

Legal Politics of Handling the Social Impact of Land Acquisition: The Paradox between State Hegemony and the Rights of Indigenous Communities

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Abstract

National development through National Strategic Projects (PSN) in Indonesia often raises issues of land acquisition, particularly when it intersects with customary territories. Although the constitution recognizes the rights of indigenous peoples, its implementation in sectoral policies remains weak. Presidential Regulation No. 78 of 2023, which regulates the handling of the social impacts of land acquisition, is seen as reinforcing state dominance over customary lands and disregarding customary rights. This regulation is seen as formal legitimization for the expropriation of customary land in the name of national interests, while benefiting elite groups such as investors and oligarchs. This study aims to analyze the legal politics of Presidential Regulation No. 78 of 2023 regarding the recognition of customary rights, as well as to examine its legal and sociological implications in the context of agrarian conflicts. The method used is normative legal research with a legislative and conceptual approach. The findings show that this regulation weakens the protection of indigenous peoples' rights and exacerbates agrarian conflicts, depriving indigenous communities of access to justice. The results of this study are expected to provide conceptual contributions to more equitable agrarian policy reform and promote a balance between national development and respect for the traditional rights of indigenous peoples.

Keywords: Legal Policy, Land Acquisition, Indigenous Peoples' Rights, State Hegemony, Social Impact.

Introduction

National development in Indonesia is a strategic agenda that aims to improve people's welfare and accelerate the country's economic progress (Sujadi, 2018). One of the key elements in achieving these goals is the provision of land for national strategic projects (NSPs) (Rongiyati, 2019). However, land acquisition and land acquisition often overlap with customary law people's land or land (Carolina et al., 2022). This kind of thing creates tension and tug-of-war between the interests of the state and the rights of indigenous peoples who have controlled the land for generations (Bustam et al., 2020).

Indigenous peoples in this country have long struggled in the face of severe trials that shake their rights to land and territories that they have owned since their ancestors (Bustam et al., 2020). Although Article 18B ayat 2 expressly states that the state recognizes and respects the traditional rights of indigenous peoples, the reality often shows that such recognition is only a forgotten text, while their rights are often taken away in an unfair and arbitrary manner for the implementation of national strategic projects (Fuzain, 2023).

The birth of Presidential Regulation Number 78 of 2023 concerning Amendments to Presidential Regulation Number 62 of 2018 concerning Handling Social Impacts of the Community in the Context of Land Provision for National Development (Presidential Regulation 78/2023). The Presidential Regulation a quo was made on the basis of consideration of the provision of land for national development and the handling of community impacts due to land provision. However, this legal policy reveals its paradoxical veil, where there are two seemingly parallel but in practice contradictory goals (Hasibuan, 2007).

This Presidential Regulation regulates the provision of compensation in the form of money or the relocation of settlements to residents who are willing to take their land for the benefit of national projects (Taupiqurrahman & Dalimunte, 2023). Although intended to reduce social impact, this regulation is seen as not providing adequate compensation for the customary rights of indigenous peoples, who have been managing the land (Wibawa et al., 2023).

The provision in Presidential Regulation 78/2023 which requires the community to prove a minimum of 10 years of land tenure with strict requirements further exacerbates this paradox. This requires indigenous peoples to prove ownership of their land, even though it has been controlled for many years and for generations (Sondakh et al., 2023). Such proof is the same as practice *domain varklaring* applied by the Dutch colonial government, where land whose ownership cannot be proven is considered state land and can be taken back at any time (Suci Rahmadani & Muhammad Imanuddin Kandias Saraan, 2022).

Paradoxical handling of the sociological impact due to the birth of the press regulation *aquo* creating an anomaly. This situation shows how the policy of land acquisition for national development, which should be able to prosper the people, has become an instrument of legitimacy for the deprivation of rights. The choice of attitude that is far from the word humanist is contrary to the spirit of agrarian reform and the concept *green constitution*, which promotes ecological justice in a sustainable manner (Yusa & Hermanto, 2018).

The deprivation of rights to customary territories further reveals the wider dimension of injustice. Data from the Alliance of Indigenous Peoples of the Archipelago (AMAN) states that in the period from 2014 to 2024, more than 11 million hectares of customary land have been controlled by the state and corporations under the pretext of development and investment (Triani et al., 2023). Of these, about 2.4 million hectares have been confiscated in just the past year, a reality that shows how fragile the protection of land that is an integral part of indigenous peoples' identity and survival is (Hilmy, 2020).

The conflict that occurred on Rempang Island, where until now there are still many rejections from the local community (Triani et al., 2023). The rejection also came from the local indigenous people who did not want to be relocated to new settlements. The existence of settlements for indigenous peoples is feared to eliminate cultural identity and the sustainability of local wisdom values that they have been preserving (Renhoat et al., 2023). In addition to land acquisition on Rempang Island, there are still many PSNs that are being boosted to accelerate their development and it will trigger an increase in agrarian conflicts on the motherland.

Thus, a hypothesis emerges that the presence of Presidential Decree 78/2023, although intended to respond to development challenges, can actually be seen as part of an effort to smooth the seizure of indigenous peoples' land rights and provide more benefits to a few parties, such as investors and oligarchs, who benefit from these development projects. As a result, the agrarian conflicts that occurred were getting sharper, and justice for indigenous peoples became increasingly difficult to achieve (Kristianingsih et al., 2020).

Based on these problems, this research is intended to answer two main questions: First, what is the legal politics in land acquisition policies for national development and Second, what are the implications of Presidential Decree 78/2023 on indigenous peoples, especially in the context of recognizing and resolving agrarian conflicts? By revealing the two, the results of this research are expected to be able to provide a clearer landscape regarding the legal politics of handling the social impact of PSN land acquisition on the sustainability of indigenous peoples' rights and provide recommendations for policies that are more equitable and in accordance with the spirit of the constitution.

Research Methodology

This study uses normative juridical by using two approaches: the legislative approach and the conceptual approach. Primary legal materials are from Presidential Regulation Number 78 of 2023 concerning Amendments to Presidential Regulation Number 62 of 2018 while secondary legal materials are from journals, books, articles and related regulations or writings. The collection of legal materials uses the procedure of inventory and identification of laws and regulations as well as the grouping or systematic preparation of relevant legal materials. The analysis technique used is prescriptive to offer arguments that are used as solutions to the legal issues being studied. Meanwhile, the inference technique uses deductive reasoning.

Results

Handling the social impact of the community in the context of providing land for national development is *Tagline* brought in Presidential Regulation Number 78 of 2023 concerning amendments to Presidential Regulation Number 62 of 2018 cannot be separated from the dynamics of national development, especially related to the acceleration of the implementation of PSN (Sujadi, 2018).

Tangible evidence of the impact of this impact can be seen in the 2023 Annual Report of AMAN (Alliance of Indigenous Peoples of the Archipelago), which states that more than 150 indigenous communities lost their living space due to national strategic projects, and as a result, more than 60% of them lost the ability to carry out customary ceremonies and preserve local languages (Alliance of Indigenous Peoples of the Archipelago, 2023).

Based on data collected from Harian Tempo, December 10, 2024, the distribution of PSN throughout Indonesia shows a greater concentration of development in the western region compared to the eastern region.

Region	Sum
Sumatra	79
Javanese	110
Sulawesi	33
Bali and Nusa Tenggara	11
Kalimantan	42
Maluku and Papua	19
Others (National, cross-regional)	14

Table 1. Number of National Strategic Projects (PSN) in Indonesia

Table 1 shows the number of PSNs spread across various regions of Indonesia. Of the total total, Java is recorded as the region with the highest number of projects, which is 110 projects, or about a third of the total national PSN. Furthermore, Sumatra occupies the second position with 79 projects, while Kalimantan obtained 42 projects, most of which are related to the development of supporting infrastructure for the Capital City of the Archipelago (IKN). On the other hand, Sulawesi received an allocation of 33 projects, while Maluku and Papua

recorded 19 projects. The Bali and Nusa Tenggara regions have the least number of projects, namely 11 projects, which shows that the allocation of PSN in the eastern region of Indonesia is still limited. In addition, there are 14 projects that are national or cross-regional, especially in the energy, telecommunications, and transportation sectors that have a wide impact across regions.

Since the issuance of Presidential Regulation Number 3 of 2016 concerning the Acceleration of the Implementation of PSN, the Government is committed to encouraging infrastructure development as the main pillar of improving national connectivity and long-term economic growth. However, in its implementation, the implementation of PSN faces a number of obstacles, one of which is social and community problems that arise due to land acquisition. Many people have lived for generations on state land, government agency or state-owned land, and customary land that have not received compensation as stipulated in the provisions of the law regarding land acquisition for the public interest (Matondang, 2019).

Responding to these conditions, the government issued Presidential Regulation Number 62 of 2018 concerning Handling Social Impacts of the Community in the Context of Providing Land for National Strategic Projects. This regulation is the first step to provide assistance to communities affected by development, but do not have land rights (Fath & Fawwaz, 2024). However, along with the implementation in various regions, it was found that the Presidential Regulation had a number of weaknesses. One of them is the limited scope of community groups that can receive assistance only those who live on state land or agency land without paying attention to the reality where most residents live on Right to Use (HGU) land, Management Rights (HPL) land, or even customary land. In addition, the provisions regarding the form and mechanism of assistance are not regulated in detail, thus causing uncertainty and potential gaps in implementation in the field (Baskara et al., 2021).

Responding to these weaknesses, the government evaluated the effectiveness of the implementation of Presidential Regulation No. 62 of 2018. This evaluation was led by the Coordinating Ministry for Economic Affairs together with the Ministry of ATS/BPN and the Ministry of Home Affairs, and involved local governments and civil society organizations. Based on the results of evaluations and recommendations from various parties, changes are needed to the substance of existing regulations to provide broader and fairer social protection. The national coordination meeting held in early 2023 agreed on the importance of updating regulations to cover a wider range of affected communities and clarify the form of assistance and the role of the agencies involved (Wardana & Darmawardana, 2024).

The stipulation of Presidential Regulation No. 78 of 2023 marks a change in the state's approach to dealing with the social impact of development from a formalistic and responsive approach to the real conditions of society. By expanding the scope of the recipient of assistance and strengthening its implementation base at the regional level, this policy reflects a more inclusive development paradigm. The history of the issuance of this regulation reflects the state's efforts to align the interests of national development with the protection of citizens' basic rights, especially the right to land for residence and a decent livelihood (Wibawa et al., 2023).

This regulation was carried out in response to the need to improve the mechanism for regulating the provision of compensation to communities affected by strategic projects but do not yet have formal land rights (Aditya et al., 2023). This means that the government pays special attention to community groups that have actively and actively used land but do not have evidence of legal land ownership. This is where the fundamental problem behind the issuance of this regulation lies, namely the gap between formal land law and the reality of land tenure in the community.

The substance of this Presidential Regulation concerns the expansion of the criteria and subjects of aid recipients, as well as the adjustment of the implementation mechanism for handling social impacts (Suci Rahmadani & Muhammad Imanuddin Kandias Saraan, 2022). One of the important changes that has been made is the affirmation that those entitled to social impact management assistance are not only limited to individuals or groups who occupy land illegally, but also include customary law communities and other vulnerable groups, who are disproportionately affected by the *de facto* have used the land for social, economic, or cultural activities for a specified period of time, at least the last five years before the project commenced (Sinaga & Sabila, 2019). This shows the state's recognition of customary or unwritten forms of land control that have been occurring in various regions of Indonesia.

This Presidential Regulation also emphasizes the importance of coordination between relevant ministries or institutions, Regional Governments, and Land Banks or other agencies that are assigned to manage state land or state-controlled land. The verification and validation process for the affected communities is now carried out more rigorously but also open to evidence of historical and social control. This social impact management action plan includes the provision of compensation or assistance in the form of money, relocation, or other support so that the community does not experience prolonged social and economic losses (Sylviana, 2020). This change marks a paradigm shift in the state from a purely legalistic approach to a socially inclusive approach, which recognizes the existence of controlling land in a systematic manner. *de facto* but not in a *de jure* (Sinaga & Sabila, 2019).

Presidential Decree No. 78 of 2023 was issued in response to various obstacles in land acquisition for the National Strategic Project (PSN), including the resistance of affected communities. Normatively, this Presidential Regulation aims to accelerate land acquisition while addressing its social impacts, especially those that arise from the construction of large projects such as Rempang Eco City (Muhlizi, 2019).

Constitutionally, the substance of this Presidential Regulation is in line with the protection of the basic rights of citizens as guaranteed in the 1945 Constitution of the Republic of Indonesia. One of the most relevant rights in this situation is the right to decent housing and decent livelihood, as stipulated in Article 28H paragraph (1) of the 1945 Constitution. When the state organizes development, the state is also obliged to protect its people from the negative impact of the development. Such protection can only be said to be meaningful if it is given comprehensively, including to residents who do not have formal proof of land ownership.

This Presidential Regulation has a close relationship with the principle of the rule of law as regulated in Article 1 paragraph (3) of the 1945 Constitution. In a state of law, development should not be carried out in a way that deprives people of their rights, especially for economically and socially weaker groups. This is where Presidential Regulation 78 of 2023 becomes important as a policy instrument to ensure that social justice is truly implemented in the scope of development. The state acts not only as a facilitator of development, but also as a protector of the people.

This Presidential Regulation also reflects the recognition of the rights of customary law communities, as explained in article 18B paragraph (2) of the 1945 Constitution, which states that the state recognizes and respects the unity of customary law communities and their traditional rights as long as they are alive and in accordance with the times. In reality, people often lose their rights to customary land because they are not officially registered in the national land system. Thus, with this Presidential Regulation, the State provides space for indigenous peoples to be accommodated in the social impact protection scheme of development.

The legal politics underlying the issuance of Presidential Regulation Number 78 of 2023 concerning amendments to Presidential Regulation Number 62 of 2018 reflect the direction of government policies oriented towards accelerating economic development through land acquisition for National Strategic Projects (PSN). In the context of legal political theory, this regulation describes an instrumentalist approach, namely the law is used as a tool to achieve economic and development goals that have been set by the government, not as a mechanism to create social justice. As explained by Mahfud MD, legal politics consists of two main elements: the substance of the law and its law enforcement. If viewed from the substance, Presidential Regulation 78 of 2023 does include clauses regarding affected communities, including

customary law communities. However, this substance is not followed by a concrete and strong legal mechanism to protect the customary rights that have been constitutionally recognized. There is no procedural clarity regarding how the status of customary law communities is determined, how customary territories are identified, and how forms of protection of customary lands are carried out. This shows that substantively, this Presidential Regulation is declarative and does not meet the principle of substantive justice as understood in progressive legal political theory. (MD, Politik Hukum di Indonesia 2011) (Rahardjo, Ilmu Hukum Progresif 2006)

In terms of law enforcement, this Presidential Regulation also contains a number of fundamental problems. In its implementation in the field, this policy is often used as the basis for the legitimacy of the eviction of people from their customary lands. Indigenous peoples' rejection of evictions is often responded to by the state with a security and repressive approach, as happened in the agrarian conflict in the Rempang Eco-City project. This shows that the law in this context is not a protector of the community, but a tool of state power and capital to smooth the investment agenda. According to Boaventura de Sousa Santos's view, this condition reflects the dominance of the formalistic "law of the state" over the laws of the people that live and develop in society. In other words, customary law, including collective control over customary land, is overridden by state rules that tend to top-down, regardless of the underlying historical and social realities. (Santos 2002)

From a human rights perspective, the existence of this Presidential Regulation should also be criticized because it does not adopt the principle of Free, Prior and Informed Consent (FPIC), which is the principle that indigenous peoples must be given full information and the freedom to approve or reject a project before the project is implemented. This principle is an important part of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), where customary lands and the cultural identity of indigenous communities are an inseparable collective right. Unfortunately, the approach in this Presidential Regulation tends to view land as a mere object of development, not as part of the social, spiritual, and cultural system of customary law communities. It is not surprising that WALHI calls Presidential Decree 78 of 2023 an instrument to accelerate the seizure of people's land, because it opens a legal loophole for the takeover of customary territories by the state and corporations without adequate legal protection mechanisms. (Nations 2007) (WALHI 2024)

According to Dewi Kartika, Secretary General of the Agrarian Reform Consortium (KPA), Presidential Decree No. 78 of 2023 has the potential to remove the people's rights to land because it provides a legal justification for land grabbing without fair compensation. The term "compensation" used in this Presidential Regulation, according to the KPA, shows that the state does not recognize the community's rights to the land, and only provides assistance as a

form of mercy and not as a legal obligation arising from legal land ownership according to customary law or real in the field. This is contrary to the principle of agrarian justice as contained in Law Number 5 of 1960 concerning the Basic Agrarian Regulations (UUPA). (Kartika 2024)

A number of legal experts consider that the policy of Presidential Regulation Number 78 of 2023 reflects the state's tendency to prioritize the effectiveness of economic development over the fulfillment of human rights. Especially the right to land and residence. Prof. Dr. Maria Farida Indrati, a former Constitutional Judge and constitutional law expert, stated that every legal product including presidential regulations must be subject to the principle of non-discrimination and respect for the constitutional rights of citizens, including those who do not have formal land rights certificates. According to him, the use of the term "compensation" in the Presidential Regulation risks denying the status of legal subjects of people who have lived and managed land for a long time. (Indrati 2024)

Prof. Satya Arianto, Professor of Constitutional Law at the University of Indonesia, highlighted that land rights for citizens, especially customary law communities or urban poor groups, are not solely measured by formal certification but also by social and historical control. In this context, the state should carry out its constitutional obligation to recognize and respect the unity of customary law communities and their traditional rights as stipulated in Article 18B paragraph (2) of the 1945 Constitution. The implementation of Presidential Regulation 78/2023 without substantive protection for indigenous peoples has the potential to be a form of structural discrimination.

Prof. Jimly Ashiddiqie, legal expert and former Chief Justice of the Constitutional Court emphasized the importance of procedural justice (*procedural justice*) and substantial justice (*substantive justice*) in any public policy, especially those that have an impact on basic rights such as housing and land. He stated that policy-making that does not involve the community in a participatory manner, especially those related to evictions, can be categorized as a violation of the principles of the rule of law and human rights (Habiba et al., 2023). He also reminded that the recognition of land rights should not be based solely on legal formalism, as it would be detrimental to vulnerable groups.

From the perspective of providing land for national development, the legal approach in this Presidential Regulation is still far from the ideal principle of legal pluralism. When land acquisition is viewed only through the lens of formal administration and certification of individual property rights, communal control over land, such as customary rights, will continue to be marginalized. In the context of multicultural Indonesia, the existence of customary law should be a strong foundation in the formulation of land policy. However, this regulation

actually shows the existence of the rule of law of the state over customary law (Joireman & Tchatchoua-Djomo, 2023). As a result, indigenous peoples who do not have certificates or administrative recognition are vulnerable to losing their customary lands. This shows that the legal politics in Presidential Regulation 78 of 2023 still places customary law communities as objects of development, not legal subjects who are sovereign over their living space.

According to Prof. Boedi Harsono, in the Indonesian agrarian law system, the state has the authority to regulate the use of land for the public interest, but its implementation must still heed the principles of social justice and not harm the rights of small people (Isnaini & Lubis, 2022). In this case, land provision is not only a technical administrative matter but also includes social, economic, and cultural dimensions.

The fundamental change in the Presidential Regulation *a quo* also occurred in the compensation given to the people who took over their land. The compensation changed from a compensation scheme to compensation in land acquisition for the National Strategic Project (PSN) which drew criticism because it had the potential to reduce the rights of affected communities, especially customary law communities. Previously, compensation was carried out based on the principle of agreement between the parties as a form of bilateral *legal act*, which allowed negotiations regarding the value of compensation, the form of compensation, and the time of implementation. This approach at least opens up a space for distributive justice and ensures that the affected communities have a relatively equal bargaining position in the land acquisition process.

However, in Presidential Regulation 78/2023, the government uses a new approach in the form of compensation, as stated in Article 6. This compensation is in the form of a monetary and/or resettlement agreement, which is a one-way legal act (*unilateral legal act*) where the community is only the beneficiary of the policy without any room for negotiation (Irwan Permadi, Hamidi Masykur, Herlindah, Setiawan Wicaksono, 2015). This is particularly problematic, because in the context of indigenous peoples, their bargaining position is very weak due to the absence of formal legal documents on land ownership, even though sociologically they have occupied and managed the territory for generations.

Recent research by Fikri, Santosa, & Putri (2022) in the Journal of Indigenous Rights and Governance states that the state's unilateral approach to land acquisition often violates the principle of *free, prior, and informed consent* (FPIC) guaranteed in international law. They point out that such approaches often lead to structural injustices, where indigenous peoples are victims of development claimed to be in the public interest. A similar point is affirmed by Hall et al. (2020) in Land Use Policy, which highlights that large projects tend to ignore the

collective rights of local communities in decision-making, especially when states choose to use a top-down approach in land procurement (Azevedo-Ramos et al., 2020).

The use of compensation schemes that do not involve community participation actually increases the potential for agrarian conflicts and causes distrust in state institutions. They emphasized that non-inclusive development policies risk violating the economic, social, and cultural rights of indigenous peoples as guaranteed by the International Covenant and Article 28I of the 1945 Constitution.

Criticism of this compensation scheme is not solely based on normative grounds, but also based on the empirical fact that communities affected by land acquisition often experience new impoverishment (*new poverty*), loss of cultural identity, and inappropriate relocation (Subekti, 2016). Therefore, the implementation of compensation schemes has the potential to create deepening structural inequalities if it is not accompanied by participatory mechanisms, mapping of customary territories, and recognition of collective rights to land.

The change in approach from compensation-based compensation to the provision of compensation for people who do not have formal rights basis. However, this approach still contains weaknesses in guaranteeing legal certainty and a sense of justice, as criticized by experts. Dr. Arie Sukanti Hutagalung said that land acquisition must consider the rights of the community who have been controlling and utilizing land in real terms, even though they do not have a formal certificate (Suyanto, 2019).

The imbalance between development needs and the protection of residents is affected by the central issue. Therefore, land allocation policies should ideally be designed in an inclusive, transparent, and participatory manner. This is in line with the principles of sustainable development which require intergenerational justice and protection of vulnerable groups.

The legal politics of Presidential Regulation Number 78 of 2023 reflects the tension between development interests and the protection of human rights. These regulations demonstrate the dominance of formal legal approaches and economic efficiency, but ignore the dimension of substantive justice for affected citizens, including customary law communities. A review from the perspective of human rights, customary rights, national land provision, and the opinions of legal experts shows the need for policy reformulation to be in line with the principles of a democratic state of law and uphold human rights (Yarsina, 2023).

Politics in Presidential Decree 78 of 2023 seems to be more dominant political than law, as can be seen from the policy orientation that emphasizes more on accelerating infrastructure development than protecting citizens' constitutional rights. The legal approach taken is more

instrumental, where the law functions as a tool for political legitimacy of development. This shows that the political determinants are stronger in the formulation of these regulations, as emphasized by Satjipto Rahardjo that the law is often a means of power rather than a means of justice (Fauzan Hadi & Achmad Fadhil Fachryansyah, 2025).

Judging from a theoretical approach in legal science, this regulation contains orthodoxy, realism, and elistine at the same time. The orthodox approach can be seen from the use of law as a tool of power that prioritizes the interests of the state in development. The realistic approach is reflected in the policy of "compensation" which is a compromise on the social reality that many societies do not have formal evidence of land ownership, despite having occupied it for generations. Meanwhile, the elystic approach can be seen from the policy-making process that tends to benefit the ruling elite group and the implementer of national strategic projects with little room for participation for the affected communities. In this regard, Prof. Jimly Asshiddiqie emphasized that in a democratic legal country, the policy-making process must involve the community in a participatory manner and ensure human rights as an integral part of public policy (Satrio Alif Febriyanto & Firman, 2023).

Presidential Regulation Number 78 of 2023 should be revised to be more in favor of the values of social justice and human rights protection. Governments should replace the "compensation" approach with fair compensation based on the recognition of land rights, especially for customary law communities and vulnerable groups that lack formal legal evidence. In addition, the land acquisition process must involve the active participation of local communities through participatory mapping mechanisms, customary territory registration, and transparent and accountable public consultation processes. It is important that development policies are not only fast and efficient, but also inclusive and just and in line with the principles of human rights as stipulated in Articles 28H and 28I of the 1945 Constitution, the International Covenant on Economic, Social and Cultural Rights, and the UN Declaration on the Rights of Indigenous Peoples.

Juridical Implications for the Recognition and Protection of Customary Rights

Presidential Regulation Number 78 of 2023 concerning amendments to Presidential Regulation Number 62 of 2018 concerning the acceleration of the implementation of National Strategic Projects (PSN) is a reflection of the direction of national development policies based on accelerating economic growth and providing infrastructure. In practice, PSN requires the availability of a large amount of land, which often intersects directly with customary territories or customary lands that have been controlled and managed by customary law communities for

generations (Cahyaningrum, 2022). This raises great concerns about the legal existence of indigenous peoples and the continuity of their culture.

Although the Indonesian constitution has recognized the existence of customary law communities and their customary rights through Article 18B paragraph (2) of the 1945 Constitution, the reality is that this recognition has not been fully implemented in sectoral policies, including in regulations governing national strategic projects. Presidential Decree 78 of 2023 strengthens the dominance of economic development logic over the communal rights of indigenous peoples, as it prioritizes the formal legal aspects of land ownership over recognition based on collective rights and the history of customary land tenure (Dahlan, 2019).

This condition confirms that Presidential Decree 78 of 2023 not only puts indigenous peoples in a socially vulnerable position, but also legally. Some of the juridical implications of this policy indicate potential violations of constitutional principles and the human rights of indigenous peoples.

a. Weakening of Recognition and Protection of Customary Rights in Land Acquisition Schemes for PSN

The politics of law in Presidential Regulation Number 78 of 2023 concerning Amendments to Presidential Regulation Number 62 of 2018 has had a significant impact on the recognition and protection of customary rights of customary law communities. This regulation basically aims to accelerate the implementation of the National Strategic Project (PSN), but in its implementation it ignores structural aspects related to the existence of customary law communities and the collective land tenure system that has been going on for generations.

Presidential Decree 78/2023 does not explicitly mention the recognition of customary land or the existence of customary law communities as subjects who have legal standing in land acquisition. In fact, in the national legal system, the recognition of customary rights has received a clear place through various laws and regulations such as Article 3 of Law Number 5 of 1960 concerning Agrarian Principles (UUPA) which states that the implementation of customary rights and similar rights of customary law communities is recognized, as long as in reality it still exists and does not contradict the national interest. This is strengthened by the Constitutional Court Decision No. 35/PUU-X/2012, which affirms that customary forests are not part of state forests, and customary law communities have the right to manage their territories independently.

The approach in this Presidential Regulation prioritizes speed and administrative convenience, so customary rights that are not formally administered are not recognized as the basis for claims. This causes customary law communities to not be covered as subjects of compensation or social compensation in the process of land acquisition for PSN (Suntoro, 2019). The legal consequence is a denial of the principle *lex superior repealed inferior laws*, where the higher norms in the 1945 Constitution on the recognition and protection of customary law communities (Article 18B paragraph (2)) should be a reference in the formulation of lower regulations (Yarsina, 2023).

In addition, Presidential Regulation 78/2023 does not provide an affirmative mechanism for identifying or verifying the existence of customary law communities. In fact, according to the provisions of Article 67 paragraph (2) of Law Number 41 of 1999 concerning Forestry, the recognition of customary law communities is a must contained in the Constitution, the non-involvement of local governments in this Presidential Regulation makes the legal status of indigenous peoples even more vulnerable.

b. Potential Human Rights Violations and Barriers to Access to Justice

Presidential Decree 78 of 2023 also raises potential human rights violations, especially in the context of land rights, decent housing, the right not to be arbitrarily evicted, and the right to obtain information and participate in decision-making that affects their lives. The procurement of land for PSN regulated by this Presidential Regulation risks getting rid of customary law communities without providing space for active participation, sufficient information, and the opportunity to refuse.

Article 28H paragraph (1) of the 1945 Constitution states that everyone has the right to live a prosperous life in birth and mind, to live, and to have a good and healthy living environment. In addition, Indonesia has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) through Law Number 11 of 2005, which guarantees the right to decent housing and protection from forced displacement (Itasari, 2021).

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms in Article 10 that indigenous peoples shall not be forcibly removed from their lands without free, prior and informed consent (*Free, Prior and Informed Consent* / FPIC). However, Presidential Regulation 78/2023 does not explicitly regulate the FPIC principle as a prerequisite before land acquisition is carried out, thus opening a loophole for the

legalization of the transfer of customary law communities without their consent. (UNDRIP 2007)

The facts show that customary law communities have difficulty obtaining justice because the national legal system requires formal proof in the form of property certificates or other documents, which are not owned by indigenous communities who still rely on the customary law system for generations (Amal, 2024). When disputes arise, courts tend to dismiss lawsuits because there is no administrative evidence, even though real land tenure has been going on for generations.

c. The Political Dominance of Development Law on the Substance of Social Justice

Presidential Decree 78/3023 reflects the politics of development law that places law as an instrument to achieve state goals in the form of economic growth through the acceleration of national strategic projects. The law is no longer positioned as a means to realize social justice, but as a tool of state legitimacy to facilitate the investment and infrastructure process. This paradigm is known as legal instrumentalism, which in Satjipto Rahardjo's perspective is positivistic and ignores the values of substantive justice.

This condition causes a crisis of legal legitimacy in society. When people feel that the law does not protect them, especially in agrarian conflicts and evictions, trust in legal institutions and the state decreases dramatically. The law, which was supposed to function as a protector of rights, turned into a means of legalizing the removal of rights.

The dominance of the state and strategic project actors in this Presidential Regulation also marginalizes the role of local governments. In fact, the recognition of customary law communities legally can only be done by local governments through regional regulations. If local governments are not given sufficient space in central policies, then the process of recognizing indigenous peoples becomes hampered, and in the end their rights to customary land do not have a strong legal basis.

d. The Disconnection of Cultural Relations and the Loss of the Collective Identity of Indigenous Peoples

An equally important and very long-term implication is the severance of spiritual, cultural, and historical ties between indigenous peoples and their customary lands. For indigenous peoples, land is not only an economic asset, but also a representation of

ancestral values, a space for the implementation of customary rites, and a source of social and cultural identity.

If the state or investors take over customary land without involving indigenous peoples, what happens is not only physical eviction, but also the erasure of collective memory and local knowledge systems. Franz Magnis-Suseno stated that the loss of land means the loss of the identity and existential roots of indigenous communities. Communities that lose their land will also lose the ability to maintain their traditions, language, customary legal system, and social structure. (Magnis-Suseno 1995)

Neglect of the existence of indigenous peoples and their rights creates economic inequality, but it will also systematically eliminate the nation's cultural heritage. The state has a moral and constitutional obligation to protect indigenous peoples, not to make them victims of exploitative development logic.

It can be concluded that Presidential Regulation Number 78 of 2023, although aimed at accelerating development, has had serious juridical implications for the recognition and protection of customary rights. Weakening the Recognition and Protection of Customary Rights in the Land Acquisition Scheme for PSN. Potential human rights violations and barriers to access to justice, and development that ignores cultural values lead to the loss of people's identity and relationship with their land.

This implication shows that legal politics in Presidential Decree 78 of 2023 is still not sensitive to legal pluralism and substantive justice. The state needs to adopt a pluralistic and rights-based approach in the formulation of development policies, so as not to sacrifice the existence of customary law communities for the sake of investment and physical development alone. The implementation of the recognition and protection of customary rights must be placed as an integral part of the fulfillment of human rights, social justice, and cultural sovereignty of indigenous peoples. Therefore, legal reforms are needed that are not only based on formal legality, but also recognize and protect customary law as part of the national legal system (Widiatmika, 2015).

Conclusion

Presidential Regulation Number 78 of 2023 normatively shows the state's alignment with the acceleration of development and investment through land acquisition, but it has not provided adequate protection for the rights of customary law communities, especially customary rights. The absence of explicit regulations on the recognition and protection of

customary territories in this regulation has weakened the legal position of indigenous peoples and has the potential to make customary land the object of state claims. Substantially, these regulations reflect the dominance of economic interests and elite groups, as well as ignore the principles of social justice and the constitutional rights of indigenous peoples. As a result, agrarian conflicts continue to escalate, and indigenous peoples are increasingly excluded from the decision-making process over their own land. Therefore, there is a need for a more equitable and inclusive reform of agrarian policies, which are able to balance the interests of national development with respect for the traditional rights of indigenous peoples.

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Conflict of interests

The authors declare that they have no conflict of interest.

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