.12322>

⁴ Muhamad Mahrus, Setia Wijaksana, and Nurita Wulandari, 'The Optimization of Environmental Policy to Achieve Sustainable Development Goals', *Journal of Sustainable Development and Regulatory Issues*, 1.2 (2023), 98–107 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.10> *Journal*

⁵ Jessica Chan and others, 'Radiation Therapy and Indigenous Peoples in Canada and Australia: Building Paths Toward Reconciliation in Cancer Care Delivery', *International Journal of Radiation Oncology*Biophysics*, 116.2 (2023), 421–29 <https://doi.org/https://doi.org/10.1016/j.ijrobp.2022.09.085>

⁶ Al Fadilla and others, 'The Implementing a Carbon Tax as a Means of Increasing Investment Value in Indonesia', *The Implementing a Carbon Tax as a Means of Increasing Investment Value in Indonesia*, 1.2 (2023), 39–50 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.6>

indigenous peoples and their traditional interests and rights regulated in customary law can be simply ignored⁷.

In customary law communities, customary land has a deep meaning and is an integral part of cultural identity and social life. Ulayat land is not only used as a place to live and agricultural fields, but also as a place for carrying out traditional ceremonies, storing traditional knowledge, and preserving ancestral heritage. Nature has become a victim of human economic activity, especially in developing countries⁸. However, customary land rights of customary law communities often face serious challenges. Economic development, urbanization, mining, and changes in government policies can threaten the existence and sustainability of indigenous peoples and their rights to customary land.

Many indigenous and tribal peoples in various parts of the world experience conflict with interested parties in accessing and controlling their customary lands⁹. Biodiversity, natural beauty, and unique customs are the main attraction for tourists. However, in its utilization there is often a conflict of interest between the local customary law community and the state, this has been experienced by Indonesia and Thailand. In Indonesia, the need for land to support tourism investment in Bali has been targeted at the utilization of lands belonging to indigenous peoples. The existence of customary land will be greatly influenced by the establishment of state policies in investment at the level of basic norms, national and national regulations, and including living law products in Bali (*awig-awig* and *perarem*). Thus, the determination of data on whether or not an investment is carried out in a customary village area is determined by their respective customary law as contained in the *awig-awig* or *perarem*.¹⁰

In research conducted by Granbom entitled "A Field Study of an Indigenous People in Thailand and their Problems with Rapid Tourist Development" in Urak Lawoi, an indigenous people in the Andaman Sea outside the West Coast of Thailand. The study shows what happened to them when being deprived of their territory and forced to abandon their culture, lifestyle, and traditional economic subsistence.¹¹ During the last one and a half decades, rapid tourist development, with large-scale hotels and bungalow resorts, has impacted significantly the nomadic lifestyle of the Urak Lawoi. They have been pushed farther from the shore and into unproductive areas. Powerful global forces linked to the world market

⁷ Lara Domínguez and Colin Luoma, 'Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment', *Land*, 9.3 (2020), 65 <https://doi.org/10.3390/land9030065>

⁸ Agung Wicaksono, Irni Yunita, and Gede Ginaya, 'Living Side by Side with Nature: Evidence of Self-Governance in Three Local Communities in Indonesia', *Heliyon*, 8.12 (2022), e12248 <https://doi.org/10.1016/j.heliyon.2022.e12248>

⁹ Muhammad Alif K Sahide and others, 'Land and Power Framework for Assessing Ecosystem Essential Area Policy', *MethodsX*, 7 (2020), 101032 <https://doi.org/https://doi.org/10.1016/j.mex.2020.101032>

¹⁰ Jennifer L Gerbrandt and Clinton N Westman, 'When a Pipe Breaks: Monitoring an Emergency Spill in the Oil Sands and Documenting Its Erasure of Indigenous Interests in Land', *The Extractive Industries and Society*, 7.4 (2020), 1301–8 <https://doi.org/https://doi.org/10.1016/j.exis.2020.07.012>

¹¹ Prakashan Chellattan Veettil, Darley Jose Kjosavik, and Arathy Ashok, 'Valuing the "Bundle of Land Rights": On Formalising Indigenous People's (Adivasis) Land Rights in Kerala, India', *Land Use Policy*, 30.1 (2013), 408–16 <https://doi.org/https://doi.org/10.1016/j.landusepol.2012.04.013>

economy result in a situation that is not favorable to the Urak Lawoi and their ecosystem.¹²

Therefore, it is important to understand the protection of customary land rights in the context of indigenous and tribal peoples, especially in areas with rich cultures and distinctive customs such as Indonesia and Thailand. In this context, This article aims to analyze the protection of customary land rights in Indonesia and Thailand, identify the factors causing the problem of protection of customary land rights, and describe the latest developments in efforts to protect these rights. With a better understanding of this issue, it is hoped that more effective steps can be taken in ensuring the sustainability and protection of customary land rights of indigenous peoples in Bali.

2. Research Method

This study focuses more on normative legal research. The normative juridical method is intended to explain various laws and regulations related to the mechanism for recognizing customary law communities.¹³ This study used library materials in the form of secondary data as the main source. Secondary data includes primary legal materials, namely binding legal materials, starting with the Constitution and other relevant regulations. while secondary legal materials provide an explanation of primary legal materials. This study uses library materials in the form of secondary data as the main source. The data collection technique is carried out through library research, which is obtained through searching laws and regulations, books, journals, newspapers, or magazines, as well as data from the internet related to the recognition mechanism. customary law community. The analytical method used in this study is qualitative. The collected data is then grouped and sorted to look for relevant and representative ones related to the subject matter. The data is then studied in depth, analyzed, and described descriptively, then conclusions are made that are expected to answer the issues raised and discussed.¹⁴

3. Results and Discussion

The Protection of Indigenous Communities on Land Rights in Indonesia

The existence of Article 18 B paragraph (2) and 23 I (3) and also in the Law (UU) sectoral (UU Number 5 of 1960 concerning Agrarian Principles; Law Number 4 2009 concerning Mining, Mineral, and Coal; Law Number 7 of 2004 regarding Water Resources; and other related laws) have endeavored to provide acknowledgment and respect for the Customary Law Community Unit (MHA). The central government is obliged to administer the system welfare government by fighting for the achievement

¹² Stefan Wheat and others, 'Climate Change and COVID-19: Assessing the Vulnerability and Resilience of U.S. Indigenous Communities to Syndemic Crises', *The Journal of Climate Change and Health*, 8 (2022), 100148 <https://doi.org/https://doi.org/10.1016/j.joclim.2022.100148>

¹³ Tiara Tiolinec, 'Indonesian Telemedicine Regulation to Provide Legal Protection for Patient', *Journal of Sustainable Development and Regulatory Issues*, 1.2 (2023), 75–97 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.9>

¹⁴ Eka Rismawati and Abdul Kadir Jaelani, 'The Regulation of Foreign Workers as Technology and Knowledge Transfer', *Journal of Sustainable Development and Regulatory Issues*, 1.2 (2023), 64–74 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.8>

fulfillment of constitutional rights and traditional rights. With the hope of getting meet the basic needs of society both materially and immaterially.¹⁵

The inequality of reality between *das sollen* and *das sein* is related to recognition and respect for indigenous peoples and traditional rights is quite evident. This can be seen in the formulation of Article 18B paragraph (2) of the Constitution, which states that customary law communities and their traditional rights are recognized and respected by the state as long as it still exists, in accordance with modern life and does not conflict with the Unitary State of the Republic of Indonesia and is regulated by law.¹⁶ Recognition of customary law communities and their customary rights are also regulated in other regulations under the constitution. Law Number 5 of 1960 Concerning Basic Basic Regulations Agrarian (UUPA) which is the main law in the regulation of natural resources recognizes the existence of customary rights through Article 3 which reads as follows: "By bearing in mind the provisions in Articles 1 and 2, implementation customary rights and similar rights of legal communities customs, insofar as in reality they still exist, must be in such a way so that it is in accordance with national and state interests, which are based on national unity and must not conflict with the law and other higher regulations".¹⁷

The existence of UUPA is due to the existence of legal dualism in the regulation of national land law namely the existence of lands that are subject to Western law and the existence of lands that are subject to customary law. In this sense, it is clear that customary rights belong to customary law communities. A similar understanding is also shared by the UUPA saying that customary law communities with customary rights are prohibited from obstructing the granting of usufructuary rights or refusing to clear forests for the purpose of adding food and resettlement of residents (General Explanation II point 3). By using this concept, the UUPA recognizes the existence of customary law communities as subjects with customary rights (objects). Customary rights as objects that cannot exist without the community customary law as a subject.¹⁸

The ineffectiveness of legal instruments related to recognition and respect for indigenous peoples is evidenced through the uncertainty of the status of indigenous peoples as legal subjects (legal standing) or holders of rights, the authority to act, and can be burdened with obligations law. Each province in Indonesia is a factually customary law community unit with its characteristics and has existed for hundreds of years.¹⁹ Customary law communities are organized community groups, which behave as a unit, live in a certain area, have rulers, have their customary law and their wealth, both in the form of tangible

¹⁵ Penelope Anthias, 'Rethinking Territory and Property in Indigenous Land Claims', *Geoforum*, 119 (2021), 268–78 <https://doi.org/https://doi.org/10.1016/j.geoforum.2019.09.008>

¹⁶ Michael Kotutwa Johnson and others, 'Barriers to PES Programs in Indigenous Communities: A Lesson in Land Tenure Insecurity from the Hopi Indian Reservation', *Ecosystem Services*, 32 (2018), 62–69 <https://doi.org/https://doi.org/10.1016/j.ecoser.2018.05.009>

¹⁷ Kasey M Stirling and others, 'Experiences and Insights on Bridging Knowledge Systems between Indigenous and Non-Indigenous Partners: Learnings from the Laurentian Great Lakes', *Journal of Great Lakes Research*, 49 (2023), S58–71 <https://doi.org/https://doi.org/10.1016/j.jglr.2023.01.007>

¹⁸ Candace Kaleimamoowahinekapu Galla and others, 'Community-Centered Indigenous Language Recovery, Restoration, Revitalization, and Renewal', in *International Encyclopedia of Education (Fourth Edition)*, ed. by Robert J Tierney, Fazal Rizvi, and Kadriye Ercikan, Fourth Edition (Oxford: Elsevier, 2023), pp. 786–96 <https://doi.org/https://doi.org/10.1016/B978-0-12-818630-5.07038-X>

¹⁹ Sarah E Nelson and Kathi Wilson, 'Rights and Health versus Rights to Health: Bringing Indigenous Peoples' Legal Rights into the Spaces of Health Care Services', *Political Geography*, 85 (2021), 102311 <https://doi.org/https://doi.org/10.1016/j.polgeo.2020.102311>

and intangible objects and control natural resources within their reach.²⁰ Customary law communities, especially in Bali, when seen through reality are community groups that are organized as a unit with their customary law, live permanently, have rulers, and have their wealth, both in the form of tangible and intangible objects. They also control the natural resources that exist in their living area's scope (*labenraum*).²¹

Tourism is a fast-growing industry in Indonesia. In addition to natural resources, Indonesia also has good tourism potential from which can be developed both from natural, historical, and human resources aspects. The economic interests promoted by the state and its development partners through the Bali tourism industry have led to the elimination of customary land tenure, the disintegration of customary lands, and the weakening of customary village institutions as community representatives on land issues²². Of course, it is urgent to investigate how the legal protection for MHA in Bali is specifically unique with the traditional rights inherent in it.²³

The situation of marginalized indigenous peoples is impossible without cause. On the one hand, the nature of customary law prioritizes elements magical, cash, concrete and flexible that can function effectively when values of honesty, togetherness, and mutual assistance, are still institutionalized. And on the other hand, the state as a power and also as an entrepreneur bases its claims more on rights dominated by the rule of law and requires formal and written evidence. To differences in the character of society and its laws, in general, no policy can ever seek a way out.²⁴

Customary land in Bali is known as the land of *druwe desa pakraman* (land belonging to a customary village according to Balinese customary law. This term is also commonly qualified as *ulayat* land as joint land that is controlled and owned by a customary village communally. As qualified by *Swastawa Dharmayuda*, customary land in Bali can be divided into several categories, namely *Druwe Desa Land* in the form of Market Land, Field Land, Grave/Setra Land, *Laba Pura Land* as village-owned land specifically used for temple purposes (places of worship for people Hindus), Village Yard Land (PKD) as land controlled by the village which is given to the villagers (*Krama desa*) for housing needs, and *Tanah Ayahan Desa* (AYDS) as land controlled by the village whose cultivation is handed over to each villager with the right to be enjoyed and given the obligation to provide fatherhood in the form of labor and material to the village.²⁵

²⁰ Silvano Paixao and others, 'Modeling Indigenous Tribes' Land Rights with ISO 19152 LADM: A Case from Brazil', *Land Use Policy*, 49 (2015), 587–97
<https://doi.org/https://doi.org/10.1016/j.landusepol.2014.12.001>

²¹ Lyndsey Huynh and others, 'Examining the Connection between Water Concerns, Water Anxiety, and Resilience among Indigenous Persons: A Systematic Scoping Review', *Child Abuse & Neglect*, 2023, 106184 <https://doi.org/https://doi.org/10.1016/j.chiabu.2023.106184>

²² Gusti Ayu Made Suartika, 'Territoriality and the Market System—Adat Land vs. State Regulations on Land Matters in Bali', *Habitat International*, 31.2 (2007), 167–76
<https://doi.org/https://doi.org/10.1016/j.habitatint.2006.11.001>

²³ Bryan Leonard, Dominic P Parker, and Terry L Anderson, 'Land Quality, Land Rights, and Indigenous Poverty', *Journal of Development Economics*, 143 (2020), 102435
<https://doi.org/https://doi.org/10.1016/j.jdeveco.2019.102435>

²⁴ Anne M Larson, Juan Pablo Sarmiento Barletti, and Nicole Heise Vigil, 'A Place at the Table Is Not Enough: Accountability for Indigenous Peoples and Local Communities in Multi-Stakeholder Platforms', *World Development*, 155 (2022), 105907 <https://doi.org/https://doi.org/10.1016/j.worlddev.2022.105907>

²⁵ I Gusti Agung Mas Rwa Jayantiari and I Ketut Kasta Arya Wijaya, 'Tinjauan Yuridis Pengaturan Tanah Druwe Desa Di Bali (Aspek Hukum Perlindungan Masyarakat Adat Atas Tanah)', *WICAKSANA: Jurnal Lingkungan Dan Pembangunan*, 1.1 (2017), 33–39
<https://doi.org/https://doi.org/10.22225/wicaksana.1.1.2017.33-39>

In general, the concept and meaning of Customary Law Community includes rights. The tradition is quite clearly protected in various legal regulations, but in practice, it is not easy to implement. The tendency of such material content clearly cannot provide legal certainty, on the contrary, it can negate Customary Law Community. The occurrence of overlap between one legal regulation and another often occurs and results in the infringement of the traditional rights of indigenous peoples.²⁶

In several areas in Indonesia, administrative boundaries still become problems. There is no definite or obvious limit, only coordinates on the map or in other words, textual rather than spatial. In addition, there are differences in the base maps used as references. They significantly affect the land registration at the Land Office related to the principle of contradictory delimitation. In relation to communal or ulayat land boundaries, besides administrative boundary problems, it is undeniable that communal or ulayat land in Indonesia does exist. In fact, the issue of not qualifying Pakraman village as a subject of land law has long been a dilemma for the people in Bali. The situation where Pakraman Village is not a legal subject that can have ownership rights to land makes Pakraman Village unable to register its ownership rights at the District/City Land Office) to obtain a certificate. As a result, the land ownership status of Druwe Desa Pakraman in Bali has become floating.²⁷

The mechanism that has been practiced so far is that land belonging to indigenous peoples is released by way of exchange (*ruislag*) or through the release of rights over the land first by the customary head. In its development, customary land has been given communal rights status based on the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 10 of 2016 concerning Procedures for Determining Communal Rights over Land of Customary Law Communities and Communities Residing in Certain Areas. Article 3 paragraph (2) of the regulation states that customary law communities can be given communal rights as long as they meet the following requirements: Indigenous peoples are still in the form of associations, there are institutions within their customary rulers, there are clear customary law areas and there are legal institutions and instruments, which are still being obeyed.

The Protection of Indigenous Communities on Land Rights in Thailand

The turn of the twentieth century, when still named Siam, all land belonged to the king, from which people could lay claim to provide for their families. Customary systems enshrined local land use, with forest areas regarded as commons²⁸. Larger formal arrangements had been created for the collection of tax, or through trade agreements with foreign powers. Although Siam was never formally colonized, it did take extensive inspiration from these powers for the development of legal and administrative systems. In Thailand, the recognition of customary land rights of indigenous peoples is regulated through several regulations. Land Law Responding to population growth and the

²⁶ Purabi Bose, 'Land Tenure and Forest Rights of Rural and Indigenous Women in Latin America: Empirical Evidence', *Women's Studies International Forum*, 65 (2017), 1–8 <https://doi.org/https://doi.org/10.1016/j.wsif.2017.10.006>

²⁷ Katie L Kamelamela and others, 'Kökua Aku, Kökua Mai: An Indigenous Consensus-Driven and Place-Based Approach to Community Led Dryland Restoration and Stewardship', *Forest Ecology and Management*, 506 (2022), 119949 <https://doi.org/https://doi.org/10.1016/j.foreco.2021.119949>

²⁸ Larry Lohmann, 'Land, Power and Forest Colonization in Thailand', *Global Ecology and Biogeography Letters*, 3.4/6 (1993), 180 <https://doi.org/10.2307/2997768>

commercialization of agriculture title by registration was adopted, using the Australian Torrens system. This was centralized and administered by the newly formed Department of Land (DOL) within the Ministry of the Interior. The law was applied principally in the Central Plains, hardly affecting the outer regions of the kingdom.²⁹

The 1954 Land Code With the dismantling of absolute monarchy in 1932, and the nation of Thailand established, the platform was provided for a full transition to private land ownership. The 1954 Land Code laid out the basic titling forms that exist today, with rights officially passed onto citizens for the first time. The NS-4 ('Chanote') deed offers fully unrestricted rights allowing the sale, rental, division, inheritance, and mortgage of land. The NS-3 (and NS-3K from 1972) represents a similarly secure transitional title, and the NS-2 is a 'pre-emptive' temporary deed of five years that would theoretically be upgraded to full rights upon its renewal. The SK-1 'claim' certificate registers an application for land that might later be formalized with an NS deed, based on occupation or use prior to 1954. The 1954 code also introduced the concept of idle land to encourage greater productive use, with punitive measures for unlawful registration or forged documentation. The administration was carried out by the DOL.³⁰

The Thai Land Titling Program (TLTP) Land Development Act, in 1984 the TLTP was introduced to increase efficiency, insert technological improvements and speed up the titling process. Using World Bank funding, AusAID technical assistance, and the private contractor Land Equity International (LEI), it was the largest such program in the world, perceived as a huge success and taken as a model for other countries to follow. By 1998, over 19 million titles had been distributed compared to 4 million when the project started. Initially administered by the Bangkok-based DOL, work was gradually passed on to metropolitan, provincial, and local-branch authorities, although strong central monitoring was maintained.³¹

State-Owned Land the Royal Forestry Department (RFD), a branch of the Ministry of Natural Resources and Environment, was formed in 1896 as an attempt to stave off the monopolization of the teak trade by foreign powers. Following the creation of the Thai nation-state, subsequent legislation attempted to shore up public land ownership and start processes of demarcation. The 1941 Forest Act proclaimed that forests consisted of all land that does not belong to any individual by law', foregoing any mention of tree cover. National Reserved Forest Act In 1961, a cabinet decree designated 50% of land in Thailand as state-owned forestry.³²

The 1964 National Reserved Forest Act adjusted this figure to 45% and clarified terms of designation and rules for usage. 1975 Land Reform Act As a partial reaction to populist protest movements, the 1975 Land Reform Act acknowledged a high rate of farmer

²⁹ Robert A Fligg, Brian Ballantyne, and Derek T Robinson, 'Informality within Indigenous Land Management: A Land-Use Study at Curve Lake First Nation, Canada', *Land Use Policy*, 112 (2022), 105786 <https://doi.org/https://doi.org/10.1016/j.landusepol.2021.105786>

³⁰ Giuseppe Poderati, 'Human Rights Aspects and Soil Governance. A Special Focus on Land Grabbing', *Soil Security*, 6 (2022), 100042 <https://doi.org/https://doi.org/10.1016/j.soisec.2022.100042>

³¹ Jin Sato, 'People in Between: Conversion and Conservation of Forest Lands in Thailand', *Development and Change*, 31.1 (2000), 155–77 <https://doi.org/10.1111/1467-7660.00150>

³² Peter Ho, 'Debunking the Chinese Unitary State via Legal Pluralism: Historical, Indigenous and Customary Rights in China (1949–Present)', *World Development*, 151 (2022), 105752 <https://doi.org/https://doi.org/10.1016/j.worlddev.2021.105752>

tenancy and landlessness in Thailand, and the encroachment of cultivators onto public lands, influenced by unclear demarcation and poor enforcement of rules. Although aiming towards land redistribution, the Act settled on the formalization or promotion of settlements in forest reserve areas. The Agricultural Land Reform Office (ALRO) was formed, to lease out or allocate land to occupants of the public estate.³³

In 1981 Introduction of usufruct land certificates in the 1980s, the majority of the working population in Thailand was still engaged in agriculture. Forest cover was diminishing from 66% of national land pre-Second World War to around 15% in 1993. Under pressures of population growth, commercial logging (eventually banned in 1989), infrastructure projects, and agriculture, policy shifted towards preservation over-exploitation. Yet around 20% of official forest reserves were occupied by communities, where boundaries frequently did not reflect actual forest cover. Therefore, in 1981, to accommodate the presence of farmers on public land, usufruct certificates (STK) were handed out by the RFD, a temporary 5-year deed for a maximum of 2.4 hectares, carrying limited rights. Various attempts have been made to account for farmer presence in protected lands (see the example of the khor jor kor scheme in box 1). When the STK program ended in 1993, an equivalent usufruct certificate (SPK-4.01) was made available from the ALRO.³⁴

Although degraded forestland was redistributed to farmers, such plots retained protected status. Attempts have been made to extend the rights of the SPK certificate. Most notably, in the previous decade, Thaksin Shinawatra identified the potential to include mortgaging of such land, theoretically offering a source of capital to the poor, and creating a new stream of tax revenue. The proposal was not enacted, with land remaining in public hands. In 2007 Community Forestry Bill. It offered rights to communities who had lived in forest reserves prior to 1997, entering into an agreement with RFD for assistance with the preservation and management of such areas. Criticized by both conservationists and land rights activists, the Bill nevertheless passed the National Legislative Assembly in 2007. However, due to an inability to attract consensus across different government departments, the bureaucratic nature of the proposed policy, and its marginalization against the political instability of the time, by 2009 it had lapsed.³⁵

Indigenous and tribal peoples in Thailand often face conflicts with other parties, including industrial companies, private land owners, and the government. These parties can have interests that conflict with customary land rights of customary law communities. This conflict can have a negative impact on efforts to recognize and protect customary land rights, as well as increase the risk of eviction and misuse of communal land. They are struggling to overcome the problem of the state claiming sovereign control over large areas of 'public land' and embarking on a formalization process that introduces local

³³ Jingmei Zhang, Subin Xu, and Nobuo Aoki, 'Contradictions of Indigenous Cognition and Heritage Evaluation under Political Transformations in a Working-Class Community in Tianjin, China', *Cities*, 132 (2023), 104031 <https://doi.org/https://doi.org/10.1016/j.cities.2022.104031>

³⁴ Anna Normyle and others, 'Land Cover and Fire Accounts to Support Indigenous Land Management: A Pilot Study of Yawuru Country', *Journal of Environmental Management*, 313 (2022), 115003 <https://doi.org/https://doi.org/10.1016/j.jenvman.2022.115003>

³⁵ John F. McCarthy and others, 'Land Reform Rationalities and Their Governance Effects in Indonesia: Provoking Land Politics or Addressing Adverse Formalisation?', *Geoforum*, 132.April (2022), 92–102 <https://doi.org/10.1016/j.geoforum.2022.04.008>

populations to new land-based production systems on adverse terms³⁶. The customary land areas of customary law communities overlap with areas claimed by other parties, such as industrial companies or the government. This conflict can complicate the recognition and protection of customary land rights³⁷. The Indigenous Peoples of Thailand are fighting against the government which still carries the legacy of a colonial mentality regarding forest management in the centralized state of Thailand³⁸.

One of the common challenges is the ambiguity and conflict regarding the boundaries of customary land areas. The process of financing and paying for customary land boundaries is often complicated and time-consuming. In addition, there are situations where the boundaries of customary law community land areas overlap with areas claimed by other parties, such as industrial companies or the government. These contracts can make it difficult to recognize and protect customary land rights. At the political level, the separation of agricultural land and forests is carried out by means of state territorialization (state control over land and land users) and marginalization of shifting cultivation, as well as policies that encourage export orientation of agricultural and forest products.³⁹ The administrative process for recognizing customary land rights in Thailand is sometimes considered complex and time-consuming. Customary law communities must fulfill strict requirements, such as verification of existence as customary law communities, collecting evidence of ownership and use of *ulayat* lands, and establishing a *ulayat* land management committee. This process can be confusing and time-consuming, especially for communities with limited access to information and resources.

The Developments and Challenges of the Indigenous Communities Protection

In the 1945 Constitution, it is stated that the traditional rights of indigenous and tribal peoples are respected as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. The problem that arises is the law regarding what or how the regulation regarding the recognition of the rights of indigenous peoples. That is, it is still unclear what the legal form or substance of the arrangement is. So that there are those that are regulated in the law, but there are also general arrangements at the local level which are set forth in the respective regional regulations. Legal uncertainty, statutory regulations at the central level and other Sectoral Laws can negate indigenous and tribal peoples. The conflicts with other parties, such as industrial companies, private land owners, or the government, are factors that influence the recognition of customary land rights. When there are conflicting interests, the interests of the state take precedence, thereby hindering efforts to recognize customary land rights. This tension can arise due to claims on communal land by other parties who wish to use it for economic or development purposes.

³⁶ McCarthy and others.

³⁷ Melanie Pichler, Manan Bhan, and Simone Gingrich, 'The Social and Ecological Costs of Reforestation. Territorialization and Industrialization of Land Use Accompany Forest Transitions in Southeast Asia', *Land Use Policy*, 101 (2021), 105180 <https://doi.org/https://doi.org/10.1016/j.landusepol.2020.105180>

³⁸ Chusak Wittayapak and Ian G Baird, 'Communal Land Titling Dilemmas in Northern Thailand: From Community Forestry to Beneficial yet Risky and Uncertain Options', *Land Use Policy*, 71 (2018), 320–28 <https://doi.org/https://doi.org/10.1016/j.landusepol.2017.12.019>

³⁹ Pichler, Bhan, and Gingrich.

The problem of recognizing customary land rights can lead to a decline in the welfare of indigenous peoples and threaten the sustainability of their cultural identity. Loss of access to customary lands can disrupt traditional lifestyles, local knowledge, and cultural practices associated with these lands. This can lead to a decrease in the physical, social and spiritual well-being of indigenous and tribal peoples. According to FAOSTAT, in material terms Thailand was the world's largest exporter of dry rubber and cassava in 2017, the second most important exporter of rice and the third largest exporter of raw sugar. This is considered to be a trigger for the forest transition to further deforestation. In practice, there has been forest expansion in a rain-fed maize area north of Phetchabun, Thailand. From the perspective of land users, forest expansion following land abandonment and land confiscation is driven by pressure rather than private afforestation. Increased economic opportunities are driving wealthier farmers (with access to paddy fields) to turn their attention to irrigated agriculture, but this has an even greater indirect and contradictory effect on less wealthy farmers. Much of the forest expansion appears to be unresponsive or adaptable to some farmers. Adaptation and resistance strategies are discussed, including pluriactivity and political activism.⁴⁰

The problem of recognizing customary land rights can have a negative impact on the economic and social life of indigenous and tribal peoples. Indigenous land is often their main source of livelihood, such as traditional farming, fishing or handicrafts. When customary land rights are not recognized, customary law communities can lose access to these resources, resulting in significant economic and social losses. In addition, cultural decline can also hamper the tourism industry. This not only harms the country's economic interests and development but in creating undue dependence on the tourism industry, the effects of the National Development Plan in Bali could seriously erode the traditional forms of subsistence of an agrarian society. The rampant development of tourism facilities has led to large-scale conversion of paddy fields and also disruption of irrigation channels which are very important for rice farming activities. This not only harms the country's economic interests and development, but also has a debilitating effect on sustainable development in Bali.⁴¹

The problem of recognizing customary land rights can create inequality and discrimination against indigenous and tribal peoples. When their rights are not adequately recognized or protected, they can experience unfair treatment and discrimination in access to resources, public services and economic opportunities.⁴² The presence of the rights of indigenous peoples as institutions that are recognized as long as they do not conflict with the spirit of development, so that there is an impression that the

⁴⁰ Jean-Philippe Leblond, 'Revisiting Forest Transition Explanations: The Role of "Push" Factors and Adaptation Strategies in Forest Expansion in Northern Phetchabun, Thailand', *Land Use Policy*, 83 (2019), 195–214 <https://doi.org/https://doi.org/10.1016/j.landusepol.2019.01.035>

⁴¹ Jhon Urasti Blesia, Keith Dixon, and Beverley Rae Lord, 'Indigenous Experiences and Perspectives on a Mining Corporation's Community Relations and Development Activities', *Resources Policy*, 80 (2023), 103202 <https://doi.org/https://doi.org/10.1016/j.resourpol.2022.103202>

⁴² Sophie Thériault, Sabrina Bourgeois, and Zoé Boirin-Fargues, 'Indigenous Peoples' Agency within and beyond Rights in the Mining Context: The Case of the Schefferville Region', *The Extractive Industries and Society*, 12 (2022), 100979 <https://doi.org/https://doi.org/10.1016/j.exis.2021.100979>

government is ignoring the rights of indigenous peoples.⁴³ While factually there is a spirit in society to strengthen the rights of indigenous and tribal peoples. Ignorance of customary land rights can increase the risk of eviction of indigenous peoples from their own lands. When their ulayat lands are claimed by other parties or used for development projects, indigenous and tribal peoples may face threats of eviction that disrupt their social, economic, and cultural life.⁴⁴

According to John Rawls freedom and equality are elements that form the core of the theory of justice. Rawls asserts that freedom and equality should not be sacrificed for social or economic benefits, however great the benefits may be derived from that angle. In line with the principle of justice according to John Rawls, The 1945 Constitution has provided a means to overcome inequality the position of its citizens, as stated in article 28 H paragraph (2), which states that everyone has the right to receive facilities and special treatment to obtain equal opportunities and benefits in order to achieve equality and justice. It can be concluded that the State can provide special treatment to its citizens to create equality and justice. In UUPA there is a principle of protection for class of citizens who are weak against fellow citizens who strong economic position, which is stated in article 11. This principle is a form of positive discrimination, wherein in this regulation, discriminatory matters are regulated to achieve justice and equality.

Equality before the law is of little use as long as there is a difference in the level of social and economic welfare is still quite wide in people's lives. That is why, every policy carried out by the state that involves the interests of the strong and the weak must benefit the weak position so that the gap in socio-economic differences does not widen. The state claims sovereign control over vast 'public lands' and begins a process of formalization that incorporates local populations into new lands whose production systems impose adverse conditions.⁴⁵

The process of formalization institutionalizes state governance in territories that previously resisted such political rationality, stabilizes existing property relations, and accommodates ad hoc settlements without substantially resolving detrimental formalizations while provoking new land politics⁴⁶. Indigenous peoples must be protected from threats, intimidation, or violence that may arise as a result of their claims or struggles for customary land rights. A fair and independent court system also needs to be available for them to resolve ulayat land disputes in a fair and transparent way. These impacts underscore the importance of recognizing and protecting customary land rights for customary law communities in Bali and Thailand. Comprehensive and sustainable efforts need to be made to address the problems of recognizing customary land rights and

⁴³ Kamaljit K Sangha and others, 'Recognising the Role of Local and Indigenous Communities in Managing Natural Resources for the Greater Public Benefit: Case Studies from Asia and Oceania Region', *Ecosystem Services*, 39 (2019), 100991 <https://doi.org/https://doi.org/10.1016/j.ecoser.2019.100991>

⁴⁴ Michelle Levy and others, 'Growing Stronger Together: Implementing the Strengthening Families Program with Indigenous Communities', *Child Abuse & Neglect*, 2023, 106241 <https://doi.org/https://doi.org/10.1016/j.chiabu.2023.106241>

⁴⁵ Liam Greal, 'Slow Withdrawal as Managed Retreat: Dismantling and Rebuilding an Indigenous Community Controlled Housing Sector', *Geoforum*, 136 (2022), 173–85 <https://doi.org/https://doi.org/10.1016/j.geoforum.2022.09.002>

⁴⁶ McCarthy and others.

ensuring the sustainability, prosperity, and cultural identity of indigenous and tribal peoples.

The support of the international community through the policy of ratifying international conventions into their national legal system is urgently needed. So that the state through law is obliged to accommodate the protection of the rights of indigenous peoples. The relationship between Indigenous peoples and their land is regulated in the United Nations Declaration on the Rights of Indigenous Peoples which reads as follows: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.⁴⁷

The description above, it can be seen that the United Nations recognizes the relationship between customary communities and their land. The recognition contained in this declaration includes the rights and obligations of indigenous peoples. The right possessed by indigenous peoples according to this Declaration is the right to maintain and develop their distinctive relationship both spiritually and materially with their lands, territories, waters, offshore areas, and other resources that they have traditionally owned. In addition to these rights, indigenous peoples are also given the obligation to be responsible for the fate of future generations.⁴⁸

In line with this, countries in the world have agreed on the recognition and protection of the rights of indigenous peoples, which is clearly stated in Article 14 paragraphs (1) and (2) of ILO Convention 169, which reads as follows, first, the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. Second, the governments shall take steps as necessary to identify the lands which the people concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.⁴⁹

Article 14 clearly states that the rights of ownership and control over land traditionally occupied must be recognized. In addition, measures must be taken to protect the rights of indigenous peoples to use lands that they not only control but to which they have long had traditional access. The situation of nomadic peoples and shifting cultivators deserves special attention. The government must identify lands that have traditionally been controlled by indigenous peoples and ensure effective protection of their rights of ownership and control over their lands. Various problems arise related to the weak

⁴⁷ Renata Leonhardt and others, 'Government Instruments for Community Renewable Energy in Northern and Indigenous Communities', *Energy Policy*, 177 (2023), 113560 <https://doi.org/https://doi.org/10.1016/j.enpol.2023.113560>

⁴⁸ Elana Nightingale and Chantelle A M Richmond, 'Building Structures of Environmental Repossession to Reclaim Land, Self-Determination and Indigenous Wellness', *Health & Place*, 73 (2022), 102725 <https://doi.org/https://doi.org/10.1016/j.healthplace.2021.102725>

⁴⁹ Sigrid Engen and others, 'Small Hydropower, Large Obstacle? Exploring Land Use Conflict, Indigenous Opposition and Acceptance in the Norwegian Arctic', *Energy Research & Social Science*, 95 (2023), 102888 <https://doi.org/https://doi.org/10.1016/j.erss.2022.102888>

recognition of indigenous peoples as legal subjects who have special and special rights. Then there were rampant violations of the rights of indigenous and tribal peoples by the state, especially customary rights. Thus, development laws and policies in Indonesia should pay special attention to the rights of indigenous and tribal peoples. The push for the government to immediately issue policies that are implementable for the recognition and protection of indigenous and tribal peoples continues.⁵⁰

The Participatory Strengthening of Customary Law Communities

Indigenous and tribal peoples in Thailand and Indonesia often face conflicts with other parties, including industrial companies, private land owners and the government. These parties can have interests that conflict with customary land rights of customary law communities. This conflict can have a negative impact on efforts to recognize and protect customary land rights, as well as increase the risk of eviction and misuse of communal land.⁵¹

In facing this challenge, it is important to involve all stakeholders involved, strengthen the capacities of indigenous and tribal peoples, improve coordination between relevant government agencies, and improve administrative procedures for the recognition of customary land rights. In addition, public awareness and support from civil society in fighting for the rights of indigenous and tribal peoples are also important factors in overcoming these challenges and obstacles. The presence of democratic values in local communities requires the existence of a rule of law at the regional level. Community participation in general and MHA in particular can take part in the formation of public policies including in the planning and formation of regulations in Law Number 12 of 2011 concerning the Formation of Legislation, clearly providing space for public participation. It is important to strengthen participatory mechanisms that involve indigenous and tribal peoples in the decision-making process regarding the recognition of customary land rights. This can be done through the establishment of special institutions or forums that represent customary law communities, where they have an active role in determining policies, mapping areas, and making decisions related to customary lands.⁵²

In Bali, the management of village funds is influenced by the customary village *awig-awig* in determining decision-making because village funds are handed over and the village government is directly given the authority to manage the funds that have been given. In the customary village system, the management of customary village funds involves village communities in their management, and some of the

⁵⁰ Filiberto Penados, Levi Gahman, and Shelda-Jane Smith, 'Land, Race, and (Slow) Violence: Indigenous Resistance to Racial Capitalism and the Coloniality of Development in the Caribbean', *Geoforum*, 2022 <https://doi.org/https://doi.org/10.1016/j.geoforum.2022.07.004>

⁵¹ Michele Graziano Ceddia, Ulrich Gunter, and Pasquale Paziienza, 'Indigenous Peoples' Land Rights and Agricultural Expansion in Latin America: A Dynamic Panel Data Approach', *Forest Policy and Economics*, 109 (2019), 102001 <https://doi.org/https://doi.org/10.1016/j.forpol.2019.102001>

⁵² Jessica Hernandez and others, 'Prevent Pandemics and Halt Climate Change? Strengthen Land Rights for Indigenous Peoples', *The Lancet Planetary Health*, 6.5 (2022), e381–82 [https://doi.org/https://doi.org/10.1016/S2542-5196\(22\)00069-9](https://doi.org/https://doi.org/10.1016/S2542-5196(22)00069-9)

traditional villages are managed and their villages are influenced by the customary village policies themselves and their customary village laws.⁵³

The better awareness and understanding of customary land rights need to be increased, both among customary law communities and among the general public. There is still little understanding of the role of communities in place creation in tourism when place creation is the result of organic, community-led processes. Making places through emic, organic, folkloric, community-based initiatives that are very different from the usual formal 'industry'.⁵⁴ Information, education, and training campaigns targeting indigenous and tribal peoples, government, academics, and other stakeholders can help raise awareness and strengthen understanding of the importance of recognizing customary land rights. Managers and decision-makers need a better understanding of the policy systems in place to meet conservation targets to inform post-2020 CBD policy implementation.⁵⁵

It is important to carry out accurate and comprehensive mapping and documentation regarding customary land and land rights claims by indigenous peoples. This will strengthen the evidence and arguments in favor of recognizing customary land rights, as well as provide a strong basis for negotiations with the government and other relevant parties. Collaboration and partnerships between indigenous and tribal peoples, civil society organizations, academics, and government are very important. Through close collaboration, they can advocate for the recognition of customary land rights, exchange knowledge and experiences, and jointly address emerging challenges. A collaborative approach can also include organizing cross-sectoral meetings, dialogues, and discussions to find common solutions. These solutions and efforts must be carried out in a holistic and sustainable manner, involving all relevant stakeholders. Only by adopting a comprehensive approach can the recognition of customary land rights for indigenous and tribal peoples be strengthened and guaranteed, so that they can maintain the continuity of their culture and obtain just welfare.⁵⁶

4. Conclusion

Indigenous peoples, as a group attached to a distinctive culture and customs, have lived and interacted with land and natural resources since ancient times. Ulayat land rights are collective rights owned by customary law communities over

⁵³ Ranjan Datta, Margot A Hurlbert, and William Marion, 'Indigenous Community Perspectives on Energy Governance', *Environmental Science & Policy*, 136 (2022), 555–63 <https://doi.org/https://doi.org/10.1016/j.envsci.2022.07.010>

⁵⁴ Trevor Sofield, Jaime Guia, and Jan Specht, 'Organic "Folkloric" Community Driven Place-Making and Tourism', *Tourism Management*, 61 (2017), 1–22 <https://doi.org/https://doi.org/10.1016/j.tourman.2017.01.002>

⁵⁵ Kelly Dunning, 'Biodiversity Conservation Policy in Megadiverse Countries: Comparing Policy Systems for 2020 Targets to Inform Management in the Coming Decades', *Journal of Environmental Management*, 302 (2022), 113815 <https://doi.org/https://doi.org/10.1016/j.jenvman.2021.113815>

⁵⁶ Samantha Darling, Blane Harvey, and Gordon M Hickey, 'From "Stakeholders" to Rights Holders: How Approaches to Impact Assessment Affect Indigenous Participation in the Yukon Territory, Canada', *Environmental Impact Assessment Review*, 99 (2023), 107025 <https://doi.org/https://doi.org/10.1016/j.eiar.2022.107025>

the land they inhabit and manage. Biodiversity, natural beauty, and unique customs are the main attraction for tourists. However, in its utilization there is often a conflict of interest between the local customary law community and the state, this has been experienced by Indonesia and Thailand. The factors that influence the problem of protecting customary land rights in Indonesia and Thailand such as the existence of legal dualism in land management, conflict of interest between indigenous peoples and the state, and unclear boundaries of customary land territories. Then, the impact of the problematic protection of customary land rights on customary law communities is legal uncertainty regarding the protection of customary land, the decline in the welfare of customary law communities, and inequality and discrimination of indigenous and tribal peoples.

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