

LEGAL CERTAINTY OF INDIGENOUS PEOPLE'S LAND RIGHTS OF FORMER CUSTOMARY LAND OWNERSHIP EVIDENCE AFTER ITS VALIDITY PERIOD EXPIRES

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Article Info

Keyword:

Customary Land Rights,
Legal Certainty,
Indigenous,
Communities,
Transitional Justice

Abstract

This article examines the legal protection afforded to holders of written proof of customary land ownership in Indonesia, particularly after the enactment of Article 96(2) of Government Regulation No. 18 of 2021, which stipulates that the document becomes invalid after five years. The provision has raised serious concerns about the legal certainty and constitutional rights of indigenous peoples. Using normative juridical methods and conceptual approaches, this study analyzes the tension between state-imposed administrative requirements and the recognition of land tenure based on historically rooted customary law. The study revealed that the abrupt cancellation of customary land documents without a transitional mechanism creates legal exceptions and exacerbates structural inequalities, especially among rural and indigenous peoples with limited access to legal resources. The analysis reveals that such a policy contravenes the principles of procedural fairness, legitimate expectations, and the protection of property rights, as guaranteed by the 1945 Constitution of Indonesia and international human rights instruments. The article argues for a rights-based and restorative framework to ensure transitional legal protection and the recognition of non-formal evidence rooted in Indigenous traditions. This approach is essential to aligning agrarian policy with justice, inclusivity, and constitutional obligations.

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Article history:

Received: February 7, 2025; Received in revised form: April 10, 2025; Available online: May 26, 2025

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Introduction

The Constitution of the Republic of Indonesia explicitly acknowledges the existence of Indigenous law communities and their traditional rights, as stipulated in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution. Philosophically, this recognition reflects the principle of substantive justice within a democratic state governed by the rule of law, whereby legal norms must not merely reflect the will of the majority but also serve to protect minority groups and local values passed down through generations (Rawls, 2001). From a juridical perspective, Indigenous peoples' rights to their customary land are categorized as collective economic human rights, placing a positive obligation on the state to safeguard and respect these rights within the national land law system (Anaya, 2004). Sociologically, however, the implementation of these constitutional principles continues to face structural inequalities, particularly in terms of access to land administration services and the formal recognition of traditional land documents such as *girik*, *ketitir*, *petuk land tax/landrente*, or hereditary land certificates (Harsono, 2020). The core problem lies in the gap between state law, which emphasizes formal legality, and customary law, which is grounded in social legitimacy and collective recognition (Paryanto, 2021). When the state imposes an expiration period on customary land documents without an inclusive transitional mechanism, it effectively neglects the historical and socio-cultural dimensions of Indigenous land ownership that are maintained through non-formal means. In contrast, various modern legal systems have adopted more accommodative approaches to Indigenous land rights, including the acceptance of unwritten or community-based evidence within land governance frameworks (Cook, 2020). This condition underscores the need to reconstruct the relationship between the state and Indigenous law communities, particularly in a manner that ensures legal certainty without sacrificing communal justice (Dhiaulhaq & McCarthy, 2020).

Numerous legal discourses have addressed the vulnerability of Indigenous communities in accessing the national land administration system, particularly when confronted with rigid administrative requirements such as formal certification and legal documentation. The prevailing reliance on formal written evidence often marginalizes forms of land ownership rooted in communal legitimacy, which has been socially recognized for generations (Ndi et al., 2022). In this context, documents such as *girik*, *ketitir*, *petuk land tax/landrente*, or hereditary land certificates are often considered to have no adequate legal basis. Nonetheless, existing legal debates tend to focus on administrative challenges, while ignoring the substantive legal implications that arise when such customary documents are expressly declared invalid by state regulations. This creates a normative vacuum that directly impacts the legal status of Indigenous land. Within the framework of legal theory that upholds the principle of legal certainty, the elimination of evidentiary value from longstanding land documents without providing equivalent legal protection mechanisms risks producing systemic legal uncertainty (Tapia-Hoffmann, 2021). This research contributes to filling that gap by offering a normative analysis of Article 96 (2) of Government Regulation No. 18 of 2021 and assessing its consequences on the recognition of Indigenous land rights within Indonesia's agrarian legal system.

The imposition of a five-year deadline for holders of written evidence of former customary land to register their land, as stipulated in Article 96 (2) of Government Regulation No. 18 of 2021, poses a significant risk of reinforcing structural inequalities in access to land rights. Many Indigenous communities face serious challenges in understanding formal legal procedures, lack access to legal assistance, and are further constrained by geographic and administrative barriers to reaching land registration offices. Within the framework of a state

governed by the rule of law, administrative actions by the state must not negate substantive rights of its citizens especially those rights protected under the Constitution (Lähteenmäki-Uutela et al., 2021). When the state fails to accommodate the structural limitations faced by Indigenous communities, the risk of legal marginalization increases.

Moreover, policies that disregard prevailing social realities tend to exacerbate agrarian conflicts, particularly in areas where customary land ownership is dense and contested. The disjunction between normative law and social fact in this context reflects a failure of the state to fulfill the distributive function of law in an equitable manner (Phiri, 2022). Legal systems that overlook socio-cultural constraints in favor of rigid formalism risk legitimizing exclusion and perpetuating systemic injustice under the guise of procedural neutrality.

The legal issue arising from the implementation of Article 96 (2) of Government Regulation No. 18 of 2021 directly engages with the core principles of legal certainty and the constitutional protection of property rights. When written evidence of prior customary land ownership is declared invalid after a certain time limit, the fundamental question arises as to whether the state has provided a fair and proportionate legal alternative for Indigenous peoples. Legal instruments that regulate the proof of land ownership should not only rely on a formalist-positivist approach but should also take into account the principles of substantive justice embedded in people's life experiences (Suwito et al., 2023). The exclusion of forms of proof that are outside the administrative norms of the state, but recognized by indigenous peoples, can be considered as a violation of protected property rights under international legal standards (Penner & Smith, 2013). In this context, the essential inquiry becomes how far the state may legitimately revoke traditional evidentiary instruments that have been historically and culturally recognized, and what form of legal protection should be enacted to prevent the unilateral extinguishment of Indigenous land rights.

This study aims to examine the legal protection provided to holders of written evidence of customary land ownership in Indonesia, particularly after the enactment of Article 96 (2) of Government Regulation No. 18 of 2021, which states that such documents are no longer valid after five years. Previous research has shown that the transfer of land that was previously customary property through a deed of sale by the sub-district head as the Provisional Land Deed Official has legal force and is binding (Suryadi et al., 2024). The Indonesian government, through the Basic Agrarian Law, still emphasizes the unity of national land law but has not paid sufficient attention to customary rights to customary land. The orientation that emerges in the registration of customary land is that priority is given to the unity of national land law, as well as the regulations and field practices that support it (Simarmata, 2021). Positive law in Indonesia governing customary rights is still ambiguous and has not been clearly regulated, so the government can still act arbitrarily. Customary rights, which are the highest rights of control of indigenous peoples, are often ignored and even taken away by the government (Kristiani, 2020). The sale and purchase of customary land according to customary law is carried out by the seller as the owner by communicating with relatives in the *soa/mata rumah/marga* to obtain approval in the form of a letter of release of rights to customary land. If approval is not obtained from the *soa/mata rumah/marga*, the sale and purchase are certainly not valid according to customary law (Belseran et al., 2023).

Research Method

This study uses a legislative approach with the aim of conducting an in-depth study of the juridical construction of existing norms in laws and regulations (Nalle, 2023). This methodological approach is intended to evaluate the normative coherence of existing

regulations with universal standards of justice and the state's obligation to protect traditional rights. Consequently, the study is not only descriptive-analytical in its legal interpretation but also evaluative regarding the legal protection afforded to Indigenous communities in the context of national agrarian practices.

Results and Discussions

The Constitutional Relevance of Indigenous Rights Recognition

The recognition of Indigenous law communities within the Indonesian legal system is firmly grounded in the 1945 Constitution of the Republic of Indonesia. Article 18B (2) affirms that the state acknowledges and respects the existence of traditional communities and their customary rights, insofar as they are still alive and consistent with the development of society and the principles of the Unitary State of the Republic of Indonesia. Furthermore, Article 28I (3) strengthens this by asserting that cultural identity and the rights of traditional communities must be respected by the advancement of civilization. Normatively, these provisions place the rights of Indigenous peoples within the domain of constitutional rights that cannot be overridden by administrative policies or technical regulations (Sundariwati, 2024).

The state is required to develop a legal framework capable of bridging Indigenous values with the demands of national legal certainty. When tensions arise between formal evidentiary systems and long-standing traditional rights, the interpretation of Articles 18B and 28I of the Constitution must aim to safeguard the continuity of Indigenous rights as constitutional entitlements that cannot be subordinated to temporary administrative procedures.

The constitutional recognition of Indigenous law communities entails an active obligation on the part of the state to guarantee, respect, and fulfill their rights in concrete terms. Within the framework of a modern rule-of-law state, recognition without corresponding implementation amounts to a denial of constitutional accountability and risks reducing such recognition to a mere symbolic gesture. The rights of Indigenous peoples to land that has been collectively inherited across generations cannot be confined to constitutional rhetoric; they must be safeguarded through affirmative state action that ensures the effective realization of these rights within the positive legal system (Gómez-Sánchez, 2024). From a human rights perspective, the state bears positive obligations toward vulnerable groups, including Indigenous communities, and such obligations must be fulfilled through equitable regulation and fair access to legal mechanisms (Tiedemann, 2023).

In international practice, such obligations include the legal recognition of Indigenous forms of land ownership, the formulation of policy frameworks that protect *ulayat* (communal) land, and the adaptation of national legal instruments to ensure that non-formal ownership evidence recognized under customary law is not subjected to discriminatory treatment. When a state enacts regulations such as Article 96 (2) of Government Regulation No. 18 of 2021 which imposes an expiration period on customary land documents such measures must be interpreted through the lens of constitutional rights protection rather than mere administrative efficiency. The state's obligation in this context involves the establishment of transitional mechanisms, community-based legal services, and the acknowledgment of legal pluralism that characterizes Indonesian society (Charters & Stavenhagen, 2009).

The state is also required to uphold the principle of substantive equality, which entails treating Indigenous communities not through uniform formal standards, but through differentiated approaches that take into account their structural vulnerabilities and cultural barriers (Enno Sellya Agustina, 2025). This aligns with the principle of contextual justice in

modern constitutional law, which rejects the assumption that formal equality constitutes justice, and instead promotes inclusive and participatory approaches in the formulation and implementation of public policy (Khaitan, 2015). Failure to meet this obligation risks reinforcing the legal exclusion of Indigenous peoples and undermining the legitimacy of the state as a guarantor of equal protection for all citizens without discrimination.

Constitutional recognition of Indigenous rights cannot be separated from the necessity of granting legal legitimacy to land ownership evidence grounded in customary systems. Documents such as *girik*, *ketitir*, *petuk land tax/ landrente*, and other forms of non-certificate-based proof, although not classified as formal evidence under positive law, have long held legitimate status within Indigenous communities as concrete representations of land ownership. Disregarding the existence of such documents effectively means dismissing the recognition of living law the normative systems that organically operate within customary societies. Within the framework of a pluralistic agrarian legal system, evidentiary instruments that are socially validated must be accorded legal protection as part of the constitutional guarantee of property rights (Gilbert, 2018).

The protection of customary land documents is also an integral component of the principle of legal empowerment, which emphasizes strengthening the legal standing of marginalized groups by recognizing their local legal systems (Banakar, 2015). When the state exclusively acknowledges formal evidence in the form of land certificates without accommodating traditional documentation that predates the introduction of formal land registration systems—it risks perpetuating inequality in access to justice. This condition is further exacerbated by the implementation of Article 96 (2) of Government Regulation No. 18 of 2021, which limits the validity of written evidence of customary land ownership to only five years from the date the regulation took effect. Such a restriction may be interpreted as the legal erasure of ownership claims that remain socially and communally recognized within Indigenous law communities. In the context of land rights, evidence documents serve not only as administrative records but also as anchors of collective memory and an existential foundation for Indigenous peoples to their ancestral territories.

Access to Land Registration: Sociological Reality and the Risk of Marginalization

One of the main obstacles faced by customary law communities in the land registration process is limited access to the national land administration system, which relies heavily on technical procedures and legal formalities. Most Indigenous peoples live in remote areas with minimal infrastructure, making physical access to land offices or legal services institutions a significant barrier. In addition, the low level of legal literacy means that many members of society are unaware of the importance of legalizing land ownership in the state system. This lack of awareness is not only a result of limited formal education but also reflects a deep epistemological gap between the country's legal systems (Graham, 2010). In many cases, indigenous peoples do not have the administrative capacity to prepare the necessary documentation, such as heritage certificates or technically appropriate land maps.

This limitation is further exacerbated by the lack of state support through community-based legal services or participatory outreach programs. State-managed land registration systems tend to be top-down and less inclusive of social and cultural diversity, which often leaves Indigenous peoples feeling alienated from the legal process that should, in principle, serve to protect them.

In many Indigenous communities, land ownership is based not on formal documentation, but on collective recognition, genealogical relations, and social agreements that are not recorded administratively, yet carry authoritative legitimacy within the community's

social structure. The imposition of administrative formalism in such contexts not only ignores the lived legal consciousness of Indigenous societies but risks invalidating long-standing customary arrangements that have historically regulated land tenure.

When state law fails to comprehend the social logic underlying Indigenous practices of land ownership and inheritance, the result is the emergence of widespread structural injustice. Requiring Indigenous peoples to prove land ownership through documentation they have never historically used constitutes a form of legal disenfranchisement—the marginalization of communities from the legal system due to evidentiary standards that are inherently exclusionary (Tamanaha, 2021). A legal system that is unaccommodating of social complexity risks gradually eroding the existence of customary law, as state regulations compel communities to conform to a legal order they neither understand nor can easily access.

In such circumstances, state law ceases to function as a means of social integration and instead operates as a mechanism of exclusion, privileging administrative compliance over substantive justice. This imbalance reveals that the effectiveness of law cannot be measured solely by its formal validity, but also by its ability to respond to social realities and maintain social legitimacy within a pluralistic society. When the law is unable to bridge the diversity of recognition and evidentiary systems regarding land rights, it risks failing in its role as a social regulator and instead contributes to deepening social inequality and escalating agrarian conflict.

From the perspective of socio-legal theory, entrenched inequalities in access to and recognition of land rights cannot be overcome simply by providing equal legal treatment. What is needed is the application of the principle of substantive equality, which emphasizes the recognition of contextual differences and the special needs of minority groups. Without such an approach, the law risks reproducing exclusion under the guise of formal legitimacy.

Moreover, the disregard for the unique characteristics of customary land ownership systems exacerbates land distribution inequality and reinforces the dominance of groups more integrated into the state legal framework. This condition leads to structural invisibility, wherein Indigenous communities are systematically rendered invisible in the formulation of policy and the compilation of administrative land data (Levi & Durham, 2015). In such situations, substantive justice remains unfulfilled because those most in need of protection are often the ones most adversely affected by state policy. As a result, there is an urgent need to restructure the agrarian legal paradigm to become more responsive to the diversity of social systems and to prevent the law from functioning as a tool of exclusion against those without access to formal legal recognition.

When a state regulation explicitly sets an expiration date for written evidence of former customary land ownership, it creates an urgent need for the establishment of transitional legal protection mechanisms. The sudden loss of evidentiary value concerning land rights is not merely an administrative issue, but a fundamental deprivation of property rights that have been passed down through generations within Indigenous communities. In a legal system that upholds principles of justice and non-discrimination, the state is not permitted to extinguish pre-existing rights without providing a legal bridge toward integration into the new system. The concept of transitional legal protection is particularly relevant in cases where state law displaces deeply rooted local legal systems, especially when affected communities lack the structural capacity to adapt immediately (De Schutter, 2019). In such contexts, the state is obliged to implement normative grace periods and provide legal facilitation to avoid the abrupt exclusion of vulnerable groups from rights protection frameworks.

The principle of legitimate expectations in constitutional law asserts that individuals or groups are entitled to rely on the continued legal protection of conditions that have long been

recognized, both legally and socially (Endicott, 2021). Accordingly, provisions such as Article 96(2) of Government Regulation No. 18 of 2021 must be interpreted with caution, as they risk violating the legitimate legal expectations of Indigenous communities who have relied on traditional forms of evidence as the basis for land tenure. When the state imposes a time limit without accounting for the objective realities of affected communities, such a policy may be regarded as a form of regulatory negligence—a failure to design legal measures that are procedurally fair. Transitional protection is not optional but a normative obligation to ensure that the law does not become an instrument of arbitrary deprivation. In the realm of human rights, the state bears the responsibility of ensuring that legal reforms do not impose disproportionate harm on vulnerable groups, including Indigenous law communities (Jones, 2018). Transitional legal safeguards are thus essential to preserving the continuity of justice and reinforcing the legitimacy of the state in the eyes of those whose legal frameworks are being replaced.

The implementation of land policies that invalidate customary land ownership documents without providing corrective mechanisms reflects a tendency toward administrative legalism that disregards procedural justice and proportionality. In such a situation, an approach that exclusively demands adherence to formal legal norms—without acknowledging the socio-cultural background and structural disadvantages faced by Indigenous peoples—will only exacerbate legal exceptions and undermine the principle of rights protection. A more humane and equitable alternative can be developed through administrative reforms based on procedural fairness, which not only ensures access to the land registration system but also guarantees that the procedure can be passed by the most vulnerable groups (Roy, 2024). The principle of procedural justice requires that all citizens, including Indigenous Peoples, be treated equally in legal proceedings and be given sufficient opportunities to adapt to new regulations through consultation, dissemination of information, and adequate legal assistance. Contemporary thinking on social justice and restoration increasingly emphasizes the relevance of restorative justice in public policy, including in terms of land distribution and the recognition of rights.

Legal provisions that are sudden or retroactively applied without transitional protections tend to create a sense of injustice, thereby undermining public trust in state institutions. In a broader normative framework, legal certainty requires not only clarity and consistency but also an element of justice that ensures that the rule of law does not place a disproportionate burden on certain social groups. When the state designs agrarian systems that can only be accessed by those with legal literacy and substantial resources, the result is the reinforcement of legal inequalities that systematically exclude Indigenous law communities.

As a legal instrument intended to ensure administrative order in land affairs, Article 96 (2) of Government Regulation No. 18 of 2021 instead reflects characteristics of a policy that fails to fulfill the integrative function of law. When legal regulations are formulated without adequate assessment of social impact, they are likely to produce uncertainty and widen the gap between state law and community-based legal systems. In a pluralistic society, the law must function as a bridge not a wall between national legal norms and the historically and socially valid values of local communities.

Conclusion

The provision under Article 96 (2) of Government Regulation No. 18 of 2021, which declares that written evidence of former customary land ownership becomes invalid and inadmissible as proof of land rights five years after the regulation's enactment, presents a serious tension between the state's administrative interests and the constitutional protection of

Indigenous land rights. Within a national legal system that upholds the principles of legal certainty, procedural fairness, and the protection of property rights, any policy that nullifies the legal value of longstanding evidence without an inclusive transitional mechanism risks fostering legal exclusion and undermining substantive justice. The legal issues raised in this study show that the regulation is not fully in line with the basic principles of the state of law as stated in Article 28G (1) and Article 18B (2) of the 1945 Constitution of the Republic of Indonesia.

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