



Legal Policy on the Recognition of Indigenous Peoples' Rights in the Draft Indigenous Peoples' Law

Politik Hukum Pengakuan Hak Masyarakat Adat dalam Rancangan Undang-Undang Masyarakat Hukum Adat

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Article Info

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History:

Submitted: xx-xx-xxxx

Revised: xx-xx-xxxx

Accepted: xx-xx-xxxx

Keyword:

Legal policy; customary law communities; rights recognition; legal protection.

Kata Kunci:

Politik hukum; masyarakat hukum adat; pengakuan hak; perlindungan hukum.

Abstract

This paper aims to examine the legal construction of recognition for indigenous legal communities (MHA) in the Draft Law on Indigenous Peoples (RUU MHA) and analyze it within the context of Indonesia's legal politics. Indigenous communities are a vital part of national diversity whose existence is acknowledged in Article 18B paragraph (2) of the 1945 Constitution. However, such recognition remains conditional and has yet to be effectively implemented. This research employs a normative legal method with statutory, historical, and conceptual approaches. The findings reveal that the RUU MHA offers a more comprehensive legal framework to secure the recognition of indigenous rights, including communal land, customary institutions, and freedom of belief. However, political challenges and overlapping regulations hinder its realization. In terms of legal politics, recognition of MHA is not yet a legislative priority, as seen in the delayed enactment of the bill since its inclusion in the 2012 National Legislation Program. Therefore, strong political will and legal reform are required to ensure that indigenous communities are fully recognized and protected. The RUU MHA is expected to become a legal instrument that fosters social justice and safeguards the rights of indigenous peoples in Indonesia.

Abstrak

Tulisan ini bertujuan untuk mengkaji konstruksi hukum pengakuan terhadap masyarakat hukum adat (MHA) dalam Rancangan Undang-Undang Masyarakat Hukum Adat (RUU MHA) serta menganalisisnya dalam konteks politik hukum di Indonesia. MHA merupakan bagian dari keragaman bangsa yang eksistensinya diakui dalam Pasal 18B ayat (2) UUD 1945. Namun, pengakuan ini bersifat bersyarat dan belum diimplementasikan secara efektif. Penelitian ini menggunakan metode normatif dengan pendekatan perundang-undangan, historis, dan konseptual. Hasil penelitian menunjukkan bahwa RUU MHA memberikan kerangka hukum yang lebih lengkap untuk menjamin pengakuan atas hak-hak MHA, termasuk hak ulayat, kelembagaan adat, dan kebebasan berkeyakinan. Namun, tantangan politik dan tumpang tindih regulasi menjadi penghambat utama dalam realisasi RUU tersebut. Dalam konteks politik hukum, pengakuan terhadap MHA belum menjadi agenda prioritas, terbukti dari lambannya pengesahan RUU MHA sejak masuk Prolegnas 2012. Oleh karena itu, diperlukan komitmen politik dan reformasi hukum yang berpihak pada masyarakat adat. RUU MHA diharapkan menjadi instrumen yang dapat mewujudkan keadilan sosial dan menjamin keberlanjutan hak-hak masyarakat hukum adat di Indonesia.



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 <https://doi.org/10.28918/ajlh.v5i1.2>

INTRODUCTION

Customary law communities have been an integral part of Indonesia's history. The 1945 Constitution explicitly recognises their existence, but this recognition is still conditional. Many cases of customary land rights violations and land conflicts have occurred due to the ambiguity of this legal recognition. Erasmus Cahyadi from the Indigenous Peoples Alliance of the Archipelago (AMAN) emphasises the importance of passing the MHA Bill to address this uncertainty. Indigenous communities need recognition as a form of acknowledgement of their existence in the country.¹ This also serves as legal protection for indigenous peoples. Recognition of indigenous peoples is a statement by a state acknowledging that these indigenous peoples are ready and willing to build relationships with other communities, local governments and central government as a manifestation of recognition of indigenous peoples.² Recognition of the rights of MHA is important to protect their interests, especially those related to land and natural resources. Without formal recognition, MHA are vulnerable to conflict, land grabbing and neglect of their socio-economic rights. This recognition is also important in preserving their cultural sustainability and identity.

Legal uncertainty regarding the existence of customary law communities remains the main trigger for conflicts over customary land ownership. This situation is highly problematic because the lack of formal recognition leads to overlapping policies that are detrimental to indigenous communities. This demonstrates a discrepancy between the law and the social reality on the ground.³ In fact, a concrete conflict occurred in East Sumba, where the government granted a permit to the sugar cane company PT Muria Sumba Manis to operate in a customary forest area. This situation sparked fierce resistance from the local indigenous community, which then manifested itself in a series of demonstrations.⁴ The Indigenous Peoples Alliance of the Archipelago (Aliansi Masyarakat Adat Nusantara/AMAN) stated that the MHA Bill is urgently needed to end land grabbing. Therefore, formal recognition through the MHA Bill is a crucial step to prevent conflict and guarantee the rights of indigenous peoples.

Of the many violations of indigenous peoples' rights, the MHA Bill is a solution to address all legal issues concerning indigenous peoples' rights and to achieve legal certainty regarding the existence of indigenous peoples. The MHA Bill aims to provide recognition and protection for the rights of indigenous peoples. This bill is expected to become a legal instrument that can guarantee land rights, access to resources, and respect for local wisdom. Through this bill, it is hoped that there will be synergy between national law and customary law that supports the welfare of indigenous peoples.⁵ Although this bill offers hope, the challenges in its implementation remain significant. Diverse political, economic and social interests often hinder the process of recognising the rights of indigenous peoples. In addition, legal uncertainty and a lack of

¹ Zayanti Mandasari, 'Politik Hukum Pengaturan Masyarakat Hukum Adat (Studi Putusan Mahkamah Konstitusi)' (2014) 21 Jurnal Hukum Ius Quia Iustum 227.

² Damianus Krismantoro, 'Pengakuan Hak Masyarakat Adat Atas Tanah Ulayat: Analisis Hubungan Antara Hukum Nasional Dan Hukum Adat' (2022) 4 AKSELERASI: Jurnal Ilmiah Nasional 21.

³ Harris Y. Sibuea, 'Urgensi Pembentukan Rancangan Undang-Undang Tentang Masyarakat Hukum Adat' (2019) 11 Info Singkat 1.

⁴ Frichy Ndaumanu, 'Kebijakan Pemerintah Daerah Terhadap Upaya Perlindungan Dan Penghormatan Masyarakat Hukum Adat Di Kabupaten Alor Provinsi Nusa Tenggara Timur' (2018) 9 Jurnal HAM 37 <<http://ejournal.balitbangham.go.id/index.php/ham/article/view/412>>.

⁵ Ade Bagus Saswoyo and dan Margo Hadi Pura, 'Urgensi Pengundangan Rancangan Undang-Undang Masyarakat Hukum Adat Sebagai Bentuk Kesetaraan Warga Negara' (2023) 5 Jurnal suara Hukum 19.

understanding of customary law among the public and the government are obstacles to the realisation of this bill.

METHODS

This research is normative or doctrinal legal research that focuses on analysing legal texts and applicable norms.⁶ This approach is the most appropriate choice because it aims to thoroughly examine, evaluate, and analyse the rules and principles of law⁷ related to the recognition of the rights of indigenous peoples. This approach provides a strong methodological basis for understanding the substance of the law, making it highly relevant for dogmatic studies.⁸ This research specifically focuses on an in-depth analysis of legal documents and legislation. In addition, we also carefully examine relevant legal literature and official government documents. The ultimate goal is to provide a comprehensive legal basis for understanding the legal basis and norms governing the recognition of MHA rights in the bill.

This study utilises three complementary approaches, namely the legislative approach, the conceptual approach, and the historical approach.⁹ The combination of these three approaches is crucial to producing an analysis that is not only comprehensive but also multi-dimensional, enabling researchers to explore issues from various perspectives. The legislative approach is used to examine various relevant laws in depth and systematically. The conceptual approach is applied to understand the legal concepts underlying the issues under study. The historical approach is used to trace the historical development of MHA recognition law in Indonesia over time. Thus, the integration of these three approaches ensures a holistic study of the complex issues discussed in this research.

All research data was collected from legal materials divided into three main categories, namely primary, secondary and tertiary legal materials. The use of this strict hierarchy is very important and fundamental to ensure the validity and legal authority of each piece of data used in the research. Primary legal materials include the 1945 Constitution, the 2009 MHA Bill, and Law No. 39 of 1999 on Human Rights. Secondary legal materials consist of legal literature such as books, scientific journals, and seminar proceedings. Tertiary legal materials include legal dictionaries and encyclopaedias used to deepen understanding of terminology. Thus, this research is built on a foundation of strong, valid, and scientifically accountable data.

The data collection technique used in this study was library research. This technique is the most relevant, efficient, and effective method for normative legal research because the required data is available in the form of written documents and literature. All relevant legal materials were collected from various reliable sources, both from university libraries and digital journal databases. This collection process involved carefully reading and reviewing each document. Thus, this technique ensured that all relevant legal information was collected systematically and comprehensively.

Finally, all legal materials collected in this study were analysed qualitatively. This analysis was essential to interpret the meaning and relevance of existing legal norms, which cannot be measured quantitatively. The analysis techniques applied include

⁶ Indiarito Adisaputro, 'Paradigma Posivistik Dalam Penelitian Hukum; Kritik Terhadap Pandangan Teori Hukum Normatif Di Indonesia' (2020) 2 *Proyuris* 131.

⁷ Suteki & Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori Dan Praktik)* (1th edn, RajaGrafindo Persada 2020).

⁸ Nunung Rodliyah, Elfa Murdiana and Ricco Andreas, 'Judicial Ijtihad in Religious Courts for Achieving Substantive Justice in Indonesia' (2025) 2 *Journal of Law and Regulation Governance* 372 <<https://journal.worldofpublication.com/index.php/jlarg/article/view/79>>.

⁹ Tanius Sebastian, 'Masalah Metodologis Ilmu Hukum Indonesia' (2018) 4 *Veritas et Justitia* 59.

interpretation to understand the intent and purpose of a legal text. In addition, we also use argumentum a contrario to draw logical conclusions from something that is not regulated. Not to forget, the syllogism technique is also used to formulate valid conclusions. Thus, this study will produce findings that are legally valid and scientifically accountable before the academic public.

RESULT AND DISCUSSION

1. Legal Construction of Recognition of Customary Law Community Rights in the Draft Customary Law Community Bill.

The formation of the Unitary State of the Republic of Indonesia (NKRI) began with the unification of various indigenous communities that had long existed in the archipelago. This formation was very important because it reflected the state's recognition of social and cultural diversity as the foundation of a pluralistic nation.¹⁰ Recognition of their existence is an absolute prerequisite for building national unity based on diversity. The existence of these indigenous communities has been recognised since the Dutch colonial period, particularly in the form of villages with their own systems of government and justice. This historical recognition was later reinforced and formally enshrined in the country's constitution after independence.¹¹ Specifically, recognition of indigenous peoples is also enshrined in the 1945 Constitution, as stipulated in Article 18, Article 18B paragraph (2), and Article 28I paragraph (3). Thus, recognition of indigenous peoples is a fundamental historical and constitutional foundation for the identity and sustainability of the Unitary State of the Republic of Indonesia.

During the New Order era, economic development policies based on the exploitation of natural resources had a significant impact on the rights of indigenous peoples. These policies systematically eliminated the traditional rights and access of indigenous peoples to their territories. This led to increasing conflicts between indigenous peoples and the government and private entities.¹² This fact was comprehensively proven by the National Inquiry conducted by the National Human Rights Commission (Komnas HAM) in 2014. In addition, although Constitutional Court Decision No. 35/PUU-X/2012 explicitly stated that customary forests are not part of state forests, the implementation of this recognition still faces serious obstacles. Various highly complex and convoluted bureaucratic issues have hampered the recognition process. Therefore, despite legal progress, the challenges in implementing policies on the recognition of indigenous peoples' rights remain very real and ongoing to this day.¹³

At the international level, the protection of indigenous peoples' rights has become a concern, as stipulated in the ILO Convention and the 2007 UN Declaration. In Indonesia, efforts to pass the Indigenous Peoples Bill have been ongoing since the Congress of Indigenous Peoples of the Archipelago (KMAN). Although the House of Representatives has included the bill in the National Legislation Programme

¹⁰ Retno Kus Setyowati, 'Pengakuan Negara Terhadap Masyarakat Hukum Adat' (2023) 12 *Binamulia Hukum* 131.

¹¹ Valeri M. Siringoringo, 'Pengaturan Perlindungan Hukum Dan Pengakuan Terhadap Masyarakat Adat Terkait Resistensi Pembangunan (Studi Kasus Masyarakat Adat Tobelo, Halmahera, Maluku Utara)' (2016) 3 *Gema Keadilan* 36.

¹² Yuliana Primawardani, 'Perlindungan Hak Masyarakat Adat Dalam Melakukan Aktivitas Ekonomi, Sosial Dan Budaya Di Provinsi Maluku' (2017) 8 *Jurnal HAM* 1 <<http://ejournal.balitbangham.go.id/index.php/ham/article/view/165>>.

¹³ 'Rancangan Undang-Undang Tentang Masyarakat Hukum Adat' hal 2-3.

(Prolegnas) since 2013, it has not yet been passed into law.¹⁴ The government has actually recognised the importance of protecting indigenous peoples, but existing policies are still not fully effective in resolving their problems. Conflict resolution mechanisms rely heavily on formal legal channels, which tend to be detrimental to indigenous peoples because their legal status is still debatable. Therefore, more inclusive and implementable policies are needed to ensure the recognition and protection of the rights of indigenous peoples in Indonesia.

Within the systematic framework of legislation in Indonesia, the existence of customary law communities is constitutionally recognised both through the 1945 Constitution of the Republic of Indonesia and through subordinate legislation. These laws and regulations include: ¹⁵ the 1945 Constitution of the Republic of Indonesia (UUD 1945); MPR Decree No. IX of 2001 on Agrarian Reform and Natural Resource Management; Law No. 5 of 1960 on Agrarian Principles; Law No. 5 of 1994 concerning the Ratification of the International Convention on Biological Diversity (United Nations Convention on Biological Diversity); Law No. 39 of 1999 concerning Human Rights; Law No. 7 of 2004 concerning Water Resources; Law No. 18 of 2004 concerning Plantations; Law No. 19 of 2004 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2004 concerning Amendments to Law No. 41 of 1999 concerning Forestry into Law; Law No. 41 of 1999 on Forestry; Law No. 23 of 2006 on Population Administration; Law No. 26 of 2007 on Spatial Planning; Law No. 1 of 2014 amending Law No. 27 of 2007 on Coastal Zone and Small Islands Management; Law No. 23 of 2014 on Regional Government; Law No. 4 of 2009 on Mineral and Coal Mining; Law No. 32 of 2009 on Environmental Protection and Management; Law No. 2 of 2012 on Land Acquisition for Development in the Public Interest; Law No. 21 of 2001 on Special Autonomy for Papua Province; Law No. 11 of 2006 on the Government of Aceh; and Law No. 6 of 2014 on Villages.

The recognition of customary law communities has a strong philosophical foundation, stemming from Indonesia's welfare state ideals. This concept is very important because it affirms that the state has an obligation to protect and promote the welfare of all its people, without exception. This shows that their rights are an integral part of the national objectives enshrined in the constitution. In fact, the fourth paragraph of the preamble to the 1945 Constitution explicitly mandates the state's goal of protecting and promoting the general welfare of all its people. Furthermore, the 1945 Constitution explicitly recognises and respects customary law communities and their rights. Evidence of this recognition is contained in Article 18B paragraph (2), Article 28I paragraph (3), and Article 32 paragraphs (1) and (2). Thus, the recognition and protection of the rights of indigenous peoples is a philosophical and constitutional necessity that must be realised.¹⁶

Indigenous community regulations have a very strong sociological and legal basis in the Indonesian legal system. The combination of these two foundations is crucial to ensure that every regulation made is not only legally fair but also relevant to the social reality on the ground. Therefore, the drafting of laws must be based on empirical facts and the specific needs of diverse indigenous communities. The legal basis stems from various legal instruments that affirm their recognition. This recognition is firmly rooted in Articles 18B and 28I of the 1945 Constitution, and is reinforced in sectoral laws such as the Village Law and the Environmental Protection Law. Further evidence is provided by Constitutional Court Decisions No. 35/PUU-X/2012 and No. 55/PUU-VIII/2010, which explicitly recognise customary rights and the existence of indigenous legal

¹⁴ 'Rancangan Undang-Undang Tentang Masyarakat Hukum Adat' (n 13).

¹⁵ *ibid.*

¹⁶ *ibid.*

communities. Thus, the recognition of indigenous peoples has a solid legal and social foundation.¹⁷

The legal construction of the recognition of the rights of Indigenous Peoples (MHA) in the MHA Bill is based on constitutional principles, namely Article 18B paragraph (2) of the Constitution of the Republic of Indonesia, which states that the state recognises and respects the unity of MHA and their rights as long as they are alive and in accordance with the times. Furthermore, Article 28I paragraph (3) of the Constitution of the Republic of Indonesia emphasises that the cultural identity and rights of traditional communities are respected in accordance with the developments of the times and civilisation.¹⁸ In addition, this legal construct also refers to various international legal instruments that support the recognition and protection of indigenous peoples, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which states: 'Recognising and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.'¹⁹

The recognition and protection of indigenous peoples must be based on fundamental principles that uphold justice and human rights. These principles are essential to ensure fair treatment for indigenous peoples as equal citizens of Indonesia in all areas of life. This foundation informs every article and policy relating to their rights. This principle is enshrined in the Principle of Justice, which guarantees equal treatment before the law, in politics and in economic matters.²⁰ In addition, the Principle of Equality affirms equal treatment for indigenous peoples in accessing education, social and cultural rights. The Principle of Humanity is also emphasised, whereby the fulfilment of human rights is a primary obligation to respect, protect and fulfil the basic rights of citizens. Therefore, these principles must be a strong moral and ethical foundation in every policy that regulates indigenous peoples.

The recognition and empowerment of indigenous peoples must be governed by principles that guarantee full participation and transparency in all policies. This is essential in order to give indigenous peoples authority and a decisive voice in programmes that directly affect their lives. Participation and transparency are the foundations for building strong and trusting relationships between indigenous peoples and the government. The principle of participation explicitly states that every member of an indigenous community is fully involved in all stages of development and decision-making. Furthermore, the principle of transparency guarantees openness of information regarding the planning, implementation and evaluation of programmes that impact on their rights. These principles are integrated with the Principle of National Interest, in which the recognition and protection of indigenous peoples is seen as a unifying force for the Republic of Indonesia that guarantees sustainable development. Thus, meaningful recognition must be realised through involvement and openness.²¹

The regulation of indigenous peoples must also be based on principles that maintain a balance between the interests of the community and the preservation of nature. These principles are vital to ensure that the recognition and protection of indigenous peoples' rights not only benefits them, but also contributes to overall environmental sustainability. This balance is key to creating long-term harmony. The

¹⁷ *ibid.*

¹⁸ Retno Kus Setyowati (n 10).

¹⁹ Patrick Thornberry, 'The UN Draft Declaration on the Rights of Indigenous Peoples' [2012] *Indigenous Peoples and Human Rights* 370.

²⁰ 'Rancangan Undang-Undang Tentang Masyarakat Hukum Adat' (n 13).

²¹ *ibid.*

principle of harmony explicitly emphasises that the recognition, protection and empowerment of indigenous peoples must be in line with efforts to maintain social and national harmony. In addition, the Principle of Preservation and Sustainability serves as an affirmation of the global awareness that the fate of humanity is highly dependent on its ability to manage the environment. This principle calls on humans to be wise in managing natural resources. Therefore, sustainability and harmony are crucial foundations for ensuring a fair, balanced, and sustainable future.

The State recognises Indigenous Peoples who still live and thrive in society in accordance with the principles of the Unitary State of the Republic of Indonesia. Recognition of Indigenous Peoples is carried out in stages:

- 1) Identification of Indigenous Peoples;
- 2) Verification and validation of Indigenous Peoples; and
- 3) Determination of Indigenous Peoples.²²

It must be understood that the identification and verification process is part of the process towards the recognition and protection of indigenous peoples. The main principle is the Right of Indigenous Peoples to identify themselves because it is impossible for any party outside the indigenous community concerned to know them better than the indigenous community itself. However, in order to avoid other parties claiming to be indigenous peoples when they do not meet the basic criteria for indigenous peoples, a verification process is necessary. Regulations concerning the identification, verification and determination of the existence of indigenous peoples are, in principle, highly centralised and monopolised by the state. This is referred to as a monopoly because these processes are carried out by the government and the determination of the existence of indigenous peoples is made through a Presidential Decree.²³

The terms and concepts in the Draft Regulation on Indigenous Peoples will be examined through a theoretical study of the concepts of indigenous peoples, customary law communities, traditional communities, recognition of communities, protection and empowerment of indigenous peoples. In addition, the concepts of original structure and origin rights, recognition and legal personality and customary law will be examined. Requirements for an indigenous community to be designated as a community. The constitutional relationship between customary law communities and the state, which has implications for how the state should treat indigenous peoples. The position of indigenous peoples as legal subjects who can have rights and perform legal acts in their capacity as customary law communities and traditional communities.

2. The Position and Dynamics of Recognition of Customary Law Communities in the National Legal System

The position of customary law communities is an integral part of the national legal system and the concept of the Indonesian rule of law. This position is very important because it reflects the state's recognition of legal pluralism that has existed since before independence. This recognition serves as a bridge connecting modern law with local traditions. Recognition of customary law communities is explicitly stated in the 1945 Constitution of the Republic of Indonesia (UUD 1945). As evidence, Article 18B paragraph (2) of the 1945 Constitution explicitly states that 'The state recognises and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society.' This provision confirms that this recognition is constitutional. Therefore, the existence of customary

²² (Kementrian Dalam Negeri, 2014)

²³ Ervina Dwi Indriati, 'Implementasi Mekanisme Pengakuan Masyarakat Hukum Adat Di Indonesia Dalam Mengatasi Kesenjangan Sosial' (2021) 1 Jurnal JURISTIC 291.

law communities cannot be separated from the legal and historical foundations of Indonesia, even though their recognition is conditional.²⁴

Recognition of customary law communities has been explicitly strengthened in Law No. 39 of 1999 on Human Rights. This reinforcement is very important because it shows that recognition of the existence of indigenous peoples is now not only constitutional, but also a fundamental part of the national human rights legal framework. This confirms that their rights are an integral part of the civil rights of all Indonesian citizens. Evidence of this recognition is clearly contained in Article 6 of the Law, which specifically mentions protection of their differences and needs. Article 6 paragraph (1) clearly states that 'in the context of upholding human rights, the differences and needs of indigenous peoples must be taken into account and protected by law.' Furthermore, paragraph (2) adds that 'the cultural identity of indigenous peoples, including their rights to customary land, shall be protected.' Thus, the Human Rights Law becomes a vital legal instrument that provides concrete protection for the basic rights of indigenous peoples.²⁵

Recognition of customary law communities is also specifically reinforced in legislation in the agrarian and governmental sectors. This is very important to ensure that the protection of indigenous peoples' rights has a strong and applicable legal basis in the field.²⁶ This reinforcement demonstrates the state's commitment to integrating customary law into the national legal system in various sectors. Evidence of this can be found in Law No. 5 of 1960 on Agrarian Principles (UUPA), which serves as a vital foundation for the recognition of customary rights to land. Article 3 of the UUPA explicitly states that 'the implementation of customary rights ... must be in accordance with national interests.' In addition, Law No. 6 of 2014 on Villages provides legal recognition to customary villages by clearly defining them as 'legal community units that have territory and the authority to regulate and manage community interests.' Thus, legal recognition of indigenous peoples has been disseminated and integrated into various sectoral laws and regulations.²⁷

In the forestry sector, Law No. 41 of 1999 on Forestry mentions the category of customary forests in Article 5 paragraph (3), which were originally categorised as state forests.²⁸ However, Constitutional Court Decision No. 35/PUU-X/2012 fundamentally changed this definition, stipulating that customary forests are not part of state forests, but rather belong to customary law communities. This decision became an important milestone in the protection of customary rights to natural resources.²⁹ Analysis shows that despite constitutional recognition of MHA, its implementation still faces various obstacles. Political and legal limitations, a lack of clear regulations, and ambivalence in legal interpretation are the main challenges in effectively realising the recognition and protection of the rights of customary law communities. To achieve social justice for MHA, a more inclusive and responsive approach to their needs and rights is needed, including in the process of policy and legislation making.

The absence of comprehensive national legislation, such as the Indigenous Peoples Act, has led to inconsistencies in policy between regions and opened the door to discriminatory interpretations. This situation is highly problematic because it creates legal uncertainty and is prone to abuse of authority at the local level. As a result, the

²⁴ Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia* (Konstitusi pers 2005).

²⁵ 'Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia' [1999] Lembaran Negara 1999/ No. 165, TLN NO. 3886, LL SETNEG : Hlm 29 1, Pasal 6.

²⁶ Boedi Harsono, *Hukum Agraria Indonesia* (Djambatan 2003).

²⁷ Undang - Undang No 6 Tahun 2014 Tentang Desa 2016 (ACM International Conference Proceeding Series) 45.

²⁸ Undang - Undang No 41 Tahun 1999 Tentang Kehutanan.

²⁹ Putusan Mahkamah Konstitusi No. 35/PUU-X/2012 2012 32.

recognition that should be given by the state becomes dependent on the subjective policies of local governments. As evidence, research shows that recognition of the To Cerekang indigenous community in East Luwu Regency faces significant obstacles. This recognition has been hampered by the lack of formal legalisation by the local government, even though their social and cultural existence has long been recognised. In fact, this recognition is based on adequate research and historical documentation. Thus, the absence of strong national regulations can hinder the implementation of the rights of indigenous peoples that should already be recognised.³⁰

The dynamics of conflict between customary law systems and nationally applicable positive law pose a significant challenge to the recognition of indigenous peoples. This conflict is particularly problematic because customary law, which evolves dynamically, often conflicts with formal state law, which tends to be rigid and written. This fundamental difference creates friction that often harms indigenous peoples. The fact that customary law is often ignored is evident in the establishment of economic or conservation areas. For example, the designation of protected forest areas and national parks is often carried out without adequate consultation with local communities. This practice has led to forced evictions and the loss of access to natural resources that form the basis of their livelihoods. Thus, the recognition of positive law often fails to accommodate the rights of indigenous communities, which triggers various conflicts.³¹

This dynamic is also reflected in the lack of participation by indigenous peoples in the process of drafting legislation that affects their interests. It has been noted that in the process of revising Law No. 5 of 1990 on the Conservation of Living Natural Resources and Their Ecosystems, the participation of indigenous peoples was not an integral part of the public consultation process, even though the regulation has a direct impact on their customary territories. This lack of participation reflects the power imbalance between the state and indigenous peoples, as well as the weakness of inclusive consultation mechanisms in Indonesia's legislative system.³² In addition, decentralisation and regional autonomy, which have been promoted since the reform era, should have provided an opportunity for more contextual recognition of MHA through regional regulations. However, in reality, many local governments lack the political will and administrative capacity to establish and protect MHA, both in the form of local regulations recognising indigenous peoples and in the process of recognising customary territories through spatial planning and natural resource management schemes. The overlapping authorities between ministries/institutions such as the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, the Ministry of Home Affairs, and the Ministry of Environment and Forestry also complicate the recognition process, especially when customary territories are located in forest areas or overlap with company concessions.³³

Inequality in access to information and legal education is also a cause of the weak bargaining position of indigenous peoples when facing legal issues. Many indigenous communities do not have adequate legal understanding, making it difficult for them to defend their rights before the state or in court. Therefore, legal empowerment programmes and capacity building for indigenous communities are needed to enable them to recognise their rights and the advocacy mechanisms available to them. In the international context, the principles in the United Nations Declaration on the Rights of

³⁰ Andi Jaka Hendra, 'Perlindungan Masyarakat Hukum Adat Di Kabupaten Luwu Timur' (2024) 7.

³¹ Feri Rinaldi and others, 'Dinamika Konflik Antara Hukum Adat Dan Hukum Positif Di Era Globalisasi' (2024) 2.

³² Nur Halimah Widowati and Universitas Sragen, 'Partisipasi Masyarakat Hukum Adat Dalam Proses Penyusunan Undang - Undang No . 34 Tahun 2024 Tentang Perubahan Atas Undang - Undang No . 5 Tahun 1990 Tentang KSDAHE' (2025) 5 5721.

³³ Retno Kus Setyowati (n 10).

Indigenous Peoples (UNDRIP), although not yet formally ratified by Indonesia, have begun to serve as a moral reference and advocacy for civil society in promoting the recognition of indigenous peoples' legal rights. International pressure to respect the rights of indigenous peoples has also encouraged changes in policy approaches in several sectors, particularly forestry and the environment.³⁴

Finally, the dynamics of recognition of customary law communities in Indonesia are the result of complex interactions between constitutional norms, national policies, local political dynamics, global pressures, and civil society movements. Recognition of indigenous peoples cannot rely solely on legal products, but also requires political courage and a commitment from the state to truly make indigenous peoples equal, dignified, and sovereign subjects of law over their own territories. In this context, equitable legal development for indigenous communities can only be achieved if the state shifts its paradigm from an approach of domination over natural resources to one that is inclusive, participatory, and respectful of the diversity of laws that exist within communities.

Although their existence is guaranteed by the constitution, recognition of Indigenous Peoples (MHA) is still hampered by a lack of political will. This obstacle is highly problematic because it contradicts the mandate of the constitution and causes legal uncertainty for long-established indigenous communities. This demonstrates a serious gap between legal commitments and political reality. In fact, the Indigenous Peoples Bill (RUU MHA) has not yet been passed by the House of Representatives (DPR), even though it has been included in the National Legislation Programme (Prolegnas) since 2012.³⁵ Evidently, discussions on this bill have always been delayed or even pushed aside by other interests that are considered more strategic. The lack of political will from the government and parliament is a major obstacle in the legislative process. Thus, the passing of the RUU MHA faces significant challenges from political factors that hinder the implementation of full legal recognition.³⁶

Some parties even believe that the passing of this bill could hinder strategic national projects, such as the construction of the new national capital, Nusantara, which intersects with indigenous territories. These concerns arise because the MHA Bill will strengthen the rights of indigenous peoples over their territories, which could complicate land acquisition for government or private projects. Transactional politics in parliament also cause bills that are considered electorally disadvantageous to be deprioritised.³⁷ The state has an obligation to ensure that the rights of indigenous peoples are accommodated in the applicable legal system, so that there is no more injustice. Fulfilling this legal requirement is not merely a formality, but a concrete step in protecting and empowering indigenous peoples, who have become an integral part of Indonesia's diversity. The enacted law must provide legal certainty, justice, and better protection for indigenous peoples, given their long history of injustice.³⁸ If the state truly recognises and respects indigenous legal communities and their traditional rights, then concrete steps through the enactment of this bill are urgently needed to create

³⁴ Thornberry (n 19).

³⁵ Yayan Hidayat, 'Penantian Panjang RUU Masyarakat Adat' (*Detik news*, 2018).

³⁶ Wahyu Chandra, 'Masyarakat Adat Masih Terus Berjuang Untuk Pengakuan' (*Mongabay*, 2021).

³⁷ Arga Sumantri, 'RUU Masyarakat Hukum Adat Tak Kunjung Disahkan Karena Berpotensi Menghambat IKN' (*Media Indonesia*, 2024); I Made Halmadinigrat and Aridiva Firdharizki, 'Politik Hukum Undang-Undang Tentang Ibu Kota Negara Dan Akibatnya Terhadap Perlindungan Lingkungan Pada Hak Masyarakat Adat Di Kalimantan Timur' (2024) 9 *Jurnal Hukum Lingkungan Indonesia* 333 <<https://jhli.icel.or.id/jhli/article/view/601>>.

³⁸ Nabil Abduh aqil and others, 'Urgensi Perlindungan Hak Kepemilikan Atas Tanah Masyarakat Adat Di Wilayah Ibu Kota Negara Nusantara' (2022) 1 *Recht Studiosum Law Review* 14 <<https://talenta.usu.ac.id/rslr/article/view/nabil-abduh-aqil>>.

clearer and more structured legal guarantees, rather than being delayed for a long time as if forgotten.

In economic terms, the existence of MHA is often seen as an obstacle to investment and development. The government and business actors are concerned that the recognition of customary rights could interfere with industrial expansion, especially industries based on natural resources such as forestry, mining and large-scale plantations. However, this view is contrary to the findings of international institutions such as CIFOR, which show that customary territories actually play a significant role in maintaining environmental sustainability. Ironically, indigenous peoples, who have proven themselves capable of managing forests and natural resources in a sustainable manner, are often criminalised or marginalised from their territories for the sake of development projects. According to records from the Indigenous Peoples Alliance of the Archipelago (AMAN), the total area of customary land seized for investment purposes has reached 8.5 million hectares in the last decade.³⁹

This situation shows that the MHA Bill is not only a matter of legislation, but also a battle of interests between exploitation-based development and community-based sustainability. The Indigenous Peoples' Rights Protection Bill, which was initiated by the DPD, has four main objectives. First, it is based on the 1945 Constitution. Second, it focuses on the object, namely the diversity of indigenous peoples' rights. Third, it pays attention to the main protection mechanisms for the public and private rights of indigenous peoples. Fourth, it optimises existing institutions without forming new ones through the Coordinating Minister. Strategic efforts are needed to resolve this deadlock, such as increasing the political will of the government and the House of Representatives, simplifying the recognition mechanism, synchronising sectoral laws and customary laws, and empowering the indigenous community-based economy.⁴⁰ In addition, public education and advocacy campaigns to increase public understanding of the important role of indigenous peoples in environmental preservation and national identity are very important.

The Draft Law on Indigenous Peoples (RUU MHA) is a tangible manifestation of the state's recognition of the long history and contributions of indigenous peoples in Indonesia. Its ratification is crucial because this bill will serve as a legal umbrella to guarantee their constitutional rights. Its presence will also create legal certainty, which indigenous peoples have long been denied. Therefore, strong encouragement from all elements of civil society is needed to urge the government and parliament to immediately pass the RUU MHA. This is necessary for the sake of social justice and national sustainability. In addition, the fact that indigenous peoples have not yet fully enjoyed their human rights is another reason why this bill must be passed immediately. Thus, the passing of the MHA Bill will be a strategic step to ensure that indigenous peoples can enjoy their rights as human beings, rights that cannot be interfered with or taken away by anyone.

CONCLUSION

The legal construction of the recognition of customary law communities (MHA) in the MHA Bill is an urgent response to the long-standing legal uncertainty. This condition is very important because the absence of strong national regulations has made the existence, identity, and rights of MHA vulnerable to marginalisation in a centralised

³⁹ Nurcholis Ma'arif, 'Waka MPR Dorong RUU Masyarakat Hukum Adat Segera Disahkan Jadi UU' (*Detik news*, 2024).

⁴⁰ Andika Prawira Buana, Hasbuddin Khalid and Tri Abriana Ma'ruf, 'Ius Constituendum Formulating Basic Values of Indigenous Peoples in Constitutional Amendments' (2023) 29 SASI 826 <<https://fhukum.unpatti.ac.id/jurnal/sasi/article/view/1881>>.

national legal system. This bill is a manifestation of the state's constitutional responsibility, which aims to provide guarantees and protection. In fact, the legal construction in this bill includes recognition of customary territories, customary rights, existing customary institutions, and their socio-cultural and economic rights. However, this recognition is not absolute as it is still bound by complex administrative and substantive prerequisites. The verification process that must be undergone shows that recognition is still highly dependent on state policies and allegiances that are sometimes inconsistent. Therefore, this bill is a crucial step towards placing MHA as an equal subject of law, even though its implementation remains very challenging.

It is important for the government and parliament to immediately pass the MHA Bill and overcome the political stagnation that continues to hamper the legislative process. Strong political commitment is needed to ensure that this bill does not fall victim to elitist and political interests that prioritise investment. Passing the bill will create legal certainty that can end agrarian conflicts, the criminalisation of indigenous leaders, and overlapping territorial claims. The government must simplify the verification and implementation mechanisms in the field so that they no longer become complex bureaucratic obstacles. The legislature also needs to involve MHA representatives in every stage of implementation.

The passing of the MHA Bill will be an important instrument for reforming the governance of law and natural resources towards social justice. Therefore, this step not only guarantees cultural sustainability, but also strengthens democracy and social justice in Indonesia. This research has the main strength of comprehensively analysing the issue of MHA recognition from a normative and legal-political perspective.

This approach is particularly useful because it identifies significant gaps between the strong legal basis mandated by the constitution and the political realities that hinder implementation. The strength of this analysis lies in its ability to present a comprehensive argument as to why the passing of the MHA Bill has been so delayed. However, this study has weaknesses that must be acknowledged. The study presented is still highly conceptual and lacks empirical data obtained directly from the field. This limitation means that the discussion of the real impact of legal political dynamics is less in-depth and more theoretical. Therefore, further research is strongly recommended to strengthen this study by using a more in-depth sociological approach to law, including direct interviews and observation.

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DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

Please provide funding information of the research

ACKNOWLEDGMENT

Recognize those who helped in the research, especially funding supporter of your research. Include individuals who have assisted you in your study: Advisors, Financial support, or may other parties involve on the research.

