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Recognition Before Authorization: Reconstructing FPIC for the Use of Ulayat Land of Customary Law Communities in South Papua

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Original Article

Abstract

Constitutional recognition of customary law communities does not, by itself, guarantee the protection of ulayat land when the state is preparing to issue administrative decisions that enable third parties to use such territories. This issue is particularly significant in Papua because the Special Autonomy regime requires the provision of ulayat land to be conducted through deliberation aimed at reaching agreement with the relevant customary law community. This study examines the legal position of recognition of customary law communities and Free, Prior and Informed Consent (FPIC) in decision-making concerning the use of ulayat land and formulates a legal framework that places the protection of ulayat rights before authorization is granted. This study employs normative legal research, using statutory, conceptual, and case approaches. The findings demonstrate that land administration and registration contribute to legal certainty for ulayat rights but cannot be treated as the sole basis for the existence of rights that positive law also links to the continuing factual existence of the community and its ulayat relationship with the land. The study proposes a recognition-before-authorization framework based on the principle of protective sequencing, comprising preliminary examination of indications of ulayat rights, temporary administrative safeguards, participatory inventory and mapping, strengthened recognition, substantive consent, and authorization only after land status and community consent have been resolved. This framework seeks to prevent delays in the administrative recognition of customary law communities from allowing third-party legal interests to be established ahead of ulayat rights over Indigenous territories.

Keywords: ulayat rights; customary law communities; FPIC; administrative authorization; South Papua.

Abstrak

Pengakuan masyarakat hukum adat dalam konstitusi belum dengan sendirinya menjamin perlindungan tanah ulayat ketika negara akan menerbitkan keputusan administratif yang membuka pemanfaatan wilayah tersebut oleh pihak lain. Persoalan ini memiliki kekhawatiran di Papua karena rezim Otonomi Khusus mensyaratkan penyediaan tanah ulayat dilakukan melalui musyawarah untuk mencapai kesepakatan dengan masyarakat hukum adat. Penelitian ini menganalisis kedudukan pengakuan masyarakat hukum adat dan Free, Prior and Informed Consent (FPIC) dalam pembentukan keputusan mengenai pemanfaatan tanah ulayat, sekaligus merumuskan konstruksi hukum yang menempatkan perlindungan hak ulayat sebelum perizinan diterbitkan. Penelitian menggunakan metode hukum normatif dengan pendekatan perundang-undangan, konseptual, dan kasus. Hasil penelitian menunjukkan bahwa pengadministrasian dan pendaftaran berperan dalam memberikan kepastian hukum terhadap hak ulayat, tetapi tidak dapat ditempatkan sebagai satu-satunya dasar lahirnya hak yang menurut hukum positif ditentukan pula oleh kenyataan masih hidupnya masyarakat beserta hubungan ulayatnya. Penelitian ini menawarkan konstruksi *recognition before authorization* melalui prinsip *protective sequencing*, yang meliputi pemeriksaan awal indikasi hak ulayat, perlindungan administratif sementara, inventarisasi dan pemetaan partisipatif, penguatan pengakuan, persetujuan substantif, serta penerbitan izin setelah status tanah dan persetujuan masyarakat diselesaikan. Konstruksi tersebut diarahkan untuk mencegah keterlambatan administrasi pengakuan masyarakat adat justru mendahului pembentukan kepentingan hukum pihak ketiga atas wilayah ulayat.

Kata kunci: hak ulayat; masyarakat hukum adat; FPIC; perizinan; Papua Selatan.

1. INTRODUCTION

Ulayat land is not merely a form of collective ownership in the private-law sense. *Ulayat* rights also encompass a community's authority to regulate the use of its territory, determine the relationship between community members and the land, safeguard the continuity of land tenure across generations, and preserve the social, cultural, and spiritual values attached to customary territory.¹ Studies of various forms of formal recognition of customary land in Indonesia demonstrate that recognition concerns not only land as the object of rights, but also customary law communities as legal subjects and the legal relationship connecting the two.² Given these characteristics, *ulayat* rights cannot properly be subsumed entirely within a private-ownership framework, as doing so may diminish the public-communal authority inherent in customary governance.

The normative foundations for such recognition are already established. Article 18B(2) of the 1945 Constitution of the Republic of Indonesia recognizes and respects customary law communities and their traditional rights, while Article 28I(3) guarantees respect for cultural identities and the rights of traditional communities.³ In the agrarian sphere, Article 3 of Law No. 5 of 1960 on Basic Agrarian Principles (*Undang-Undang Pokok Agraria, UUPA*) recognizes the exercise of *ulayat* rights insofar as they continue to exist in fact.⁴ The phrase "insofar as they continue to exist in fact" indicates that the *ulayat* relationship is grounded in the factual circumstances and social life of communities that predate the operation of formal land-administration processes.

This trajectory of recognition was subsequently reinforced by Constitutional Court Decision No. 35/PUU-X/2012, which removed customary forests from the category of state forests. The significance of the decision lies not in eliminating all requirements for the recognition of customary law communities, but in correcting the previous legal construction under which customary forests were treated as part of the state forest domain.⁵ Nevertheless, scholarship following the decision has shown that constitutional recognition does not always provide customary law communities with an effective capacity to defend their land when confronted with administrative systems and development policies that rely heavily on formal documentation.⁶

A subsequent regulatory development occurred with Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 14 of 2024 on the Administration and Registration of *Ulayat* Land of Customary Law Communities. This Regulation replaced Ministerial Regulation ATR/BPN No. 18 of 2019 and established a more structured mechanism encompassing

¹ Tandori Tandori and V. Hari Supriyanto, "Kontradiksi Hak Komunal Dan Hak Ulayat Dalam Hukum Pertanahan Indonesia: Tinjauan Yurisprudensi Dan Regulasi Indonesia," *Tunas Agraria* 8, no. 3 (2025): 380–400, <https://doi.org/10.31292/jta.v8i3.483>.

² I. Gusti Nyoman Guntur, "Ragam Pengakuan Formal Terhadap Penguasaan Tanah Adat Di Indonesia," *Tunas Agraria* 6, no. 2 (2023): 93–109, <https://doi.org/10.31292/jta.v6i2.215>.

³ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Pasal 18B ayat (2) dan Pasal 28I ayat (3).

⁴ Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria (1960) Pasal 5.

⁵ Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 35/PUU-X/2012 Tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 Tentang Kehutanan Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945; lihat juga Faiq Tobroni, "Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012)," *Jurnal Konstitusi* 10, no. 3 (2016): 461, <https://doi.org/10.31078/jk1035>.

⁶ Adriaan Bedner and Yance Arizona, "Adat in Indonesian Land Law: A Promise for the Future or a Dead End?," *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 416–34, <https://doi.org/10.1080/14442213.2019.1670246>.

inventory, identification, surveying, mapping, recording, and registration of *ulayat* land.⁷ The Regulation creates opportunities to strengthen administrative legal certainty. At the same time, however, it revives questions concerning the relationship between rights that exist under living law and the proof of those rights through formal procedures established by the state.⁸

This issue is reflected in the definition of *ulayat* land under Ministerial Regulation ATR/BPN No. 14 of 2024. *Ulayat* land is defined as land located within the territory controlled by a customary law community, which continues to exist in fact, and over which no land right has been established.⁹ The final requirement may be understood as an administrative mechanism for preventing overlapping rights. It nevertheless raises a temporal problem where the identification and administration of *ulayat* land have not yet been completed, while an administrative right or interest in favor of a third party has already been established over the same territory.

Studies concerning the administration of *ulayat* land reveal that the formalization of recognition may produce a paradoxical situation. Administration is necessary to provide legal certainty. Yet when recognition depends excessively on formal state action, the existence of a customary law community may ultimately be determined by its ability to comply with procedures originating outside its own legal system.^[9] This criticism does not constitute a reason to reject registration. The concern arises when the absence of administrative documentation is used as a basis for disregarding a customary legal relationship that continues to exist in fact when the government makes a decision affecting the land.

A similar problem has long been evident in the development of Indonesian land law. Bedner and Arizona demonstrate that the recognition of *adat* within national law produces only limited protection where development and resource-control policies continue to place customary law communities in a weaker position than the state or parties that have already obtained formal rights.¹⁰ Research on proof of control over *ulayat* land similarly emphasizes the importance of factual possession and the community's actual relationship with the land. Administrative proof should therefore not be entirely detached from the social reality of customary communities' control over their land.¹¹

Papua has a more specific legal framework. Article 42(2) of Law No. 21 of 2001 on Special Autonomy for Papua Province requires negotiations between the government and investors to involve the relevant local customary law communities. Article 43(4) provides even more expressly that the provision of *ulayat* land or individually held land belonging to members of customary law communities

⁷ Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat.

⁸ Rohyani Rigen Is Sumilat, "Implementation of the Regulation of the Minister of ATR/BPN No. 14 of 2024 in the Registration of Customary Land Rights of Customary Law Communities: Implementasi Peraturan Menteri ATR/BPN No. 14 Tahun 2024 Dalam Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat," *Santhet (Jurnal Sejarah Pendidikan Dan Humaniora)* 8, no. 2 (2024): 1832–41, <https://doi.org/10.36526/santhet.v8i2.4485>; Dwi Anang Syukrisna et al., "Perlindungan Hak Masyarakat Adat Atas Tanah Ulayat Pasca Peraturan Menteri Agraria Dan Tata Ruang Nomor 14 Tahun 2024," *SENTRI: Jurnal Riset Ilmiah* 4, no. 12 (2025): 4157–65, <https://doi.org/10.55681/sentri.v4i12.5088>.

⁹ Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat. ketentuan umum mengenai Tanah Hak Ulayat Masyarakat Hukum Adat.

¹⁰ Bedner and Arizona, "Adat in Indonesian Land Law."

¹¹ Safrin Salam, "Penguasaan Fisik Tanah Sebagai Alat Bukti Kepemilikan Tanah Ulayat Di Pengadilan," *CREPIDO* 5, no. 1 (2023): 1–14, <https://doi.org/10.14710/crepido.5.1.1-14>.

for any purpose must be conducted through deliberation with the relevant customary law community and its members in order to reach agreement regarding the transfer of the land and the compensation to be provided.¹²

The phrase “in order to reach agreement” has consequences that differ from those of consultation that merely gives a community an opportunity to express its views. The provision makes deliberation an important element in legitimizing the use of *ulayat* land under Papua’s Special Autonomy regime. At the national level, Indonesian law does not yet contain a single general provision incorporating all elements of FPIC and applying them uniformly across all sectors. Nevertheless, elements of FPIC have been incorporated, in part, into a number of national and regional legal instruments.¹³ Accordingly, this study does not position FPIC as a substitute for Indonesian positive law, but rather as a conceptual benchmark for assessing the quality of the agreement required under the norms of Papua’s Special Autonomy regime.¹⁴

Previous studies have examined this issue from different perspectives. A study of the *Amyu* people identified tensions among the protection of *ulayat* rights, investment-facilitation policies, and the application of FPIC in concession licensing.¹⁵ A socio-legal study of the *Malind* Indigenous community in Merauke, meanwhile, found that investment-related conflicts occur within an unequal configuration of legal pluralism. At the same time, customary deliberation, rituals, and narratives of clan origins continue to operate as sources of legitimacy outside state law.¹⁶ Other scholarship addressing the contradiction between communal rights and *ulayat* rights has warned that efforts to establish legal certainty must not eliminate the governance authority that characterizes *ulayat* rights.¹⁷

Research on the administration of *ulayat* land following the enactment of Ministerial Regulation ATR/BPN No. 14 of 2024 has largely focused on registration, administrative recognition, legal certainty, and the risks associated with the positivization of *ulayat* rights. FPIC scholarship more frequently examines its existence or implementation in natural-resource utilization, while studies of conflicts in Papua generally treat FPIC as a protective mechanism or as part of dispute resolution. Comparatively little attention has been paid to the relationship among the process of recognizing *ulayat* land, the obligation to obtain community consent, and the timing of administrative decisions that confer legal interests on third parties.

This issue assumes particular practical significance in development policy in South Papua Province. The South Papua Province Regional Medium-Term Development Plan (*Rencana*

¹² Undang-Undang Nomor 1 Tahun 2021 Tentang Perubahan Kedua Atas Undang-Undang Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua (2021) Pasal 42 ayat (2) dan Pasal 43 ayat (4).

¹³ Winarsih and Cahya Wulandari, “Implementation of the Principles of Free, Prior and Informed Consent in the Field of Natural Resources Utilization within the Indonesian Regulatory Framework,” *Annual Review of Legal Studies* 1, no. 2 (2024): 289–322, <https://doi.org/10.15294/ars.vol1i2.6136>.

¹⁴ Jeane Neltje Saly et al., “Akselerasi Hukum Adat: Penerapan Prinsip Free, Prior, Informed Consent (FPIC) Bagi Masyarakat Adat,” *Yustitiabelen* 10, no. 1 (2024): 14–26, <https://doi.org/10.36563/yustitiabelen.v10i1.923>.

¹⁵ Asep Imroni, “Perlindungan Hukum Hak Ulayat Masyarakat Adat Studi Kasus Perjuangan Suku Awyu Melawan Ekspansi Kelapa Sawit Di Papua,” *Al-Zayn: Jurnal Ilmu Sosial Dan Hukum* 4, no. 4 (2026): 11674–86, <https://doi.org/10.61104/alz.v4i4.9909>.

¹⁶ Yuldiana Zesa Azis and Emiliana B. Rahail, “Kearifan Lokal Dalam Adaptasi Penyelesaian Sengketa Tanah Akibat Ekspansi Investasi: Studi Kasus Pada Masyarakat Adat Di Merauke,” *Jurnal Restorative Justice* 9, no. 2 (2025): 137–54, <https://doi.org/10.35724/jrj.v9i2.7321>.

¹⁷ Tandori and Supriyanto, “Kontradiksi Hak Komunal Dan Hak Ulayat Dalam Hukum Pertanahan Indonesia.”

Pembangunan Jangka Menengah Daerah, RPJMD) for 2025–2029 identifies enhanced recognition and protection of customary law communities and customary/*ulayat* land as part of regional policy intervention. The relevant measures include conducting inventories of *ulayat* land and accelerating the preparation of regional regulations on the recognition and protection of customary law communities, accompanied by delineation maps of *ulayat* land.¹⁸ The establishment of a formal recognition system is therefore occurring simultaneously with the implementation of development and resource-utilization agendas. A situation in which investment processes proceed before the completion of administrative recognition is consequently a practical concern rather than merely a theoretical possibility.

In response to this problem, this study proposes a framework of recognition before authorization. “Recognition” in this formulation does not require every customary law community first to obtain a Regional Regulation (*Peraturan Daerah, Perda*) or a decision of the regional head before its *ulayat* interests may be taken into account. Instead, the framework requires that verifiable indications of the existence of a customary law community and its *ulayat* land be examined and afforded protection before the government issues a decision that may narrow or even foreclose the possibility of recognizing those rights.

This study addresses two principal issues. The first concerns the legal position of the recognition of customary law communities and FPIC in determining the validity of authorization processes for the use of *ulayat* land in South Papua. The second formulates a legal framework under which the identification and recognition of customary law communities, together with their consent, must precede the issuance of authorization decisions concerning the use of *ulayat* land.

2. RESEARCH METHODOLOGY

This study employs a prescriptive normative legal research method, treating the law as a system of norms to examine the interrelationships among the recognition of customary law communities, the administration of *ulayat* (customary) land, community consent, and the validity of administrative decisions, while incorporating empirical findings from prior literature as secondary legal materials for context. Utilizing statutory, conceptual, and case-based approaches, the inquiry analyzes relevant legal frameworks including the 1945 Constitution, the Basic Agrarian Law (UUPA), the Papua Special Autonomy Law and its amendments, the Law on Government Administration, and Ministerial Regulation ATR/BPN No. 14/2024 alongside key concepts such as customary rights, legal pluralism, Free, Prior, and Informed Consent (FPIC), living law, and administrative decision validity. Furthermore, the analysis evaluates Constitutional Court Decision No. 35/PUU-X/2012 and Supreme Court Decision No. 458 K/TUN/LH/2024, explicitly distinguishing between the majority reasoning and the dissenting opinion in the latter to ensure accurate argument attribution regarding customary rights and environmental protection. Through grammatical, systematic, and teleological interpretations, the study identifies normative connections, assesses the role of administrative recognition, and evaluates the legal standing of mandatory deliberation under the Papua Special

¹⁸ Peraturan Daerah Provinsi Papua Selatan Nomor 2 Tahun 2025 Tentang Rencana Pembangunan Jangka Menengah Daerah Provinsi Papua Selatan Tahun 2025–2029.

Autonomy regime, ultimately synthesizing these insights to formulate a prescriptive legal framework anchored in the principle of protective sequencing.

3. RESULT AND DISCUSSION

3.1. Recognition of Customary Law Communities and FPIC in the Validity of Authorization Processes

One of the principal problems in protecting *ulayat* land arises when the existence of rights is equated with their administrative formalization. The 1945 Constitution, the UUPA, and Ministerial Regulation ATR/BPN No. 14 of 2024 all recognize the relevance of the factual existence of customary law communities and their *ulayat* rights. Administrative recognition should therefore not be treated as the sole legal act that “creates” the entirety of an *ulayat* relationship.

This position does not negate the importance of formal determination and registration. Administration remains necessary to clarify who represents the community, determine territorial boundaries, reduce overlapping claims, and provide information that can be used by other government agencies. The problem arises when administration shifts from serving an evidentiary function to becoming an absolute prerequisite, such that all customary relationships are regarded as legally irrelevant until the state’s formal process has been completed.

Ministerial Regulation ATR/BPN No. 14 of 2024 itself establishes an administrative mechanism that does not entirely depend on the prior completion of formal recognition of a customary law community.¹⁹ The process encompasses inventory and identification, surveying and mapping, and recording. A copy of the *Ulayat* Land Register may subsequently be used as one of the materials considered in formally recognizing a customary law community. This regulatory structure indicates the existence of an intermediate stage between the social reality of a customary community’s existence and formal state recognition. That stage should be managed through land administration rather than left without legal protection.

Preventive protection is required at this stage. Once the government is aware that a parcel of land is being identified as part of an *ulayat* territory, creating new interests in favor of other parties without awaiting verification of the land’s status would undermine the significance of the recognition process itself. Otherwise, the consequences of administrative delay are ultimately borne entirely by the customary law community.

Ministerial Regulation ATR/BPN No. 14 of 2024 permits certain *ulayat* land to be proposed for establishment as a Right of Management (*Hak Pengelolaan*). The Regulation nevertheless continues to recognize that land not proposed for a Right of Management may remain *ulayat* land.²⁰ This indicates that legal certainty does not necessarily require every *ulayat* territory to be transformed into a form of right created by the state land-administration system.

This position is consistent with Tandori and Supriyanto’s criticism of the risks inherent in reducing *ulayat* rights, which possess both public and private dimensions, to mere collective

¹⁹ Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat.

²⁰ Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat.

ownership.²¹ Recognition through state administration should assist communities in maintaining their customary tenure arrangements. Recognition should not become a mechanism for replacing the structure of customary legal relationships with a different form of tenure that departs from their original characteristics.

Accordingly, recognition before authorization cannot be equated with the proposition of “certification before authorization.” The framework does not require all customary land to be converted into certificates or Rights of Management. Its central premise is that every indication of an *ulayat* interest must be examined before the state treats a parcel of land as available for the creation of a new administrative interest.

Research on FPIC indicates that Indonesia does not yet have a single national norm incorporating all elements of FPIC and applying uniformly across all sectors. Winarsih and Wulandari find that several elements of FPIC have been incorporated into national and regional regulations, although the regulatory framework remains partial and inconsistent.²² Saly and colleagues similarly conceptualize FPIC as a mechanism that enables Indigenous communities to make decisions concerning activities affecting their territories.²³

Papua presents a different normative configuration. Article 43(4) of the Papua Special Autonomy Law expressly requires deliberation in order to reach agreement in the provision of *ulayat* land. This provision establishes a domestic legal basis that is not necessarily replicated with equivalent normative force in other parts of Indonesia. Analysis of FPIC in Papua therefore need not rest exclusively on international legal instruments. Its principal foundation remains domestic law, while FPIC serves as a framework for assessing whether the agreement obtained was genuinely given freely, secured at an appropriate time before the relevant decision was made, based on adequate information, and provided by persons authorized under customary law to make decisions on behalf of the community.

The existence of attendance lists, minutes of consultation meetings, or the signatures of several individuals is insufficient, by itself, to establish that valid consent has been obtained. It is necessary to determine whether those expressing consent legitimately represented the community; whether the community received information concerning the project location, the extent of the affected area, the duration of land use, and its ecological and social impacts; and whether consent was sought before the principal project decision had, in practical terms, become irreversible.

Article 52 of Law No. 30 of 2014 on Government Administration establishes authority, procedure, and substance as elements determining the validity of governmental decisions.²⁴ This framework allows questions concerning *ulayat* rights to be addressed not merely as ethical considerations in development policy, but also as part of the legal review of the process by which an administrative decision is made.

²¹ Tandori and Supriyanto, “Kontradiksi Hak Komunal Dan Hak Ulayat Dalam Hukum Pertanahan Indonesia.”

²² Winarsih and Cahya Wulandari, “Implementation of the Principles of Free, Prior and Informed Consent in the Field of Natural Resources Utilization within the Indonesian Regulatory Framework.”

²³ Neltje Saly et al., “Akselerasi Hukum Adat.”

²⁴ *Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan*, 2014 Pasal 52.

Where a special statutory provision requires deliberation aimed at reaching agreement before *ulayat* land may be made available, failure to comply with that process may constitute a procedural defect. The issue may also implicate the accuracy with which the object and substance of the decision are determined where an official proceeds on the assumption that a territory contains no *ulayat* interests despite the existence of factual indicators that should have been examined beforehand.

Not every deficiency in an FPIC process automatically means that an authorization can never produce legal effects. The legal consequences must still be assessed according to the nature of the defect, the norm violated, the available administrative mechanisms, and the possibility of judicial review. Nevertheless, where a special statute expressly requires agreement, that requirement cannot be treated merely as a social recommendation unrelated to the legal assessment of the validity of an administrative decision.

Supreme Court Decision No. 458 K/TUN/LH/2024 must be situated carefully within the analysis. The majority held that the grounds of cassation could not be accepted because the *judex facti* was considered not to have erred in applying the law. The majority noted that the plaintiff had become aware of the disputed administrative decision on August 25, 2022, filed an objection on September 21, 2022, and pursued an administrative appeal on October 17, 2022, but did not file the lawsuit until March 13, 2023. On that basis, the claim was considered to have exceeded the 90-day filing period. The remaining grounds of cassation were also regarded as essentially concerning the assessment of factual evidence, which could not be reexamined at the cassation stage.²⁵

This reasoning means that the majority opinion should not be relied upon as a basis for asserting that the Supreme Court fully examined and substantively upheld the entire community-consent process underlying the issuance of the environmental decision concerning PT Indo Asiana Lestari. Rather, the case demonstrates that procedural questions regarding filing deadlines may determine whether the substance of a dispute receives further judicial consideration.

Substantive issues concerning customary law communities are more clearly addressed in the dissenting opinion. The dissenting judge considered not only the calculation of the filing period following the exhaustion of administrative remedies, but also connected the case to Articles 42(2) and 43(4) of the Papua Special Autonomy Law, the community's right to information, and the principles of environmental protection and management.²⁶ This distinction must be maintained when interpreting the decision. The arguments concerning the obligation to involve customary law communities and obtain agreement are indeed contained in the decision, but they form part of the dissent rather than the majority's *ratio decidendi*.

The case nevertheless provides an important, albeit more limited, lesson. If the protection of *ulayat* rights becomes operative only after an authorization has been issued, communities must defend their rights through litigation governed by filing deadlines, standing requirements, rules concerning the identification of the disputed administrative decision, and evidentiary requirements. A model relying solely on remedial protection is therefore insufficient. Protection must operate before an

²⁵ Putusan Mahkamah Agung Nomor 458 K/TUN/LH/2024 pertimbangan pendapat mayoritas, khususnya bagian mengenai tenggang waktu gugatan dan batas pemeriksaan pada tingkat kasasi.

²⁶ *Putusan Mahkamah Agung Nomor 458 K/TUN/LH/2024* dissenting opinion Hakim Anggota Dr. H. Yodi Martono Wahyunadi, S.H., M.H.

administrative decision creates legal positions that subsequently become increasingly difficult to reverse.

3.2. Parameters for Controlling Discretion in the Designation of Certain Interests Based on the Social Function of Land and Agrarian Reform

Ministerial Regulation ATR/BPN No. 14 of 2024 represents an important development because it establishes a more systematic mechanism for inventorying, identifying, mapping, and recording *ulayat* land. Nevertheless, the requirement that *ulayat* land must not already be subject to another land right may create difficulties where the administrative processing of *ulayat* land proceeds more slowly than the establishment of rights or issuance of authorizations in favor of other parties.

Such circumstances may generate an administrative paradox. A community requires time to establish its community structure, genealogical relationships, the authority of customary leaders, and the boundaries of its *ulayat* territory. Investment processes, by contrast, proceed according to their own administrative schedules and procedures. If these processes are not connected within a unified system, the party that obtains a formal legal instrument from the state more quickly may acquire a stronger legal position than a community whose recognition process is still underway.

This problem is particularly relevant in South Papua because regional development-planning documents themselves acknowledge the need to accelerate the inventory of *ulayat* land and the preparation of regulations governing the recognition and protection of customary law communities.²⁷ The development of institutional mechanisms for recognition therefore occurs simultaneously with investment and development activities. Without transitional rules protecting territories that are undergoing identification, this situation may create opportunities for new conflicts.

To address this problem, this study formulates recognition before authorization as a principle of protective sequencing. The principle does not mean that a land certificate must always be issued before development activities may proceed.

Its implementation consists of the following stages:

- 1) Preliminary examination of indications of *ulayat* territory. Before issuing a substantive decision, the authorizing agency should cross-check the *Ulayat* Land Register, customary-territory maps, regional-government data, and other information concerning verifiable claims by customary law communities.
- 2) Temporary administrative protection. Where there is a strong indication that a parcel constitutes *ulayat* land and verification of its status remains ongoing, the establishment of new interests that could materially frustrate the recognition process should be temporarily deferred. This stage constitutes a proposal *de lege ferenda (ius constituendum)* and is not currently regulated expressly under this terminology in positive law.
- 3) Participatory inventory and mapping. Verification should involve the community, customary institutions, regional government, and land-administration authorities. The

²⁷ Pemerintah Daerah Kabupaten Biak Numfor, *Rancangan Akhir Rencana Pembangunan Jangka Menengah Daerah (RPJMD) Kabupaten Biak Numfor 2025-2029* (Pemerintah Daerah Kabupaten Biak Numfor, 2025).

- process should identify the legal subject, the object of the claim, territorial boundaries, and the decision-making structure applicable within the customary law community.
- 4) Strengthening administrative recognition. The results of the administrative process should be used to expedite formal recognition of the customary law community while also notifying sectoral agencies that the territory under review cannot be treated as land free from customary interests.
 - 5) Deliberation aimed at obtaining substantive consent. Where a proposed use requires the provision of *ulayat* land in Papua, deliberation should be conducted with persons possessing representative authority under customary law. The process must occur before a final decision is made, be based on adequate information, and be free from coercion.
 - 6) Authorization only after land status and consent have been resolved. The authorization process should proceed only after the competent official can demonstrate that indications of *ulayat* rights have been examined and that all specific obligations relating to consent have been fulfilled.

This model does not confer an unlimited veto over all development activities. The state retains the authority to examine the validity of claims, disputes between clans, territorial boundaries, the existence of third-party rights, and the public interest. The distinction concerns the allocation of risk. An incomplete administrative recognition process should not automatically shift the consequences of delay onto the community through the creation of new rights in favor of third parties.

As a development of protective sequencing, this study proposes the principle of no adverse authorization while recognition is pending. The principle applies where the government has received reasonably substantiated indications of the existence of an *ulayat* territory and verification of those indications remains ongoing. In such circumstances, the government should refrain from issuing new decisions that could eliminate the object or undermine the purpose of the pending recognition process.

Its function resembles a preventive administrative measure that preserves the status quo on a limited basis until examination of the legal status of the relevant object has been completed. Its application would nevertheless require stringent conditions to prevent abuse. A claim must have an initial verifiable basis, the identification process must be completed within a reasonable period, and the community must participate by providing the information required for verification.

This framework occupies a position between two opposing views. The first assumes that every customary claim should immediately halt development without any verification. The second assumes that the absence of a formal recognition instrument gives the government complete freedom to treat the territory as if no *ulayat* relationship existed. Protective sequencing adopts neither position. Instead, it treats verification as the connecting mechanism between factual claims and administrative decision-making.

The effectiveness of this model depends heavily on interagency data integration. Land offices, regency governments, the provincial government, forestry authorities, environmental agencies, and the Investment and One-Stop Integrated Services Office (*Dinas Penanaman Modal dan Pelayanan Terpadu Satu Pintu*, DPMPSTP) should not process decisions in isolation without exchanging relevant information. Before an authorization reaches its final stage, the competent official should know

whether the land concerned has been entered in the *Ulayat* Land Register, is undergoing mapping, has been subject to a formal determination recognizing a customary law community, or is the subject of a dispute.

This need for integration is consistent with the South Papua Province RPJMD for 2025–2029, which includes the inventory of *ulayat* land and acceleration of regulations on the recognition of customary law communities within the regional policy agenda.²⁸ This agenda could be expanded by establishing a customary land alert within the regional authorization-administration system. Such a designation would not itself constitute evidence of ownership; rather, it would serve as preliminary information requiring officials to conduct verification before proceeding with decisions that may affect the territory.

At the regional regulatory level, this mechanism could be incorporated by the South Papua Provincial Government into the regional regulation on the recognition and protection of customary law communities already included in the RPJMD agenda. Such regulation should not be limited to criteria for recognizing legal subjects and mapping their territories. It should also regulate the administrative consequences that a pending recognition process has for governmental decisions in other sectors. It is in this respect that the framework proposed in this study adds value beyond approaches confined to the issue of land registration.

4. CONCLUSION

The recognition of customary law communities and the administration of *ulayat* land are closely related, but they cannot be treated as equivalent. Administration and registration are necessary to provide certainty regarding the legal subjects, objects, and *ulayat* relationships concerned. Positive law itself, however, continues to link the existence of *ulayat* rights to the factual continuation of the community and its *ulayat* relationship with the land. The fact that formal recognition has not yet been completed does not, by itself, extinguish *ulayat* interests where the government has already obtained verifiable indications of their existence. Papua's distinctive legal framework provides an additional layer of protection because Article 43(4) of the Papua Special Autonomy Law requires the provision of *ulayat* land to be conducted through deliberation aimed at reaching agreement. FPIC may be used as a conceptual benchmark to ensure that such agreement is not reduced to mere consultation or the fulfillment of administrative formalities.

This study formulates a recognition-before-authorization framework through the principle of protective sequencing. The framework sequences preliminary examination of indications of *ulayat* rights, temporary administrative protection, participatory inventory and mapping, strengthened administrative recognition, and substantive consent before a decision affecting *ulayat* land is made. Its derivative principle, no adverse authorization while recognition is pending, seeks to ensure that delays in state administration do not confer a legal advantage on third parties. In South Papua, this framework could be implemented through the integration of *ulayat*-land data into the authorization system and incorporated into regional regulations on the recognition and protection of customary law

²⁸ Pemerintah Daerah Kabupaten Biak Numfor, *Rancangan Akhir Rencana Pembangunan Jangka Menengah Daerah (RPJMD) Kabupaten Biak Numfor 2025-2029*.

communities, the preparation of which has already been included in the official policy agenda under the South Papua Province RPJMD for 2025–2029.

5. REFERENCES

Journals

- Asep Imroni. “Perlindungan Hukum Hak Ulayat Masyarakat Adat Studi Kasus Perjuangan Suku Awyu Melawan Ekspansi Kelapa Sawit Di Papua.” *Al-Zayn: Jurnal Ilmu Sosial Dan Hukum* 4, no. 4 (2026): 11674–86. <https://doi.org/10.61104/alz.v4i4.9909>.
- Bedner, Adriaan, and Yance Arizona. “Adat in Indonesian Land Law: A Promise for the Future or a Dead End?” *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 416–34. <https://doi.org/10.1080/14442213.2019.1670246>.
- Guntur, I. Gusti Nyoman. “Ragam Pengakuan Formal Terhadap Penguasaan Tanah Adat Di Indonesia.” *Tunas Agraria* 6, no. 2 (2023): 93–109. <https://doi.org/10.31292/jta.v6i2.215>.
- Neltje Saly, Jeane, Majolica Ocarina Fae, Lamsiur Kinanti, and Gracia Gracia. “Akselerasi Hukum Adat: Penerapan Prinsip Free, Prior, Informed Consent (FPIC) Bagi Masyarakat Adat.” *Yustitiabelen* 10, no. 1 (2024): 14–26. <https://doi.org/10.36563/yustitiabelen.v10i1.923>.
- Rohyani Rigen Is Sumilat. “Implementation of the Regulation of the Minister of ATR/BPN No. 14 of 2024 in the Registration of Customary Land Rights of Customary Law Communities: Implementasi Peraturan Menteri ATR/BPN No. 14 Tahun 2024 Dalam Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat.” *Santhet (Jurnal Sejarah Pendidikan Dan Humaniora)* 8, no. 2 (2024): 1832–41. <https://doi.org/10.36526/santhet.v8i2.4485>.
- Salam, Safrin. “Penguasaan Fisik Tanah Sebagai Alat Bukti Kepemilikan Tanah Ulayat Di Pengadilan.” *CREPIDO* 5, no. 1 (2023): 1–14. <https://doi.org/10.14710/crepido.5.1.1-14>.
- Syukrisna, Dwi Anang, Rosita Candrakirana, and Diana Lukitasari. “Perlindungan Hak Masyarakat Adat Atas Tanah Ulayat Pasca Peraturan Menteri Agraria Dan Tata Ruang Nomor 14 Tahun 2024.” *SENTRI: Jurnal Riset Ilmiah* 4, no. 12 (2025): 4157–65. <https://doi.org/10.55681/sentri.v4i12.5088>.
- Tandori, Tandori, and V. Hari Supriyanto. “Kontradiksi Hak Komunal Dan Hak Ulayat Dalam Hukum Pertanahan Indonesia: Tinjauan Yurisprudensi Dan Regulasi Indonesia.” *Tunas Agraria* 8, no. 3 (2025): 380–400. <https://doi.org/10.31292/jta.v8i3.483>.
- Tobroni, Faiq. “Menguatkan Hak Masyarakat Adat Atas Hutan Adat (Studi Putusan MK Nomor 35/PUU-X/2012).” *Jurnal Konstitusi* 10, no. 3 (2016): 461. <https://doi.org/10.31078/jk1035>.
- Winarsih and Cahya Wulandari. “Implementation of the Principles of Free, Prior and Informed Consent in the Field of Natural Resources Utilization within the Indonesian Regulatory Framework.” *Annual Reviewl of Legal Studies* 1, no. 2 (2024): 289–322. <https://doi.org/10.15294/arls.vol1i2.6136>.

Yuldiana Zesa Azis and Emiliana B. Rahail. "Kearifan Lokal Dalam Adaptasi Penyelesaian Sengketa Tanah Akibat Ekspansi Investasi: Studi Kasus Pada Masyarakat Adat Di Merauke." *Jurnal Restorative Justice* 9, no. 2 (2025): 137–54. <https://doi.org/10.35724/jrj.v9i2.7321>.

Statutes

Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 35/PUU-X/2012 Tentang Pengujian Undang-Undang Nomor 41 Tahun 1999 Tentang Kehutanan Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Pemerintah Daerah Kabupaten Biak Numfor. *Rancangan Akhir Rencana Pembangunan Jangka Menengah Daerah (RPJMD) Kabupaten Biak Numfor 2025-2029*. Pemerintah Daerah Kabupaten Biak Numfor, 2025.

Pemerintah Republik Indonesia. *Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan*. 2014.

Peraturan Daerah Provinsi Papua Selatan Nomor 2 Tahun 2025 Tentang Rencana Pembangunan Jangka Menengah Daerah Provinsi Papua Selatan Tahun 2025–2029.

Peraturan Menteri Agraria Dan Tata Ruang/Kepala Badan Pertanahan Nasional Republik Indonesia Nomor 14 Tahun 2024 Tentang Penyelenggaraan Administrasi Pertanahan Dan Pendaftaran Tanah Hak Ulayat Masyarakat Hukum Adat.

Putusan Mahkamah Agung Nomor 458 K/TUN/LH/2024.

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Undang-Undang Nomor 1 Tahun 2021 Tentang Perubahan Kedua Atas Undang-Undang Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua (2021).

Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria (1960).