

# Legal Protection of The Customary Rights of The Pubabu-Besipae Indigenous People

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KEYWORDS	ABSTRACT
Customary Rights; Culture; Legal Protection	Ulayat land is land shared by indigenous communities. Customary land is closely related and is an integral part of customary land rights. Customary rights are the rights owned by indigenous peoples to utilize natural resources for survival. The existence of indigenous communities has been explicitly recognized in national law, such as the Basic Agrarian Law and the Forestry Law. However, recognition of customary rights is still often ignored by the Government, this is the case in the Pubabu-Besipae indigenous community. Therefore, the aim of this research is to find out how the law protects the customary rights of indigenous communities. This research uses normative legal methods and uses a statutory approach. The research findings show that legal recognition and protection of customary rights are very clearly recognized and regulated, so the government should not be able to control customary land arbitrarily according to its wishes. Ownership of customary land has limitations in carrying out legal actions and must take into account the prosperity of indigenous communities. So the actions taken by the East Nusa Tenggara Government are actions that violate the human rights of indigenous peoples because there are arbitrary actions and even acts of violence against indigenous peoples. The government should hold joint discussions with indigenous communities to reach a fair agreement

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## 1. Introduction

Customary land is the common land of customary law communities, which is believed to be a relic from their ancestors, which contains spiritual values and is the main supporting element for the lives and livelihoods of indigenous groups. The use of customary land will always be closely related to customary rights, where the two things are an inseparable unity (Marizal et al., 2022). Customary rights are inherent rights of Indigenous peoples owned by certain Indigenous peoples, in certain areas where their members reside, and these rights have been officially recognized by the government and have been regulated in national law, so this gives the ability to Indigenous peoples to manage and utilize natural resources including land to maintain the survival of Indigenous community members (Wangi et al., 2023).

In general, *the existence of indigenous peoples and their customary law is regulated in Article 3 paragraph (1), Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (hereinafter referred to as UUPA) (Indonesia, 1960) which states that "In view of the provisions of*

articles 1 and 2, the exercise of customary rights and similar rights, of Indigenous peoples, so far as they exist, shall be such that they are in accordance with national interests and States based on national unity and shall not contradict other higher laws and regulations." Furthermore, it is also regulated in Article 5 of the UUPA, which states that "Agrarian Law applicable to earth, water and space is customary law, as long as it does not conflict with national and state interests, based on national unity, with Indonesian socialism and with regulations contained in the Law and with other laws and regulations, all by revealing elements that rely on religious law." Also in Article 67 paragraph (1) of Law Number 41 of 1999 concerning Forestry (hereinafter referred to as the Forestry Law) (Pemerintah Pusat, 1999), which states that "Indigenous peoples to the extent that they exist and are recognized have the right: a. to collect forest products to meet the daily needs of the indigenous peoples concerned; b. carry out forest management activities based on applicable customary law and not contrary to the law; c. get empowerment in order to improve their welfare.

In spite of the fact that acknowledgment of standard rights is directed in laws and controls, disregard for standard rights still regularly happens. Presently there are still issues related to innate people groups and their standard law, as experienced by innate people groups in Pubabu Besipae Town, South Amanuban Locale, Central Timor Rule, East Nusa Tenggara Territory, where their standard arrival and standard woodlands will be utilized as product development regions covering a range of 6000 ha, but the execution of the program without the assent of the Pubabu-Besipae inborn individuals has activated clashes between Government with innate people groups (Ikatan Tokoh Adat Pencari Kebenaran dan Keadilan, 2020). Based on this reality, the purpose of this study will examine how the legal protection of the customary rights of the indigenous people of Pubabu-Besipae.

## 2. Materials and Methods

Normative legal research was used as a methodology in this study. According to Peter Mahmud Marzuki; Normative legal research is a process to find a rule of law, legal principles, and legal doctrines to answer the legal issues faced (Marzuki, 2007, p. 35). The approach used is the *statutory approach* (*statute approach*). That is the approach by examining the laws and regulations related to the legal issue being studied.

## 3. Results and Discussions

### **Conflict between the Local Government of East Nusa Tenggara Province and the Pubabu Besipae Indigenous People**

The conflict began with the rejection of the Besipae indigenous community over the offer of an extension of land use loans in the Pubabu-Besipae customary forest area. This conflict includes Linamnutu, Mio, and Oe Ekam villages. In 1987, for 25 years the territory of the indigenous Pubabu-Besipae community was used as a cattle breeding project area which was a collaboration between the East Nusa Tenggara Regency Government and the Australian State. Two years before the end of the cooperation in 2010, the indigenous people of Pubabu-Besipae rejected an offer from the East Nusa Tenggara Regency Government to extend the time to borrow land (Bere & Lay, 2023). The chronology of the cases of the Indigenous people of Pubabu-Besipae in detail is as follows: (Wicaksono, 2020)

1. In 1927, the indigenous people of Pubabu-Besipae together with the Dutch Colonial Government designated the Pubabu-Besipae forest area with an area of 2,674.4 Ha as customary forest. This

forest is located in South Amanuban District, South Central Timor Regency, East Nusa Tenggara Province.

2. In 1982, the Provincial Government of East Nusa Tenggara entered the Besipae region by collaborating with the indigenous people of Pubabu-Besipae in the implementation of the Livestock Intensification Pilot Project.
3. The project involved Oe Ekam Village, Mio Village, Poli Village, and Linamnutu Village. The land and forests of indigenous peoples used to cover an area of 6000 Ha.
4. This cooperation project was implemented by the Provincial Government of East Nusa Tenggara with the Australian Government, for a period of 5 years from 1982 to 1987. This project involves Oe Ekam Village, Mio Village, Poli Village, and Linamnutu Village.
5. In 1987, after the Livestock Intensification Program ended, the Forestry Service implemented the National Forest Rehabilitation Movement (GERHAN) program in the areas of Polo Village, Milo Village, Oe Ekam Village, and Eno Neten Village, South Amanuba District with a land area of 6000 Ha.
6. Through this program, the area was used as a cultivation area for commodity crops, such as teak and mahogany, under the Right to Cultivate (HGU) scheme, starting from 1988 to 2008. Where the implementation of this program is without the consent of the community.
7. Since this program was implemented, the rights of the indigenous people of Pubabu-Besipae began to be taken away. In 1995 the Forestry Service issued a forestry land register with number 29 signed by the Governor of East Nusa Tenggara and contained in the State Boundary Gazette which included the Pubabu-Besipae customary forest area in the state forest area with a protected forest function of 2900 Ha.
8. During this program, the South Central Timor Forestry Service reportedly cleared and burned the 1050 hectares of Pubabu-Besipae customary forest, which resulted in this forest becoming deforested from 2003 to 2008.
9. In 2008, indigenous people took action to reject the extension of the HGU for the GERHAN program. Natural forest clearing activities have resulted in the drying up of wells around forest areas that have been the community's water source.
10. The rejection of the indigenous people was fruitless. There was a clearing of Besipae forests in Pollo Village and Linamnutu Village by a group of people formed by the South Central Timor Forestry Service with the excuse of rehabilitating forests through GERHAN. The forest clearing was reported by the indigenous Pubabu community to the National Commission on Human Rights (Komnas HAM) in 2009.
11. In 2011 the Pubabu-Besipae Indigenous people who are members of the Association of Indigenous Leaders Seeking Truth and Justice made a letter canceling the contract extension of the East Nusa Tenggara Provincial Livestock Office at the Besipae installation with letter number: 03/ITAPKK/II/2011.
12. In the same year, Komnas HAM issued letter number 873/K/PMT/IV/2011 regarding the forest problem of the Pubabu-Besipae indigenous people. With the contents of the letter, among other things, keep the situation safe and conducive in the community and avoid intimidation until there is a solution to solve the problem.

13. Then Komnas HAM also emphasized, keeping forest areas sustainable, temporarily suspending the activities of the East Nusa Tenggara Provincial Livestock Service and the South Middle East District Forestry Service on problematic lands until there is a settlement. Finally, Komnas HAM will follow up on complaints from the indigenous people of Pubabu by monitoring the location and/or mediation efforts.
14. However, in October 2012 there was a criminalization of 17 indigenous peoples. 4 of them were women but were later released due to insufficient evidence. In addition to women, there are also 2 underage boys who are also criminalized. 1 citizen was detained for 2 months and 10 others were detained for 4 months.
15. In November 2012, the National Commission on Human Rights Indonesia (Komnas HAM) again issued a letter, number 2,720/K/PMT/XI/2012 regarding the forest problems of the Pubabu-Besipae indigenous people. The contents of the letter are returning agricultural land borrowed by the Livestock Office of East Nusa Tenggara Province which ended in 2012 to residents and evaluating the Regional Technical Implementation Unit (UPTD) of East Nusa Tenggara Province.
16. On March 19, 2013, the Government issued a Certificate of Right to Use with Number 00001/2013-BP.794953 with an area of 3,780 Ha, on behalf of the Provincial Government of East Nusa Tenggara. The certificate is the basis for ownership of the Pubabu customary forest. This is what then triggers conflict. Because in 2011, indigenous peoples through the Association of Indigenous Leaders, Enforcers, Truth and Justice had sent a letter canceling the contract extension with the East Nusa Tenggara Provincial Livestock Office.
17. In October 2017, the conflict escalated because the East Nusa Tenggara Provincial Government intimidated the indigenous Pubabu-Besipae community. At that time, the Livestock Office of East Nusa Tenggara Province together with the Civil Service Police Unit came to the community and requested that the indigenous people of Pubabu-Besipae immediately vacate the land. On the grounds that the land belongs to the East Nusa Tenggara Provincial Government on the basis of the Right to Use Certificate issued in 2013.
18. The peak of the conflict occurred in 2020, where a joint team consisting of Brimob, the Civil Service Police Unit, and The Indonesian National Armed Forces, evicted 3 heads of families and in the eviction, there was physical violence that resulted in homelessness.
19. On May 12, 2020, the Governor of East Nusa Tenggara (Viktor Laiksodat) visited the location of the Pubabu-Besipae customary forest walked to the community hut, and asked the community to dismantle the fence around the house, but the community responded with a topless action carried out by Pubabu-Besipae mothers.
20. On August 18, 2020, a joint team of officials evicted and destroyed houses belonging to 29 households in Besipae. This action was accompanied by firing several firearms. These repressive acts leave trauma for women and children.
21. On August 21, 2020, the East Nusa Tenggara Provincial Government together with Besipae traditional leaders, made an agreement to end the issue of customary land conflicts. There are several points in the agreement, namely; Pubabu-Besipae land covering an area of 3780 ha remains owned by the East Nusa Tenggara Provincial Government, 37 Pubabu-Besipae families acquired 800 square meters of caveling land.

22. However, the agreement received negative reactions from a number of indigenous Pubabu people. Some indigenous peoples still remain in the eviction site and reject dispute resolution agreements. The reason is that the agreement was carried out and made without involving the Pubabu community who are fighting to defend Pubabu customary land and forests.

### **Legal Protection of the Customary Rights of the Pubabu-Besipae Indigenous Peoples According to Applicable Legal Regulations.**

According to Satjipto Raharjo, legitimate protection is to supply protection for human rights (HAM) harmed by others which security is given to the community in arrange to appreciate all the rights given by law. The law is utilized to realize assurance that's not as it were versatile and adaptable but too contains a prescient and expectant nature. Laws are given to those who are frail and not however solid socially, financially, and politically in arrange to get social equity (Raharjo, 2002, p. 58).

Legal protection of the customary rights of indigenous peoples is part of the human rights of indigenous peoples. This is recognized not only at the national level but also recognized at the international level, as stipulated in Article 17 paragraph (1) of The Universal Declaration of Human Rights, which states: "Everyone has the right to own property alone as well as in association with others." In the article, it is said that everyone has the right to own property either alone or with other parties. This is very important in relation to the rights of indigenous peoples because indigenous peoples have the characteristics of communal rights. This international provision was adopted into Law Number 39 of 1999 concerning Human Rights (Indonesia, 1999). The realization of the recognition of indigenous peoples' rights to their land as part of human rights is contained in Article 6 paragraph (1), which states that "In order to uphold human rights, differences and needs within customary law communities must be considered and protected by law, the community, and the Government." Furthermore, Article 2 states that "The cultural identity of indigenous peoples, including customary land rights, is protected, in line with the times." The provisions in Article 6 clearly mention customary rights, which mandate that customary rights that are part of cultural identity must be protected. When looking at these provisions, it can be said that the existence of customary rights of Indigenous peoples is not only recognized but must also be protected and this is a manifestation of the responsibility of the State, in this case, the Government to the community (Widowati et al., 2014).

Recognition of customary rights is contained in various other statutory provisions even in the Constitution of the Republic of Indonesia Year 1945 Second Amendment (hereinafter referred to as UUD NR 1945) and TAP MPR No. IX Year 2001 (Muchsin & Soimin, 2010). In addition, there are several other provisions that will explain in detail regarding the recognition and legal protection of Indigenous peoples, as follows: (Dwiyatmi, 2020, p. 29)

1. Article 18B paragraph (2) of the 1945 NR Constitution, which states that "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are stipulated in the Law."
2. TAP MPR No. IX / MPR / 2001 concerning Agrarian Reform and Natural Resources Management, regulated in Article 4, which states that "One of the principles that must be upheld in the implementation of agrarian reform and natural resource management is the recognition, respect,



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and protection of the rights of customary law communities and the nation's cultural religion or agrarian resources / natural resources."

3. Law Number 39 of 1999 concerning Human Rights, regulated in Article 6 paragraph (2), which states that "The cultural identity of customary law communities, including customary land rights is protected in line with the times."
4. Law Number 41 of 1999 concerning Forestry, which is regulated in several articles;
  - Article 1 point (6), which states that "Customary forests are State forests that are within the territory of customary law communities."
  - Article 4 paragraph (3), which states that "Forest tenure by the State shall continue to take into account the rights of indigenous peoples, as long as they exist and are recognized for their existence, and do not conflict with national interests."
  - Article 5 paragraph (1), which states that "forests by virtue of their status consist of (a) State forests, and (b) rights forests." Furthermore, Article 5 paragraph (2), states that "State forests as referred to in paragraph (1) letter (a) can be customary forests."
5. Constitutional Court Decision No. 35/PUU/PUU-X/2012, which granted the petition of the Petitioners, among the decisions granted as follows: (Tobroni, 2016)
  - The word "state" in Article 1 number 6 of the Forestry Law is contrary to the 1945 NR Constitution. The word "state" in Article 1 number 6 has no binding legal force, so it must be understood to mean "customary forest is a forest that is within the territory of customary law communities."
  - Article 4 paragraph (3) of the Forestry Law is contrary to the 1945 NR Constitution. Therefore, the article must be interpreted as "Forest control by the state continues to pay attention to the rights of customary law communities, as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as stipulated in law."
  - Article 5 paragraph (1) of the Forestry Law is contrary to the 1945 NR Constitution. Therefore, although Article 5 paragraph (1) of the Forestry Law reads "Forests based on their status consist of; a. State forests, and; b. forest rights; It must still be interpreted as "State forests as referred to in paragraph (1) letter a, excluding customary forests."
  - Article 5 Paragraph (2) of the Forestry Law is contrary to the 1945 NR Constitution so that it has no binding legal force.
  - The phrase "and paragraph (2)" in Article 5 paragraph (3) of the Forestry Law is contrary to the 1945 NR Constitution. The phrase "and paragraph (2)" in Article 5 paragraph (3) must be declared missing so that it must read "The government determines the status of forests as referred to in paragraph (1); and customary forests are established as long as in reality the peoples concerned still exist and are recognized for their existence."

As the Constitutional Court Decision has been described in detail above, the State should not be able to control land arbitrarily according to its own will, but there are restrictions on carrying out actions and legal relations to be carried out. Land tenure by the State must pay attention to the prosperity of the community. So even though the state is given the right to exercise land tenure, but as a result of the land tenure does not create prosperity for the community, the land tenure is contrary to what is mandated in the applicable laws and regulations. This is often ignored where indigenous

peoples are often excluded when the State/Government with its control rights, overrides the rights of indigenous peoples in natural resource management for reasons of national interest. Indigenous peoples are often labeled as backward, ancient groups and various negative stigmas associated with their daily life activities. Indigenous peoples are also often seen as an obstacle to development when they seek to fight for their land rights (Pratama et al., 2022). As happened in the Pubabu-Besipae indigenous community, where the Government ignored the rights of indigenous peoples, the Government carried out evictions and acts of violence that were contrary to the prevailing laws and regulations.

Based on the description above, it is clear that there have been regulations on indigenous peoples and their customary law, but in this case, the Provincial Government of East Nusa Tenggara does not obey the applicable law. Instead of being a recognition and legal protection for indigenous peoples, in reality, it is inversely proportional to the applicable legal regulations. The Provincial Government of East Nusa Tenggara takes actions where Indigenous peoples experience eviction to acts of violence which are violations of the human rights of Indigenous peoples if the Provincial Government of East Nusa Tenggara controls customary land from the Indigenous people of Pubabu-Besipae a rightful approach should be taken to indigenous peoples, not only some but all parts of indigenous peoples are listened to regarding their wishes, Joint deliberation is one of the best ways to reach mutual agreement and must still pay attention to the prosperity of the community in accordance with the mandate of the laws and regulations. Then the Government should encourage interaction in efforts to prevent and fight all forms of deprivation of rights from indigenous peoples in accordance with applicable legal regulations.

#### **4. Conclusion**

Based on the above analysis, it is concluded that the recognition of the existence of indigenous peoples has been regulated in laws and regulations, such as in the 1945 Constitution of the Republic of Indonesia, the TAP MPR No. IX of 2001, the UUPA, the Forestry Law and the Constitutional Court Decision Number 35/PUU/PUU-X/2012. Likewise, regarding legal protection for indigenous peoples, legal protection for indigenous peoples is recognized nationally and internationally and is part of human rights regulated in Law Number 39 of 1999 concerning Human Rights. Regulations related to the legal recognition and protection of indigenous peoples have been very clear, so the Government should not be able to arbitrarily control land from indigenous peoples because such actions are illegal acts of applicable law.

Thus, the actions taken by the East Nusa Tenggara Provincial Government against the Pubabu-Besipae indigenous people are unlawful acts, the taking of customary land accompanied by acts of violence and evictions is an act that violates the human rights of indigenous peoples, as mandated in Law Number 39 of 1999 concerning Human Rights..

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