



ISSN Print 2615-5648  
ISSN Online 2615-174X

**Editorial Office:** Faculty of Sharia, Universitas Islam Negeri Profesor Kiai Haji Saifuddin Zuhri Purwokerto, Indonesia, Jalan Jend. A. Yani No. 40 A Purwokerto Jawa Tengah 531226 Indonesia  
Phone: +62281-635624 Fax: +62281- 636653  
E-mail: [volksgeist@uinsaizu.ac.id](mailto:volksgeist@uinsaizu.ac.id)  
Website: <http://ejournal.uinsaizu.ac.id/index.php/volksgeist>

## Fulfilling Communal Rights through the Implementation of the Second Principle of *Pancasila* towards the Regulation on Agrarian Reform

### Article

#### **Authors**

Kartika Winkar Setya<sup>1\*</sup>, Abdul Aziz Nasihuddin<sup>2</sup>, Izawati Wook<sup>3</sup>

<sup>1</sup>Doctoral Student at the Faculty of Law, Universitas Jenderal Soedirman, Indonesia

<sup>2</sup>Faculty of Law, Universitas Jenderal Soedirman, Indonesia

<sup>3</sup> Faculty of Sharia and Law, Universiti Sains Islam Malaysia, Malaysia

#### **Corresponding Author:**

\*Kartika Winkar Setya,

Email:

[setyakartika67@gmail.com](mailto:setyakartika67@gmail.com)

#### **Data:**

Received: Feb 26, 2023;

Accepted: Jun 20, 2023;

Published: Jun 30, 2023

#### **DOI:**

[10.24090/volksgeist.v6i1.7868](https://doi.org/10.24090/volksgeist.v6i1.7868)

### Abstract

Fulfilling communal rights to customary lands has still become an unresolved polemic. As a country adhering to *Pancasila* ideology, all laws and regulations should embody in *Pancasila*, including regulation on Agrarian Reform. This research aimed to figure out the reduction of values found in the 2<sup>nd</sup> principle of *Pancasila* against the Presidential Regulation Number 86 Year 2018 concerning Agrarian Reform in the context of fulfilling communal rights of indigenous peoples to customary lands. The research used a normative-juridical method with both statutory and analytical approaches. This research specifically examined and analyzed the reduction of values in the second principles of *Pancasila* toward the regulation of agrarian reform in Indonesia. The data sources were in the form of secondary data to obtain objective research results including primary, secondary, and tertiary legal materials obtained through documents and literatures. The collected data were then qualitatively analyzed and presented in the forms of narrative text. By implementing the second principle of *Pancasila*, the communal rights to customary lands are fulfilled in Agrarian Reform and become the basis to strengthen the position of indigenous peoples in national legal system.

**Keywords:** *Customary land; Pancasila; agrarian reform; indigenous communities.*

©2023; This is an Open Access Research distributed under the term of the Creative Commons Attribution Licencee (<https://creativecommons.org/licenses/by/4.0>), which permits unrestricted use, distribution, and reproduction in any medium, provided the original works is properly cited.

## INTRODUCTION

Indonesia's legal development refers to the values contained in *Pancasila* as the nation's ideology. The second principle of *Pancasila* is Just and Civilized Humanity, with which everyone has the right to fair treatment and fulfillment of human rights, including, specifically for indigenous peoples, fulfillment of their traditional rights. Understanding indigenous peoples' rights as human rights has the consequence that not only their rights need to be respected and protected, but also be fulfilled. As human rights are basic and fundamental, their fulfillment is imperative. As

regulated in Article 18B paragraph (2) and Article 28 I, the 1945 Constitution essentially mandates acknowledgement of and respect for indigenous peoples and their traditional rights as long as they are still alive and in line with communal development (civilization) and the state's, Republic of Indonesia, principles. Further, communal rights to customary lands are regulated in Presidential Regulation Number 86 Year 2018 concerning Agrarian Reform.

Although articles 18B paragraph (2) and 28I of the 1945 Constitution and Presidential Regulation Number 86 Year 2018 mandate the state to respect and fulfill indigenous peoples' traditional rights, one of which being the right to communal lands as the manifestation of legal rights. In reality, such various legal instruments are unable to secure indigenous peoples' effort to obtain their rights to the lands completely, and human rights violation against indigenous peoples often occurs, since Presidential Regulation Number 86 Year 2018 concerning agrarian reform should have the capacity to reduce and reflect *Pancasila* values, particularly "just and civilized humanity". For example, the case of Marafefen indigenous people sealing the Aru Navy Base (Lanal Aru) traditionally (sasi) as a result of Dobo District Court's decision on the Aru Islands Regency, winning over the Aru Navy Base (Lanal Aru) on the customary land dispute.<sup>1</sup> There was also the case of Ammatoa Kajang indigenous people being forced to occupy their customary land area in Tamapalolo Hamlet, Tamatto Village, Ujung Loe District, Bulukumba Regency, South Sulawesi in order to keep their customary land. PT. LONSUM as the holder of HGU on the customary land did not hesitate to use state apparatus to criminalize these indigenous peoples, including violence, to force Ammatoa Kajang indigenous people out of the disputed forest area.<sup>2</sup>

Previous studies, including one conducted by Dessy Ghea et al. "*Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Kebijakan Penataan Aset Reforma Agraria* [The Existence of Indigenous Peoples' Communal Rights in The Asset Management Policy of Agrarian Reform]" (2019), discussed the ineffectiveness of legal protection for indigenous peoples to obtain and maintain their traditional rights to customary lands. The agrarian reform policy still leaves various problems, including indigenous peoples finding it difficult to obtain formal legal acknowledgement and lack of accommodation for indigenous peoples as the subject of the specifically regulated and standalone agrarian reform. Another study by Nabil Abduh Aqil et al. "*Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat Di Wilayah Ibu Kota Negara Nusantara* [The Urgency of Protecting Proprietary Rights to Indigenous Peoples' Lands in the State Capital Nusantara]" argued that it was very important and required the government's strong commitment to protecting and fulfilling indigenous peoples' rights to lands they owned falling within the development project area for the national capital. The government must not deny the indigenous peoples' communal rights to their customary lands by making an excuse of for public interest. Another study by Dinie Anggraeni et al. "*Implementasi Nilai-Nilai Yang Terdapat Pada Sila Kedua Pancasila Terhadap Kehidupan Bangsa* [The Implementation of Values in the Second Principle of *Pancasila* in the Life of the Nation]" (2021) argued that the second principle of *Pancasila* must be embodied in the nation's whole life, implementing it in daily life for justice based on *Pancasila* as the nation's foundational philosophy. The research did not discuss how the values of the second principles

<sup>1</sup> Priska Sari Pratiwi, "*Kasus Sengketa Lahan Di Aru Dan Upaya Banding Warga Adat Marafefen*" Kompas, accessed June 16, 2023, <https://regional.kompas.com/read/2021/11/21/080700378/kasus-sengketa-lahan-di-arudan-upaya-banding-warga-adat-marafefen?page=all>.

<sup>2</sup> Bugma, "*Warga Kajang Minta PT LS Kembalikan 11 Hektare Tanah Adat,*" Sindonews, accessed June 16, 2023, <https://daerah.sindonews.com/read/702107/174/warga-kajang-minta-pt-ls-kembalikan-11-hektare-tanah-adat-1646294582>.

of *Pancasila* were reduced into Indonesia's laws and regulations that were synchronized both vertically and horizontally.

Strengthening indigenous peoples' position in the national legal system is important and is in line with the development of the paradigm in criminal law that prioritizes settlement of cases in a restorative justice principle based on local wisdom (custom), and in the scope of civil law which practically adopts local customs in settlement of civil cases. In addition, indigenous peoples are Indonesia's identity and asset that if they lost the land they live in, their very existence will gradually come to extinction. Therefore, this paper analyzed how to embody the second principle of *Pancasila* in the context of fulfilling communal rights to customary lands in Presidential Regulation Number 86 Year 2018 concerning agrarian reform to strengthen indigenous peoples' position in the national legal system.

## RESEARCH METHODS

This research used a normative juridical method and statutory and analytical approaches. The statutory approach was carried out by examining all laws and regulations and policies/regulations related to the study's legal issues, while the conceptual approach started from understanding the principles and legal doctrines to explain the fulfillment of communal rights to customary lands through realizing the second principle of *Pancasila* in Presidential Regulation Number 86 Year 2018 concerning Agrarian Reform in strengthening indigenous peoples' position in the national legal system.

## ANALYSIS AND DISCUSSION

### **Embodiment of the Second Principle of *Pancasila* in the Fulfillment of Communal Rights to Customary Lands in Presidential Regulation Number 86 Year 2018 concerning Agrarian Reform.**

Indonesia adheres to the welfare state principle. One of the state's duties as the consequence of adhering to the welfare state principle is upholding human rights (HAM). Human rights are the most fundamental rights inherent in human as God's gift from birth, thus everyone has the right to have their human rights protected, including those of indigenous peoples. Understanding indigenous peoples' rights as human rights (HAM) has the consequence that not only these rights must be respected and protected, but also be fulfilled. Human rights basically show someone's fundamental power or authority. That human rights are basic and fundamental, their fulfillment is imperative.

A good law, according to Lawrence Friedman, must contain the legal system's elements including legal structure, legal substance and legal culture,<sup>3</sup> thus every law and policy created within the national law's legal system framework should have an Indonesian context.<sup>4</sup> Each of

<sup>3</sup> Yopi Gunawan and Kristian, *Perkembangan Konsep Negara Hukum Dan Negara Hukum Pancasila* (Bandung: PT Refika Aditama, 2015).

<sup>4</sup> Hariyanto Hariyanto, "Politik Hukum Dalam Legislasi Nasional," *YUDISIA : Jurnal Pemikiran Hukum Dan Hukum Islam* 13, no. 2 (December 31, 2022): 297–312, <https://doi.org/10.21043/YUDISIA.V13I2.16206>. the product of legislation is a work that is normative. So that everything that is normative is open to legal deviations. This potential deviation from the law will create what is called a legal error (legal gap

the legal structure, substance and culture is to be directed and adjusted to *Pancasila* values (the fundamental philosophy of the nation/*volksgeist*) and the 1945 Constitution (state's fundamental norm). Law's ideals are not only interpreted as a benchmark to test whether or not a positive law is fair, but also as a constitutive basis for a law not to lose its meaning as a law. Jimly Ashiddiqie in Ninuk Triyanti said:

Whereas Gustav Radbruch asserted that the ideals of the law not only functioned as a regulative benchmark, which tested whether a positive law was fair or not, but also functioned as a constitutive basis, which determined that without a legal ideal, the law would lose its meaning as law.<sup>5</sup>

Every society and nation certainly has a worldview containing moral and ethical values considered as truth. Morals and ethics (truth values) serve as the society's guide in determining how something is considered good or bad, right or wrong, proper or inappropriate and fair or unfair. When the law is made based on the truth values living and acknowledged in a society, they will consciously implement the law without the need for the state force them. Conforming to Von Savigny's theory "*des heutigenromischen Rechts*" that law lives in the common consciousness of the people (*volkreicht*), instead of abstract rules. Law is defined as the embodiment of the fundamental philosophy of the nation (*volksgeist*), as the manifestation of values, customs and habits living, growing and developing in the society.<sup>6</sup> Starting from similar values manifested in legal products, public awareness grows to comply with the law.

According to Bernard Arief Shidarta, the position of *Pancasila* as the basic values has fully been acknowledged and implemented in state life in Indonesia, but *Pancasila* as the target value providing the basis for legal objectives has not fully been implemented. Legal objectives can be achieved if *Pancasila* serves as the basis for the formation of Indonesia's entire legal system to create humanist and populist laws with Indonesian character values. Sarbini Sumawita in Ninuk Triyanti said:

"All orders of life in Indonesia, including in implementing economic systems and legal systems, must be in harmony with the *Pancasila* values since *Pancasila* is the basis of the state philosophy (*philosophische grondslag*), state ideology, national outlook on life (*weltanschauung*), the nation's foundation, the nation's mental life, the nation's legal ideals (*rechtsidee*), the state's fundamental principles (*staats fundamentalnorm*) and the source of all sources of Indonesia's law. Having not based on *Pancasila*, the state's goals aspiring the founding of the nation would be difficult to achieve".<sup>7</sup>

<sup>5</sup> Ninuk Triyanti, "Re-Actualization Of Pancasila Values On Law Establishment In The Economic Globalization Era," *Jurnal Pembaharuan Hukum* 6, no. 2 (May 4, 2020): 217, <https://doi.org/10.26532/jph.v6i2.8721>.so that much national legislation is found in the economic field that is loaded with capitalist liberals that do not reflect the values of the Pancasila. This research is intended to explain the importance of re-actualizing the Pancasila values and how to re-actualize the Pancasila values in the formation of laws in the economic field. The results showed that the re-actualization of the values of Pancasila n the formation of laws was an important requirement and as a means to achieve the goals of the country, namely to realize the welfare of the people. The method of actualizing Pancasila values in the formation of laws is carried out through 4 (four

<sup>6</sup> Hariyanto, Hariyanto. "Pembangunan Hukum Nasional Berdasarkan Nilai-Nilai Pancasila." *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 1, no. 1 (June 7, 2018): 53–63. <https://doi.org/10.24090/VOLKSGEIST.V1I1.1731>.

<sup>7</sup> Ninuk Triyanti, "Re-Actualization Of Pancasila Values On Law Establishment In The Economic Globalization Era," 216.so that much national legislation is found in the economic field that is loaded with capitalist liberals that do not reflect the values of the Pancasila. This research is intended to explain the importance of re-actualizing the Pancasila values and how to re-actualize the Pancasila values in the formation of laws in the economic field. The results showed that the re-actualization of the values of Pancasila n the formation of laws was an important requirement and as a means to achieve the goals of the country, namely to realize the welfare of the people. The method of actualizing Pancasila values in the formation of laws is carried out through 4 (four

Legal development will not be separated from the existing legal politics, thus an ideal legal political approach must be used to create a good legal product, namely *Pancasila* values and the state's goals as expressed in the fourth paragraph of the Preamble to the 1945 Constitution. *Pancasila* as the basic norm or, according to Hans Nawiasky, the *staatsfundamentalnorm* for Indonesian has a logical consequence that *Pancasila* must be implemented as the way of the life of people, nation and state.<sup>8</sup> *Pancasila*, as the state's fundamental norm and the legal ideal, is the source, basis, and guidelines for legislation formulation thereunder, thus *Pancasila* in Indonesia's legal order has two dimensions: (1) as a critical norm, which is a test stone for norms thereunder, and (2) as a guiding star for formulation of laws thereunder.<sup>9</sup> *Pancasila* is taken as the master source of all legal sources for formulating laws and regulations as mandated in Article 2 of Law Number 12 Year 2011 concerning Legislation Formulation.

*Pancasila* contains the nation's noble values embodied in its five principles. The second principle of *Pancasila* contains human values. MPR-RI Decree No. II/MPR/1978 has set guidelines on practicing the second principle of *Pancasila* as follows: (1) Acknowledging and treating humans as per dignity and honor as God Almighty's creatures; (2) Acknowledging equality, equal rights and equal obligations among fellow human beings; (3) Mutual love for fellow human beings; (4) Developing tolerance; (5) Developing non-arbitrariness towards others; (6) Upholding human values; (7) Passion for humanitarian activities; (8) Daring to defend justice and righteousness; (9) The Indonesians feel they are part of mankind; and (10) Developing respect for and cooperation with other nations.<sup>10</sup>

According to Romli Atmasasmita, law as a norm will lose its meaning if it is not manifested in public behavior and bureaucracy's law-abiding patterns, and vice versa, seeing law as only as a system of norms and behavior will only have it been used as a bureaucratic instrument with a value system originating from *Pancasila* as the top values in the nation and state's life. *Pancasila* as crystallization of the nation's noble values should be the guide for creating its own legal system, not only adopting the laws left by the Dutch colonialists without adjustment.<sup>11</sup>

*Pancasila* as the fundamental ideal foundation in formulating the entirety of Indonesia's national legal system can be explained as follows:

1. First Principle "Belief in the One and Only God".

No regulations in the national legal system can conflict with the religious teachings adhered to in Indonesia, in harmony with the life and religious norms so as not to divide and disturb the society's peaceful life.

2. Second Principle "Just and Civilized Humanity".

Formulation of laws and policies and implementation of the national legal system must guarantee fulfillment of human rights in a just manner for all people, including the community's often-neglected communal rights.

<sup>8</sup> Oksep Adhayanto, "Implementasi Nilai-Nilai Pancasila Sebagai Dasar Negara Dalam Pembentukan Peraturan Perundang-Undangan," *Jurnal Ilmu Hukum* 5, no. 2 (2015): 3–4, <https://doi.org/http://dx.doi.org/10.30652/jih.v5i2.3599>.

<sup>9</sup> Madaskolay Viktoris Dahoklory and Lita Tyesta Addy Listya Wardhani, "Rekonstruksi Nilai-Nilai Pancasila Dalam Undang-Undang," *SASI* 26, no. 3 (September 8, 2020): 297–309, <https://doi.org/10.47268/sasi.v26i3.271>.

<sup>10</sup> Iga Ghufrani Juniarti, Yayang Furi Furnamasari, and Dinie Anggraeni Dewi, "Implementasi Nilai-Nilai Yang Terdapat Pada Sila Kedua Pancasila Terhadap Kehidupan Bangsa," *Jurnal Pendidikan Tambusai* 5, no. 3 (2021): 7273–77, <https://www.jptam.org/index.php/jptam/article/view/2139>.

<sup>11</sup> Gunawan and Kristian, *Perkembangan Konsep Negara Hukum Dan Negara Hukum Pancasila*, 6.

3. Third Principle “The Unity of Indonesia”

The national legal system implementation must be oriented towards the unity framework in the context of efforts to strengthen the national unity and integrity, avoid narrow-mindedness and regional-oriented understanding, ethnicity, race and religion which may lead to disunity and lack of integrity.

4. Fourth Principle “Democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives”

The national legal system should be organized in compliance with democratic principles and prioritize deliberation for consensus in solving any national problems.

5. Fifth Principle “Social justice for the whole of the people of Indonesia”

The legal system implementation in Indonesia is carried out in a balanced and proportional manner, thus the legal system shall return to the legal objectives to be achieved including certainty, justice and benefit.<sup>12</sup>

Legal products are made aiming at justice, certainty and benefit for all people, including fulfillment of indigenous peoples’ communal rights to lands. The Indigenous Peoples’ Alliance of Nusantara (AMAN) matches the indigenous peoples’ terminology in defining indigenous people globally as a group of people with a history of origins and occupying a customary territory for generations, and having sovereignty over a land and natural wealth, socio-cultural life regulated by customary law and customary institutions that keep indigenous peoples’ lives sustainable as an indigenous community. The ILO Convention Number 169 Year 1989 and the Declaration on the Rights of Indigenous Peoples use the term “indigenous people” to refer to indigenous peoples with the following limitations:

“... peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain or all of their own social, economic, cultural, and political institutions”.<sup>13</sup>

With the limitations above, we may conclude that “indigenous people” are a group of individuals who are the original descendants of a country living and inhabiting a territory of the country even though the country has been conquered, with different social, economic and cultural conditions from other parts of society in the country and the state regulates its legal status with a special rule.

The First Indigenous Peoples Congress in 1999 defined indigenous peoples as communities that living based on ancestral origins from generation to generation on an indigenous territory, with sovereignty over land and natural resources, socio-cultural life, governed by customary laws and institutions, customs managing the continuity of the life of its people. F.D. Hollenman stated that indigenous peoples had 4 general characteristics as follows:

1. Magical religion where the indigenous peoples’ mindset is based on belief in something sacred;
2. Communal, that is, individuals are an integral part of the society as a whole;
3. Concrete meaning that every legal relationship occurring in the society is carried out clearly; and

<sup>12</sup> Gunawan and Kristian, 7–8.

<sup>13</sup> Jawahir Thontowi et al., “Aktualisasi Masyarakat Hukum Adat (MHA): Perspektif Hukum Dan Keadilan Terkait Dengan Status MHA Dan Hak-Hak Konstitusionalnya,” (Jakarta, 2012), 56.

4. Cash, that is, achievement is fulfilled spontaneously/immediately.<sup>14</sup>

The land of indigenous peoples of high position is not only interpreted as a valuable object, but also contains historical and religious magical values where the ancestors resided. Article 3 of Law Number 5 Year 1960 concerning Basic Agrarian Regulations, in its explanatory notes states that what is meant by “*ulayat* rights” and “similar rights” is what is called “*beschikingsrecht*” in the customary law library. Bushar Muhamad stated that the objects of *Ulayat* Rights included: a) Land; b) Water (waters such as: rivers, lakes, beaches, and their waters); c) Plants living in the wild (fruit trees, trees for carpentry or firewood and so on); and d) Wild animals living freely in the forest. The association’s territory is the association’s property which is principally permanent but in reality there are exceptions. This exception is related to the customary rights’ strength applicable outside. *Ulayat* rights cover all land within the area of the concerned legal community, whether or not it has been claimed by someone. In the context of customary rights, there is no land as “*res nullius*”. In general, the boundaries of the *Ulayat* Rights of the customary law community’s territory cannot be determined with certainty.

According to Jimly Ashiddiqie, granting the authority to Regents and Mayors to acknowledge and respect for indigenous peoples through local regulations is quite incorrect. Handing over the fate of an indigenous people completely to regulatory authorities at the regency/city level without clear rules is certainly quite risky. Based on the research conducted by Asep Yunan Firdaus, the government has issued many laws and regulations to acknowledge the existence of indigenous peoples and customary forests, but has not formulated short and simple terms and procedures aiming at acknowledging local community’s rights. Such a regulatory model implementation leads to denial of the existence of indigenous peoples and their traditional rights.<sup>15</sup>

Gregory Acciaolli in his paper “From Acknowledgment to Operationalization of Indigenous Sovereignty” made some conclusions claiming the inapplicability of indigenous and tribal peoples’ sovereignty, even though the national and international legal instruments supported it due to some reasons:

1. Unclear term of sovereignty for indigenous peoples implemented related to customary rights to customary territories, and the different use of the resettlement concept for indigenous peoples living in their customary community territories.
2. External factors related to community’s self-reliance movement with regard to the continuity agrarian land supervision. The government’s acknowledgment of customary principles by rejecting specific customary claims is a real deal. In some cases, the central government’s regional autonomy reforms, up to provincial and district level governments, resulting in the emergence of a level of suppression of local revenues which are mostly opposed as they are directly conflicting with indigenous peoples’ rights.<sup>16</sup>

The basic assumption is that Article 18B paragraph (2) of the 1945 Constitution concerning acknowledgement of indigenous peoples is not effective since the conditions for determining

<sup>14</sup> Alting Husen, *Dinamika Hukum Dalam Pengakuan Dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah* (Yogyakarta: Laksbang Pressindo, 2010), 31.

<sup>15</sup> Zaka Firma Aditya et al., “*Peran Mahkamah Konstitusi Dalam Perlindungan Hak Konstitusional Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi 2003-2020)*,” (Jakarta, 2021).

<sup>16</sup> Aditya et al., 17.

customary law community are quite complex, including: 1) as long as they are still alive; 2) in line with society's development; 3) in in line with the principles of the Republic of Indonesia; and 4) regulated under law. Sapiro Rahardjo argued that the four requirements in article 18B paragraph (2) of the 1945 Constitution were a form of the state's hegemonic power that it held the power to determine whether or not an indigenous people exists. The state regulates, defines, divides, and compartmentalize (*indelingsbeluts*) anything, all of which are carried out by and according to the perception of state's power holders. Soetandyo Wignjosoebroto stated that the four requirements, both *ipso facto* and *ipso jure*, were interpreted as the acknowledgement requested by indigenous peoples, and the burden of proving their existences was assume by indigenous peoples themselves, the power to acknowledge or not acknowledge indigenous peoples' existence.<sup>17</sup>

Moreover, the application is carried out cumulatively, thus indigenous peoples find it difficult to obtain legal standing status, including obtaining their traditional rights. The contradictory arrangements of implementation include: First, implementation of regulations related to indigenous peoples' rights are ineffective considering that the norms made are often conditional and in favor of the central government's interest. This arises mainly since faithfully granting the rights to indigenous peoples is generally negated by the phrase "as long as in reality they are still alive" and so on.

Presidential Regulation (Perpres) Number 86 Year 2018 concerning Agrarian Reform contains norms for rearranging the agrarian structure aiming at ensuring protection of smallholders, fishermen and underprivileged community groups for access to state land, protecting land rights, and receiving settlement benefits In agrarian conflicts. The Presidential Regulation on Agrarian Reform also regulates indigenous peoples and fulfillment of the communal rights to customary lands, despite unclearly.

Article 12 paragraph (1) and Article 14 paragraph (3) of Presidential Regulation Number 86 Year 2018 stipulate that the objects of agrarian reform consist of individual, community group with joint ownership rights and legal entity. The articles do not reflect realization of the values of acknowledgement of equality, equal rights and equal obligations between fellow human beings that indigenous peoples are not mentioned as the subject of agrarian reform. Referring to Article 12 paragraph (4) and Article 14 paragraph (5) of Presidential Regulation Number 86 Year 2018, community group with joint ownership rights means a collection of individuals forming a group, located in one artificial particular area (formed out of common interest), instead of social unit of indigenous peoples. The unclear position of indigenous peoples as the subject of agrarian reform has serious implications for agrarian issues related to indigenous peoples. Paradigmatically, this Presidential Regulation disregards agrarian issues related to indigenous peoples from the agrarian reform policy framework.<sup>18</sup>

The Presidential Regulation also does not reflect the value of recognizing and treating humans according to their dignity and worth as God Almighty's creature that in truth every human has the right to acknowledgement as legal subject and fulfilling their basic rights, including fulfillment of

<sup>17</sup> Amrina Rosyada, Esmi Warassih, and Ratna Herawati, "Perlindungan Konstitusional Terhadap Kesatuan Masyarakat Hukum Adat Dalam Mewujudkan Keadilan Sosial," *Kanun Jurnal Ilmu Hukum* 20, no. 1 (April 18, 2018): 9, <https://doi.org/10.24815/kanun.v20i1.10021>.

<sup>18</sup> Dessy Ghea Herrayani, Lucky Faradila Soraya, and Oemar Mochtar, "Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Kebijakan Penataan Aset Reforma Agraria," *Kertha Patrika* 41, no. 3 (2019): 383–399, <https://doi.org/10.24843/KP.2019.v41.i03.p0>.



indigenous peoples' communal rights to lands through land redistribution and asset legalization. Islam also presents concepts and insights of justice from various perspectives. Justice is mentioned in several verses of Qur'an, as follows:

1. Surah An-Nahl verse 90:

Indeed, Allah commands (you) to act justly and do good, to give to relatives, and Allah forbids from heinous deeds, evil and enmity. He instructs you so that you may take lessons.

2. Surah Al Maidah verse 8:

Everyone who believes, let you be people who uphold (the truth) for the sake of Allah, witness fairly, and never to be unfair, be fair, because fairness is closer to piety, and fear Allah. Verily Allah is Aware of what you do.

Fair means paying attention to individual's rights and giving those rights to their respective owner. Fair in this case can be defined as *wadh al-syai' fi mahallihi* (putting something in its place). The antonym is unjust, or *wadh'al-syai' fi ghairi mahallihi* (putting something out of place). As the saying putting an elephant in the king's place will indeed spoil a chess game. Understanding justice such way will lead to social justice. The state is obliged to act fairly, giving every individual or group of people the rights appropriately in order to realize the desired social justice. The justice of putting indigenous peoples as the subject of agrarian reform, protecting from agrarian disputes/conflicts, and providing the independence to enforce customary law through customary institutions will have indigenous peoples continued their existence.<sup>19</sup>

Article 17 paragraph (1) of Presidential Regulation Number 86 Year 2018 sets forth that agrarian disputes and conflicts are to be handled based on the legal certainty and social justice principles for one involving individuals; individual/group with legal entity; individual/group with institution; legal entity with legal entity; legal entity with institution; and institution with institution. The article does not reflect the values of developing non-arbitrary attitude and upholding human values since at operational level, this Presidential Regulation excludes indigenous peoples from the land rights protection schemes and agrarian conflict resolution mechanisms targeted in the agrarian reform policy framework. In case of dispute or agrarian conflict between indigenous peoples and legal entities or institutions, legal protection is unlikely to be provided, let alone strengthening indigenous peoples' position to defend their *ulayat* lands.

A clear example indigenous peoples' weak position in the face of the government in defending *ulayat* lands in the areas covered in the National Capital Region (IKN). The government claims the IKN area are entirely of forest area, while in reality there are 162 land concessions, among which there are indigenous peoples still depending on the agricultural lands they are cultivating. Basically, the IKN area is not entirely a forest area as the government claims. Adjacent lands and customary land concessions have the potential over-claiming for one plot of land which may result in disputes. From a juridical perspective, ownership of land rights is indispensable for the certainty of land rights ownership status. In the IKN area, 31% of the land controlled by the community is under complete rights, while the remaining 66% of the land is only physically controlled without any rights at all, which may lead to land disputes.<sup>20</sup>

<sup>19</sup> Alfa Rangkuti, "Konsep Keadilan Dalam Perspektif Islam," *Tazkiya Jurnal Pendidikan Islam* 6, no. 1 (2017): 40, <https://doi.org/http://dx.doi.org/10.30829/taz.v6i1.141>.

<sup>20</sup> Nabil Abduh aqil et al., "Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat Di Wilayah Ibu Kota Negara Nusantara," *Recht Studiosum Law Review* 1, no. 2 (October 25, 2022): 20, <https://doi.org/10.32734/rslr.v1i2.9670>.

Customary law has a weak position in the face of the national law in resolving agrarian disputes/conflicts, resulting in defeat of indigenous peoples' rights by the national law. Judges often take the national law into consideration in decision making on customary disputes, but disregard customary law in their decisions. This can be due to the judges' least knowledge of the community's customary law, making it difficult for the judges to take this into their consideration for their decision. Meanwhile, the state itself acknowledges indigenous peoples and their local wisdom as expressed in the constitution and several laws and regulations. The judges should conduct a search on and study more deeply indigenous peoples and their communal rights, observing and studying the history of the indigenous peoples' existence in the area and see the impact on the local customary law communities' life in case their communal rights are seized.

### **The Concept of Regulating Communal Rights to Customary Land that Can Strengthen Indigenous Peoples' Position in the National Legal System**

The United Nations General Assembly's The United Nation Declaration on The Rights of Indigenous People (UNDRIP) emphasized that indigenous peoples were entitled to all kinds of basic freedoms and human rights both individually and communally as acknowledged in the Charter of United Nations.<sup>21</sup> Indigenous peoples and individuals have freedom and are equal to the common society and other individuals and have the right to freedom from all kinds of discrimination, the right to self-identify, and to freedom with civil and political rights and economic, social and cultural rights. Article 1 Law Number 39 Year 1999 concerning Human Rights defines human rights as a set of rights inherent in the existence of human as God Almighty's creature and are His gifts that the state, law, government, and everyone must respect and uphold for the honor and protection of human dignity. Understanding indigenous peoples' rights as human rights (HAM) has the consequence that not only these rights must be respected and protected, but also be fulfilled. Human rights basically show individual's fundamental power or authority. Since human rights are basic and fundamental, their fulfillment is imperative.

Hans Kelsen argued that the values of individual justice could be identified through accommodation of general values in a law. Hans Kelsen argued law as a social order could be deemed fair if it was capable of regulating human actions in a good way for them to find happiness therein. Rawls also argued the ideal concept of justice that a society's structure was the basic structure of a genuine society where basic rights, freedom, power, authority, opportunity, income and welfare are fulfilled. Raw's categorization of the ideal social structure was used to assess whether or not the existing social institutions were fair and made corrections to social injustice. Injustice according to Rawls occurs because of the social situation, thus it is necessary to sort out which principles of justice could form a good social situation. Injustice correction is carried out by returning (call for redress) the community to its original position (people on original position). It is in this basic position that the original agreement is made between community members as equals.<sup>22</sup>

---

<sup>21</sup> Abdul Haris Farid, "Masyarakat Hukum Adat: Ada Atau Tiada? [Customary Law Community: Existing or Not?]," in *Karakteristik Subjek, Objek, Permasalahan Dan Solusi Tanah Ulayat/Adat Dalam Pembangunan Pertanahan* (Jakarta: Sekolah Tinggi Pertanahan Nasional (STPN), 2019), 91–101, <http://repository.stpn.ac.id/219/1/6> Masyarakat Hukum Adat Ada Atau Tiada.pdf.

<sup>22</sup> Pan Mohamad Faiz, "Teori Keadilan John Rawls (*John Rawls' Theory of Justice*)," *Jurnal Konstitusi* 6, no. 1 (2009): 140, <https://doi.org/https://doi.org/10.2139/ssrn.2847573>.

Customary Law Community (KMHA) is a legal community unit with reciprocal legal rights and obligations between the community unit, surrounding environment and the state. Customary law Community should be protected, acknowledged and respected under justice principles. KMHA in Indonesia plays a major role and influences Indonesian as a nation. KMHA serves as a “preserver” or “guardian” of the values of the Indonesians’ life. These noble values are taken as a heritage, thus later these values will not fade and be well kept under the Republic of Indonesia.<sup>23</sup>

Customary law’s position and role in the efforts of developing Indonesia’s national law are still problematic. Customary law has been officially acknowledged by the state, but its use is limited. One conflict arising is related to indigenous peoples’ right to their agrarian resources, resulting in Constitutional Court Decision Number 35/PUU-X/2012. The Constitutional Court Decision mandates that’s customary forests are no longer the state’s forest, but belong to indigenous peoples. The Constitutional Court Decision still causes various conflicts: First, the issue of granting the rights to customary forests, which is not made immediately, only to the existing acknowledged customary law communities; Second, various, incoherent laws and regulations governing indigenous and tribal peoples’ rights; and Third, conceptual problems due to misinterpretation of the concept of customary rights and indigenous and tribal peoples’ rights as national minorities/the first multi-ethnic nation state.<sup>24</sup>

Ismudi Muchsin in Abdul Haris Farid stated positive correlation between the existence of indigenous peoples and that of modern society that they collaborate with the travel industry. The existence of indigenous peoples does not only fulfill the symbolic elements whose existence is acknowledged, but must be epicenter of the theme development. Indigenous peoples in their cultural and cultural values are the valuable asset for the nation’s future in tourism sector, which can certainly improve the country’s economy in the industrial revolution 4.0 era. The fact of acknowledging customary law communities is an important capital for transformation in the industrial revolution 4.0 era.<sup>25</sup>

Communal Rights, according to Article 1 paragraph (1) Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 Year 2016, are defined as joint property rights over a customary law community’s land, or joint property rights over land given to people living in certain areas. Acknowledgement of communal rights to customary lands has actually been set forth in Article 18B paragraph (2) and Article 28 I of the 1945 Constitution mandating to acknowledge and respect customary community units and their traditional rights as long as they are still alive and in line with the society’s development (civilization) and the principles of the Republic of Indonesia. Furthermore, Articles 3 and 5 concerning Basic Agrarian Law along with general explanatory notes II number (3) state that communal rights to *ulayat* land are only acknowledged as long as the indigenous peoples still exists in reality as proven with legalization of indigenous peoples.

The legalization concept refers to Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia No. 10 Year 2016 concerning Procedures for Determining Communal Rights to Customary Law Communities’ Land

<sup>23</sup> Rosyada, Warassih, and Herawati, “*Perlindungan Konstitusional Terhadap Kesatuan Masyarakat Hukum Adat Dalam Mewujudkan Keadilan Sosial*,” 3–4.

<sup>24</sup> Takwim Azami, “*Dinamika Perkembangan Dan Tantangan Implementasi Hukum Adat Di Indonesia*,” *QISTIE* 15, no. 1 (May 1, 2022): 52–53, <https://doi.org/10.31942/jqi.v15i1.6487>.

<sup>25</sup> Farid, “*Masyarakat Hukum Adat: Ada Atau Tiada?*,” 99.

and Communities residing in Certain Areas, as follows: 1) Customary head applies to Regent/Mayor; 2) Establishment of IP4T team; 3) Identification, verification and field inspection; 4) PNBP receipts and payments; 5) land measurement and inspection; 6) announcements; 7) bookkeeping of rights and issuance of certificates; and 8) submission of communal rights certificate.<sup>26</sup> Legalizing assets to strengthen indigenous peoples' position is currently important since even if the state often denies customary land by discrediting its position as the state's land resulting in indigenous peoples' loss of the rights to customary lands, which can be used by the state at any time under the premise of public interest.

Issuance of communal rights certificate in the context of agrarian reform is a legal breakthrough by the National Land Agency to change the ownership and control of land and legal relations related to land tenure. However, the concept offered in Presidential Regulation No. 86 Year 2018 concerning agrarian reform also cannot put indigenous peoples as the subject of agrarian reform explicitly with implications for the threat of redistribution of indigenous peoples' rights to lands and become the object of protection from agrarian disputes/conflicts. In the author's opinion, it is necessary to make some regulatory changes to the agrarian reform to strengthen indigenous peoples' position in the national legal system, as follows:

1. Reinforcing indigenous peoples' position as one subject of agrarian reform which is independent of the meaning of community groups with joint ownership rights, since indigenous peoples are not just a group of people sharing the same goals and living together/in a certain area, but are also social units.
2. Reinforcing indigenous peoples' position as a party receiving guaranteed protection and legal certainty in the face of agrarian disputes/conflicts.
3. Indigenous peoples' existence is not only proven by local government's determination on the application filed by customary head, but can be carried out through a field inspection by a designated team. Legalization of indigenous peoples' existence by determination is not compliant with the philosophy of the indigenous peoples themselves, but merely pursues legal certainty by leaving the original values of the nation.
4. Synchronized both vertically and horizontally against various law and regulations governing indigenous peoples' traditional rights, then the result of this synchronization will be material for study in law making that specifically regulates indigenous peoples.
5. Making laws that specifically regulate indigenous peoples, fulfilling indigenous peoples' traditional rights, including the rights to customary land ownership, and dispute resolution mechanisms when indigenous peoples face the government or private parties in defending their traditional rights, all of which are based on *Pancasila*.

## CONCLUSION

As the result of the discussion above, we may conclude as follows: The fulfillment of communal rights to customary lands expressed in Article 12 paragraphs (1) and (4), Article 14 paragraphs (3) and (5) and Article 17 paragraph (1) of Presidential Regulation Number 86 Year 2018 does not reflect the values of the principle Just and Civilized Humanity. A renewed concept of agrarian

---

<sup>26</sup> Herrayani, Soraya, and Mochtar, "Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Kebijakan Penataan Aset Reforma Agraria," 292.

reform is needed to strengthen indigenous peoples' position in the national legal system by affirming they are subject of agrarian reform, as parties entitled to protection and legal certainty in dealing with agrarian disputes and conflicts, and to existence. This is not only assessed based on whether there is acknowledgement of indigenous peoples, but through field inspection by authorized team. The government and the House of People's Representatives (DPR) should synergize and have a strong commitment to formulate and pass a law on indigenous peoples to guarantee their existence in Indonesia and fulfillment of their traditional rights, bearing in mind that their very existence is not just merely a symbol of entity of the state.

## REFERENCES

- Abduh aqil, Nabil, Jessica Armies, Asri Verauli, and Muhammad Iqbal Baiquni. "Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat Di Wilayah Ibu Kota Negara Nusantara." *Recht Studiosum Law Review* 1, no. 2 (October 25, 2022): 14–27. <https://doi.org/10.32734/rslr.v1i2.9670>.
- Adhayanto, Oksep. "Implementasi Nilai-Nilai Pancasila Sebagai Dasar Negara Dalam Pembentukan Peraturan Perundang-Undangan." *Jurnal Ilmu Hukum* 5, no. 2 (2015): 166–74. <https://doi.org/http://dx.doi.org/10.30652/jih.v5i2.3599>.
- Aditya, Zaka Firma, Anna Triningsih, Abdul Basid Fuadi, and Rizkysyabana Yulistyaputri. "Peran Mahkamah Konstitusi Dalam Perlindungan Hak Konstitusional Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi 2003-2020)." Jakarta, 2021.
- Azami, Takwim. "Dinamika Perkembangan Dan Tantangan Implementasi Hukum Adat Di Indonesia." *QISTIE* 15, no. 1 (May 1, 2022): 42–55. <https://doi.org/10.31942/jqi.v15i1.6487>.
- Bugma. "Warga Kajang Minta PT LS Kembalikan 11 Hektare Tanah Adat," *Sindonews*. Accessed June 16, 2023. <https://daerah.sindonews.com/read/702107/174/warga-kajang-minta-pt-ls-kembalikan-11-hektare-tanah-adat-1646294582>.
- Dahoklory, Madaskolay Viktoris, and Lita Tyesta Addy Listya Wardhani. "Rekonstruksi Nilai-Nilai Pancasila Dalam Undang-Undang." *SASI* 26, no. 3 (September 8, 2020): 297–309. <https://doi.org/10.47268/sasi.v26i3.271>.
- Faiz, Pan Mohamad. "Teori Keadilan John Rawls (John Rawls' Theory of Justice)." *Jurnal Konstitusi* 6, no. 1 (2009): 135–49. <https://doi.org/https://doi.org/10.2139/ssrn.2847573>.
- Farid, Abdul Haris. "Masyarakat Hukum Adat: Ada Atau Tiada?," in *Karakteristik Subjek, Objek, Permasalahan Dan Solusi Tanah Ulayat/Adat Dalam Pembangunan Pertanahan*, 91–101. Jakarta: Sekolah Tinggi Pertanahan Nasional (STPN), 2019. [http://repository.stpn.ac.id/219/1/6/Masyarakat Hukum Adat Ada Atau Tiada.pdf](http://repository.stpn.ac.id/219/1/6/Masyarakat%20Hukum%20Adat%20Ada%20Atau%20Tiada.pdf).
- Gunawan, Yopi, and Kristian. *Perkembangan Konsep Negara Hukum Dan Negara Hukum Pancasila*. Bandung: PT Refika Aditama, 2015.
- Hariyanto, Hariyanto. "Pembangunan Hukum Nasional Berdasarkan Nilai-Nilai Pancasila." *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 1, no. 1 (June 7, 2018): 53–63. <https://doi.org/10.24090/VOLKSGEIST.V1I1.1731>.
- . "Politik Hukum Dalam Legislasi Nasional." *YUDISIA : Jurnal Pemikiran Hukum Dan Hukum Islam* 13, no. 2 (December 31, 2022): 297–312. <https://doi.org/10.21043/YUDISIA.V13I2.16206>.

- Herrayani, Dessy Ghea, Lucky Faradila Soraya, and Oemar Mochtar. “*Eksistensi Hak Komunal Masyarakat Hukum Adat Dalam Kebijakan Penataan Aset Reforma Agraria.*” *Kertha Patrika* 41, no. 3 (2019): 383–99. <https://doi.org/10.24843/KP.2019.v41.i03.p0>.
- Husen, Alting. *Dinamika Hukum Dalam Pengakuan Dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah*. Yogyakarta: Laksbang Pressindo, 2010.
- Juniarti, Iga Ghufrani, Yayang Furi Furnamasari, and Dinie Anggraeni Dewi. “*Implementasi Nilai-Nilai Yang Terdapat Pada Sila Kedua Pancasila Terhadap Kehidupan Bangsa.*” *Jurnal Pendidikan Tambusai* 5, no. 3 (2021): 7273–77. <https://www.jptam.org/index.php/jptam/article/view/2139>.
- Pratiwi, Priska Sari. “*Kasus Sengketa Lahan Di Aru Dan Upaya Banding Warga Adat Marafenfen.*” *Kompas*. Accessed June 16, 2023. <https://regional.kompas.com/read/2021/11/21/080700378/kasus-sengketa-lahan-di-arudan-upaya-banding-warga-adat-marafenfen?page=all>.
- Rangkuti, Alfa. “*Konsep Keadilan Dalam Perspektif Islam.*” *Tazkiya Jurnal Pendidikan Islam* 6, no. 1 (2017): 1–21. <https://doi.org/http://dx.doi.org/10.30829/taz.v6i1.141>.
- Rosyada, Amrina, Esmi Warassih, and Ratna Herawati. “*Perlindungan Konstitusional Terhadap Kesatuan Masyarakat Hukum Adat Dalam Mewujudkan Keadilan Sosial.*” *Kanun Jurnal Ilmu Hukum* 20, no. 1 (April 18, 2018): 1–22. <https://doi.org/10.24815/kanun.v20i1.10021>.
- Thontowi, Jawahir, Irfan Nur Rachman, Nuzul Qur’aini Mardiyah, and Titis Anindyajati. “*Aktualisasi Masyarakat Hukum Adat (MHA): Perspektif Hukum Dan Keadilan Terkait Dengan Status MHA Dan Hak-Hak Konstitusionalnya.*” Jakarta, 2012.
- Triyanti, Ninuk. “*Re-Actualization of Pancasila Values On Law Establishment In The Economic Globalization Era.*” *Jurnal Pembaharuan Hukum* 6, no. 2 (May 4, 2020): 214–25. <https://doi.org/10.26532/jph.v6i2.8721>.