

Law and Historical Review of Land and Customary Laws

Asep Hermawan¹ A.Zeranica PF² Raziq Fakhrollah³

asherrafasya@gmail.com a.zeranicafakhis@student.iium.edu.my

raziq2001@graduate.utm.my

¹ UNU, Cirebon, Indonesia

² IIUM University Malaysia

³ UTM University Malaysia

Article Info

Received: 2022-10-12

Revised: 2023-02-30

Accepted: 2023-05-20

Keywords:

agrarian; Indigenous
Communities; Legal Reform;.

Abstract

The 1945 Constitution of the Republic of Indonesia recognizes and guarantees the rights of indigenous peoples and the continuation of their traditional life. This recognition is reflected in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which has implications for safeguarding the rights of indigenous peoples, including the agrarian rights they manage. After the issuance of the Job Creation Law, its implementation has limited and weakened the rights of indigenous peoples in managing their customary territories. This research was compiled using a normative juridical method with a legislative approach and an analytical approach. The main legal materials studied are Law Number 6 of 2023 and Law Number 5 of 1960. The results of the study indicate that the impact of the implementation of the Job Creation Law on the continuity of indigenous peoples' rights is very large. This law weakens customary rights regulated by the UUPA and other laws. One of the intended weakening efforts is the elimination of minimum forest area provisions and efforts to simplify permits that do not require the participation of indigenous peoples.

I. Introduction

Indonesia, as the largest archipelagic country in the world with ethnic and cultural diversity, has long experienced complex problems regarding the management of agrarian resources.¹ Agrarian reform has a long history, beginning with the Dutch colonial era, then progressing through the Old Order, New Order, and finally to the current reform era. This reflects socio-political

¹ Noer Fauzi Rachman, *Farmers and Rulers: The Dynamics of Indonesia's Agrarian Political Journey* (Yogyakarta: Insist Press, 2017).

dynamics that continually evolve according to the situation and conditions.²This evolution has had a significant impact, particularly on indigenous communities. Protecting and guaranteeing indigenous peoples' rights to customary land and natural resources is often a major issue.³This problem ultimately gives rise to a conflict of interest between economic development and the preservation of traditional values.

The 1945 Constitution of the Republic of Indonesia, as the Constitution of the Republic of Indonesia, clearly regulates guarantees for the rights of indigenous peoples. Article 18B paragraph (2) is the main reference for constitutional rights and state recognition of the existence of indigenous peoples and the protection of their traditional rights. Further constitutional provisions, in Article 28I paragraph (3), state continues to respect the cultural identity and traditional communities. This respect is carried out in accordance with developments in the times. Fundamentally, the Republic of Indonesia truly recognizes, guarantees, and respects the rights of indigenous peoples and the existence of their traditional traditions.

Respect for customary traditions encompasses many elements. One of these is the right to customary land. Customary land is land owned and managed by indigenous communities through a hereditary tradition passed down from their ancestors and maintained from generation to generation. The Indonesian government implements customary land protection through agrarian legislation, including the Basic Agrarian Law (UUPA).

Law Number 5 of 1960 concerning Basic Agrarian Regulations (hereinafter referred to as UUPA) is an important milestone in agrarian reform efforts in Indonesia.⁴The legal provisions in the UUPA recognize the existence of customary law (Adat Rechts) and the customary rights of indigenous communities. However, the implementation of these customary rights often clashes with conflicts of interest.⁵Development policies during the New Order were oriented toward economic growth, often ignoring the rights of indigenous communities. This resulted in agrarian conflicts stemming from numerous land evictions.

The rights of indigenous peoples were re-recognized in the reform era which amended the 1945 Constitution. This amendment explicitly recognized the

² Anton Lukas and Carol Warren, *Land for the People: The State and Agrarian Conflict in Indonesia* (Athens: Ohio University Press, 2013).

³ Tania Murray Li, *Land's End: Capitalist Relations on an Indigenous Frontier* (Durham: Duke University Press, 2014).

⁴ Boedi Harsono, *Indonesian Agrarian Law: History of the Formation of the Basic Agrarian Law, Contents and Implementation* (Jakarta: Djambatan, 2018).

⁵ Adrian Bedner and Yance Arizona, "Customs 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/https://doi.org/10.1080/14442213.2019.1670246>.

existence of indigenous legal communities.⁶Progress in the legal framework and the spirit of reform have not been directly proportional to implementation studies. The implementation of agrarian law in the field faces various challenges, such as business conflicts of interest, overlapping land claims, and weak law enforcement.

The rights of indigenous peoples have experienced significant developments internationally. The international community issued the United Nations Declaration on the Rights of Indigenous Peoples in 2007. A total of 144 countries have ratified this declaration, including Indonesia. Therefore, Indonesia has an obligation to align its national policies with these international principles.⁷(in this case, adjustment to the principles of UNDRIP).

Indonesia has now passed the Job Creation Law through a series of political events. The Job Creation Law is a regulation considered ambitious in reforming various sectors to support economic growth. The changes include investment, employment, and natural resource management. The law's implementation has had far-reaching impacts, particularly with potential controversy regarding the rights of indigenous peoples and environmental sustainability.

The legal provisions in the Job Creation Law bring significant changes to agrarian regulations and natural resource governance. The main changes include streamlining the permitting process, altering the mechanism for determining forest areas, and strengthening the central government's role in decision-making regarding land use. These changes have the potential to impact the agrarian rights of indigenous peoples, as guaranteed by the 1945 Constitution and other laws and regulations.

The rights of indigenous peoples, who are considered vulnerable, have become a concern for various parties regarding the implementation of the Job Creation Law. Ease of investment will indeed have positive impacts for Indonesia, such as increased economic growth. However, in the context of land, this law could threaten the existence of customary land, erode community access to natural resources, and have a high potential for agrarian disputes/conflicts.⁸Therefore, special regulations and further government attention are needed regarding the protection of indigenous peoples' rights, particularly in the area of customary land.

⁶Article 18B of the 1945 Constitution of the Republic of Indonesia is the result of the Second Amendment to the 1945 Constitution of the Republic of Indonesia in 2000 by the People's Consultative Assembly of the Republic of Indonesia (MPR RI). See also Nancy Lee Peluso, Suraya Abdul Wahab Afiff, and Noer Fauzi Rachman, "Claiming the Grounds for Reform: Agrarian and Environmental Movements in Indonesia," *Journal of Agrarian Change* 8, no. 2-3 (2008): 377-407, <https://doi.org/https://doi.org/10.1002/9781444307191.ch8>.

⁷Yance Arizona, *Agrarian Constitutionalism* (Yogyakarta: STPN Press, 2014).Page 50

⁸Indigenous Peoples' Alliance of the Archipelago (AMAN), "2021 Year-End Notes of the Indigenous Peoples' Alliance of the Archipelago: Resilient Amidst the Crisis" (Jakarta, 2021).Page 21

This research was conducted to address the urgency of customary land in Indonesia. This is based on the constitutionality of the rights of indigenous peoples as stipulated in the 1945 Constitution of the Republic of Indonesia. The research question, which forms the basis of this research, is: What are the implications of the implementation of the Job Creation Law on the rights of indigenous peoples? The expected outcome of this research is the creation of a strategic reference study for policy-making regarding customary agrarian matters. Furthermore, the interests of indigenous peoples are also discussed in this research to provide academic educational material regarding customary land rights and customary rights.

2. Research Method

This research uses a normative juridical legal method or also known as doctrinal legal research. Normative legal research is an effort to answer legal issues faced through the process of discovering legal rules, legal principles, and legal doctrines.⁹ This research is descriptive in nature, employing a statute approach and an analytical approach. The research data used is secondary data, consisting of primary, secondary, and tertiary legal materials. The laws used as the primary basis for this research are the Job Creation Law and the Basic Agrarian Law.

3. Results and Discussion

Implications of the Job Creation Law on the Rights of Indigenous Peoples

The Job Creation Law is a normative regulation that utilizes omnibus law provisions. This legal provision is also known as a "broom law" because through it, the government has made significant changes to several legal regulations. These changes relate to employment, the environment, ease of obtaining business permits, land, and so on.

The ratification of the Job Creation Law went through a series of political processes¹⁰, brought significant changes to the Indonesian legal landscape. These changes include aspects related to the rights of indigenous peoples. Prior to the issuance of the Job Creation Law, it is important to note that indigenous peoples' rights were enshrined in various existing laws and regulations. Indigenous peoples' rights in land areas can be found in Constitutional Court Decision No.

⁹ Peter Mahmud Marzuki, *Legal Research: Revised Edition* (Jakarta: Kencana, 2005). Page 47

¹⁰ The Job Creation Law was originally issued as a codification of Law Number 11 of 2020. However, a Constitutional Court ruling declared the law conditionally unconstitutional. Some time later, the contents of the Job Creation Law were reissued through a Government Regulation in Lieu of Law (Perppu), which was then ratified into law through the legal provisions of Law Number 6 of 2023. This legal provision is now simply referred to as the "Job Creation Law."

35/PUU-X/2012, which stipulates that customary forests are transferred from the state to indigenous peoples.

The Constitutional Court's ruling on customary forests and indigenous communities was then implemented in related regulations. To strengthen and elaborate on the Constitutional Court's ruling, the Minister of Forestry issued Regulation No. P.62/Menhut-II/2013 concerning Amendments to the Minister of Forestry Regulation No. P.44/MENHUT-II/2012 concerning the Confirmation of Forest Areas. Subsequently, Law No. 6 of 2014 concerning Villages, Regulation of the Minister of Home Affairs No. 52 of 2014 concerning Guidelines for the Recognition and Protection of Indigenous Communities, and Regulation of the Minister of Agrarian Affairs and Spatial Planning No. 10 of 2016 concerning Procedures for Determining Communal Rights to Land of Indigenous Communities and Communities Residing in Certain Areas were also issued.¹¹ A number of these regulations were issued to guarantee the protection of indigenous peoples' rights, which have become constitutional rights.

The rights of Indigenous Peoples, as stipulated in the 1945 Constitution of the Republic of Indonesia, constitute constitutional rights. Constitutional rights are human rights expressly enshrined in a country's constitution and are officially enshrined in the constitution for every citizen.¹² Based on this, constitutional rights are rigid and cannot be violated through any means. Violating these rights also violates the country's constitution and carries even greater consequences.

Returning to the discussion of the Job Creation Law's implications for agrarian reform and the rights of indigenous peoples, several key points emerged. Essentially, the implementation of this legal provision has had quite complex and multidimensional impacts on the Indonesian people. The protection of indigenous peoples has also been questioned in its implementation. The Job Creation Law has had numerous negative impacts on communities, particularly indigenous communities.¹³

The implications of the implementation of the Job Creation Law include changes to several provisions of the Basic Agrarian Law relating to customary rights. Although the Job Creation Law still recognizes customary rights, there are changes to the process and mechanisms for their recognition. The implementation of customary rights recognition through the Job Creation Law tends to complicate the process. This is because the recognition of customary rights (including customary community land) is carried out by regional heads

¹¹ Dolfries J Neununy, "The Urgency of the Omnibus Law (Job Creation Law) on the Rights of Indigenous Communities in Coastal Areas," *Balobe Law Journal* 1, no. 2 (2021): 125, <https://doi.org/10.47268/balobe.v1i2.653>.

¹² Jimly Asshiddiqie, *Introduction to Constitutional Law* (Jakarta: PT Raja Grafindo Persada, 2015). Page 224

¹³ Tengku Fariz and Benito Asdhie Kodiyat, "Legal Protection of Indigenous Peoples' Rights to Customary Land Post-Job Creation Law," *EduYustisia Journal of Legal Education* 1, no. 3 (2023): 39.

through Regional Regulations.¹⁴Through the Job Creation Law, customary rights are granted in the form of Land Management Rights (HPL), which are granted centrally by the Minister of Agrarian Affairs and Spatial Planning.¹⁵

Customary rights also include the right to control and manage customary land by customary law communities. Through Article 137 paragraph (1) of the Job Creation Law, some of the state's control rights can be granted management rights to:

- a. Central Government Agencies;
- b. Local government;
- c. Land Bank Agency;
- d. State-Owned Enterprises/Regional-Owned Enterprises
- e. Regional State-Owned Legal Entities; or
- f. Legal entity appointed by the central government.

The provisions of Article 137 paragraph (1) are clearly disharmonious with the Basic Agrarian Law. Article 2 paragraph (4) of the UUPA explains that the state's right to control can be implemented by autonomous regions and customary law communities. This implementation is only necessary (sufficient) and does not conflict with national interests according to government regulations.¹⁶

The disharmony between the provisions of the Job Creation Law and the UUPA has resulted in a violation of the constitutional rights of indigenous peoples. Legal regulations on land management that do not explicitly state that authority can be delegated to indigenous peoples are used as strong evidence of a violation of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This disharmony in legislation occurs due to the sectoral egoism of ministries or institutions in the planning process and the formation of laws.¹⁷Implicitly, the land regulations in the Job Creation Law uphold the principle of *domein verklaring*, which will be reinstated. This means that unclear customary land ownership (not having its legal status processed or not being adjusted to the latest regulations) can result in customary land becoming state land.¹⁸

Another implication of the Job Creation Law is the simplification of permitting processes used to increase investment. The most significant impact of this easing of permit applications is the exclusion of indigenous communities'

¹⁴ Article 6 paragraph (2) of Home Affairs Ministerial Regulation 52/2014

¹⁵See further in the Regulation of the Minister of ATR/BPN Number 18 of 2021

¹⁶ Putu Satria Satwika Anantha, "Legal Certainty of the Job Creation Law Against the Basic Agrarian Law Regarding Verklaring Domains," *Udayana Master Law Journal* 10, no. 2 (2021): 863, <https://doi.org/10.24843/JMHU.2021.v10.i04.p14>.

¹⁷ Wasis Susetio, "Disharmony of Legislation in the Agrarian Sector," *Lex Jurnalica* 10, no. 3 (2013): 135.

¹⁸Opcit.Satria Satwika Anantha, "Legal Certainty of the Job Creation Law on Basic Agrarian Laws Concerning Verklaring Domains."

deliberations. This simplification has the potential to minimize indigenous communities' participation in decision-making regarding land use in their customary territories. This, of course, again violates the constitutional rights of indigenous communities and leads to evictions from their customary territories.

Land use in customary areas without in-depth coordination and participation from indigenous communities undoubtedly creates a high potential for agrarian conflict. Conflicting interests can arise between the defense of customary areas and the interests of capitalism in the business world or other interests. Implementation of these provisions can also lead to overlapping claims to customary areas. Meanwhile, indigenous communities themselves may not be able to legalize their customary areas under the most recent applicable laws.

Customary forest management was also impacted by the elimination of the 30% minimum forest area requirement. Through the Job Creation Law, the provisions of Article 18 paragraph (2) of Law Number 41 of 1999 concerning Forestry, which regulates the minimum forest area that must exist in an area, were removed. This elimination aims to improve the management of non-forest land for national development programs that are driven to improve the economy. The potential for massive conversion of forest areas can be identified through amendments to Article 19 paragraph (1) of the Forestry Law. In the amendment, the article reads, "changes in the designation and changes in the function of forest areas are determined by the central government by considering the results of integrated research." Clearly, this regulatory change was implemented through a centralized system of agrarian regulation itself.

The welfare of indigenous communities can also be impacted by changes in regulations regarding minimum forest areas. Indigenous communities rely on forest products for their daily livelihoods. If forests are rezoned and managed by the state, they will lose natural resources that support their primary and secondary livelihoods.

The implications of the Job Creation Law's implementation in the agrarian and customary rights sectors threaten the fundamental rights of indigenous peoples. Indigenous rights are recognized in the 1945 Constitution of the Republic of Indonesia and guaranteed internationally by the UN Declaration/UNDRIP. Special attention and efforts to harmonize agrarian regulations in Indonesia, particularly those concerning customary rights, are needed.

Indigenous peoples and the Indonesian state share an inextricably linked relationship. Historically, Ir. Soekarno, in his speech on June 1, 1945, emphasized the importance of recognizing ethnic and traditional diversity within the concept of the Indonesian state. Furthermore, indigenous peoples are an integral component in shaping the nation's identity. The motto "Bhinneka Tunggal Ika" (Unity in Diversity) reflects this recognition of diversity, including the existence and diversity of indigenous peoples.

The urgency and interconnectedness of indigenous peoples and the formation of the state, as well as the constitutional rights of indigenous peoples, a judicial review of the agrarian law provisions in the Job Creation Law is necessary. Agrarian (land) issues are indeed complex, and therefore require more in-depth attention and study to prevent regulatory disharmony and human rights violations. The goal is to create a legal order and social conditions that are orderly, disciplined, and can improve welfare.

4. Conclusion

The rights of indigenous peoples are recognized and guaranteed internationally in the 1945 Constitution of the Republic of Indonesia and the UNDRIP. Therefore, indigenous peoples' rights (customary rights and recognition of customs) are constitutional rights that cannot be violated by anyone. The implementation of customary rights includes the management of customary rights, which are included in land (agrarian) regulations in Indonesia.

The implications of the Job Creation Law's implementation have had a significant impact on the existence of customary rights and indigenous communities. The Job Creation Law's implementation is considered to weaken the implementation of customary rights stipulated in the Basic Agrarian Law and other regulations. The granting of Land Management Rights (HPL) and the absence of regulations granting some control rights from the state to indigenous communities are the main reasons. The alleged emergence of a "domine verklaring" (a legal declaration) in the Job Creation Law complicates agrarian issues in the context of indigenous peoples' rights.

Simplifying permits and eliminating minimum forest area requirements are contributing to the decline in law enforcement of indigenous peoples' rights. This has resulted in indigenous communities losing their role in decision-making over their territories. This can negatively impact the well-being of indigenous communities themselves.

References

- Indigenous Peoples' Alliance of the Archipelago (AMAN). "2021 Year-End Notes of the Indigenous Peoples' Alliance of the Archipelago: Resilience in the Midst of Crisis." Jakarta, 2021.
- Arizona, Yance. *Agrarian Constitutionalism*. Yogyakarta: STPN Press, 2014.
- Asshiddiqie, Jimly. *Introduction to Constitutional Law*. Jakarta: PT Raja Grafindo Persada, 2015.
- Bedner, Adrian, and Yance Arizona. "Customs 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/https://doi.org/10.1080/14442213.2019.1670246>.

- Fariz, Tengku, and Benito Asdhie Kodiyat. "Legal Protection of Indigenous Peoples' Rights to Customary Land Post-Job Creation Law." *EduYustisia Journal of Legal Education* 1, no. 3 (2023): 39.
- Harsono, Boedi. *Indonesian Agrarian Law: History of the Formation of the Basic Agrarian Law, Its Contents, and Implementation*. Jakarta: Djambatan, 2018.
- Li, Tania Murray. *Land's End: Capitalist Relations on an Indigenous Frontier*. Durham: Duke University Press, 2014.
- Luke, Anton, and Carol Warren. *Land for the People: The State and Agrarian Conflict in Indonesia*. Athens: Ohio University Press, 2013.
- Marzuki, Peter Mahmud. *Legal Research: Revised Edition*. Jakarta: Kencana, 2005.
- Neununy, Dolfries J. "The Urgency of the Omnibus Law (Job Creation Law) on the Rights of Indigenous Peoples in Coastal Areas." *Balobe Law Journal* 1, no. 2 (2021): 125. <https://doi.org/10.47268/balobe.v1i2.653>.
- Peluso, Nancy Lee, Suraya Abdul Wahab Afiff, and Noer Fauzi Rachman. "Claiming the Grounds for Reform: Agrarian and Environmental Movements in Indonesia." *Journal of Agrarian Change* 8, no. 2-3 (2008): 377-407. <https://doi.org/https://doi.org/10.1002/9781444307191.ch8>.
- Rachman, Noer Fauzi. *Farmers and Rulers: The Dynamics of Indonesia's Agrarian Political Journey*. Yogyakarta: Insist Press, 2017.
- Satria Satwika Anantha, Putu. "Legal Certainty of the Job Creation Law on the Basic Agrarian Law Regarding Verklaring Domains." *Udayana Master Law Journal* 10, no. 2 (2021): 863. <https://doi.org/10.24843/JMHU.2021.v10.i04.p14>.
- Susetio, Wasis. "Disharmony of Legislation in the Agrarian Sector." *Lex Jurnalica* 10, no. 3 (2013): 135.

Legislation

- Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation to Become Law
- Law Number 41 of 1999 concerning Forestry
- Law Number 5 of 1960 concerning Basic Agrarian Regulations
- Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights

Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 52 of 2014 concerning Guidelines for the Recognition and Protection of Indigenous Legal Communities