

LEGAL REVIEW OF THE IMPLEMENTATION OF CUSTOMARY RIGHTS OF INDIGENOUS COMMUNITIES IN PAPUA AFTER THE REVISION OF THE SPECIAL AUTONOMY LAW

Marium Suprianto Sakmaf

Manokwari College of Law, West Papua, Indonesia

mariussakmaf16@gmail.com

Received 20 May 2025 • Revised 30 May 2025 • Accepted 31 May 2025

Abstract

The Indonesian government issued Law No. 21 of 2001 concerning Special Autonomy (Otsus) for the Province of Papua. This law grants a number of special rights to Papua, with the aim of improving the welfare of the Papuan people and recognizing the uniqueness of the social, cultural, and economic aspects of indigenous peoples in Papua. One of the things highlighted in the Otsus Law is the recognition of the customary rights of indigenous peoples which should be protected and respected. The research method used is the normative legal research method. The results of the study indicate that the revision of the Papuan Otsus Law provides new hope for indigenous peoples in obtaining recognition and protection of their customary rights. However, major challenges in its implementation still exist, especially in terms of proving rights, managing natural resources, and resolving disputes fairly and efforts to ensure that the rights of indigenous peoples are respected and protected must be carried out comprehensively and sustainably.

Keywords: Implementation, Customary Rights, Special Autonomy

INTRODUCTION

Indonesia is a country that adheres to the principle of plurality in its legal system, where three legal systems are recognized and enforced: Western law, religious law, and customary law. In practice, many communities still use customary law to regulate daily activities and resolve existing problems. This customary law has evolved in line with the development of society and existing traditions. The existence of customary law communities in Indonesia has in fact existed since the time of our ancestors to the present day. A customary law community is a territorial or genealogical legal entity that possesses its own wealth, has citizens distinguishable from other legal communities, and can act internally and externally as an independent legal entity (legal subject) that governs itself (Moonti, 2017).

Papua, as one of the regions with a rich cultural and traditional richness in Indonesia, has indigenous communities with customary rights (Hak Ulayat) that have existed since before Indonesia's independence. Customary rights are the rights of indigenous communities to land and natural resources within their territory, which include the right to manage, utilize, and control those resources. Over time, the relationship between indigenous peoples and the state and government policies has often been tense, particularly regarding claims to their customary rights that overlap with state and corporate interests (Sumule, 2003).

In 2001, the Indonesian government issued Law No. 21 of 2001 concerning Special Autonomy (Otsus) for Papua Province. This law grants Papua a number of special rights, aimed at improving the welfare of the Papuan people and recognizing the unique social, cultural, and economic characteristics of indigenous communities in Papua. One of the highlights of the Otsus Law is the recognition of customary rights of indigenous peoples, which should be protected and respected (Rakia, n.d.).

However, although the Otsus Law provides space for the recognition of indigenous peoples' rights, its implementation still faces various challenges. In several cases, indigenous Papuan customary lands are threatened by large-scale development projects undertaken by the government and the private sector, while indigenous peoples are often marginalized in decision-making processes. Furthermore, more detailed implementing regulations regarding customary land rights are still very limited and do not provide optimal protection for indigenous communities.

In 2021, the Papua Special Autonomy Law was revised with Law No. 2 of 2021, which seeks to strengthen various aspects of special autonomy, including policies related to natural resource management and the recognition of indigenous peoples' rights. This revision includes several important changes, including further regulations regarding customary land rights for indigenous peoples. This revision raises questions about the extent to which customary land rights for indigenous Papuans are being implemented effectively and fairly (Priyani, 2019).

A legal review of the implementation of customary land rights for indigenous peoples in Papua following the revision of the Special Autonomy Law is crucial to understanding whether the legal changes are able to address existing problems and provide better protection for indigenous peoples' rights. In this context, the challenges that arise stem not only from the legal regulations themselves, but also from their implementation, which is often hampered by various factors, such as legal uncertainty, overlapping authority between the central and regional governments, and a lack of understanding of the customary rights that should be protected.

Therefore, this study aims to analyze in depth the legal implications and challenges in implementing the customary rights of Papuan indigenous communities following the revision of the Special Autonomy Law, as well as the efforts that need to be taken to ensure that the rights of indigenous communities are respected and protected within the applicable legal framework.

RESEARCH METHOD

This research refers to normative legal research, which focuses on the use of secondary evidence in the legal field, primarily through library research (Soekanto & Mamudji, 2007). The purpose of this research is to gain a comprehensive understanding of the legal review of the implementation of customary rights of indigenous peoples in Papua following the revision of the Special Autonomy Law.

RESULTS AND DISCUSSION

Legal Implications and Challenges in Implementing the Customary Rights of Papuan Indigenous Communities

Following the Revision of the Special Autonomy Law

As part of the Unitary State of the Republic of Indonesia, the provinces of Papua and West Papua, which have been granted special autonomy, boast ethnic diversity and over 250 regional languages. Papua Province currently comprises 29 regencies/cities, while West Papua Province comprises 13 regencies/cities. Papua and West Papua cover an area of approximately 421,981 km², with a

population of 4,237,887 in 2017. The topography of both provinces varies, from swampy lowlands to snow-capped mountains. Given these vast areas and large populations, development and public services are not yet fully accessible. This situation needs to be addressed, primarily by enhancing the capacity of local governments in various aspects such as defense and security, social, cultural, governance, the effectiveness and efficiency of governance, and the development of financial resources. This will enable improved public services to accelerate the realization of community welfare (Samule et al., 2019).

There are two main objectives to be achieved through the implementation of Law No. 21 of 2001 concerning Special Autonomy for the Provinces of Papua and West Papua. First, the law is expected to be a powerful tool for resolving fundamental issues in Papua that seriously threaten the integrity of the Unitary State of the Republic of Indonesia. These issues can be categorized into three categories:

1. Human rights violations, including violations of the economic, social, and cultural rights of indigenous Papuans.
2. Development disparities between Papua and non-Papua.
3. Acute and widespread poverty, especially among indigenous Papuans.

As defined in Law No. 21/2001, Papua's special autonomy is the special authority recognized and granted to the Papua Province to regulate and manage the interests of the local people/community on its own initiative, based on the aspirations and fundamental rights of the Papuan people. Therefore, the authority of the Papua Province resulting from the implementation of this special autonomy status encompasses all authorities in all areas of government, except for foreign policy, defense and security, monetary and fiscal policy, religion, and the judiciary, which are also implemented with special provisions. Second, by resolving the three aforementioned issues correctly, thoroughly, and with dignity, the integrity of the Unitary State of the Republic of Indonesia in Papua can be maintained and strengthened.

This law places the indigenous Papuan people and the Papuan population in general as the primary subjects. The government, provincial government, district/city government, and their subordinate agencies are all directed towards providing the best possible service and empowering the people. This law also embodies the spirit of problem-solving and reconciliation, including the establishment of a Truth and Reconciliation Commission. The establishment of this commission is intended to resolve various past issues with the aim of strengthening Indonesian national unity and integrity in Papua Province.

The implementation of special autonomy is carried out by taking into account aspects of democracy, justice, equality, as well as regional potential and diversity. The implementation of special autonomy must be in accordance with the state constitution to ensure a harmonious relationship between the central and regional governments. The implementation of regional autonomy must further enhance the independence of autonomous regions, and therefore, within autonomous districts and cities, there will no longer be administrative regions. Similarly, special areas developed by the government or other parties, such as government agencies or other parties, industrial areas, authority areas, plantation areas, mining areas, forestry areas, new urban areas, tourism areas, and the like, are subject to regional regulations. Law Number 21 of 2001 concerning Special Autonomy for Papua Province clearly contains much potential for good. However, this potential will never be realized and enjoyed in the form of true benefits for the Papuan people if several important aspects are ignored.

Reflecting on the seventeen years of special autonomy in Papua, which still has a long way to go, should be considered to build the Papuan people's trust in the system itself and its administrators. The people's critical attitude towards special autonomy should be seen as part of the Papuan people's awareness that special autonomy belongs to them and that they want to play a significant role in it. Such a role can only be effectively fulfilled if there is a sense of trust in the implementation of special autonomy that has been growing and fostered within the community from the beginning. Assessment of the implementation of special autonomy in Papua is crucial and must be conducted, provided that the assessment is conducted proportionally and objectively. Development in the Papua region, which has been underway for more than a decade and a half, has demonstrated significant progress in various fields. However, problems and challenges remain for the provinces of Papua and West Papua. The population of Papua, particularly Indigenous Papuans (OAP), still has limited access to basic needs such as basic infrastructure such as clean water, sanitation, and adequate housing. They face low incomes and limited access to basic public services, such as education and health care. The abundant natural resource potential in the easternmost region of Indonesia has not been optimally utilized to support the improvement of the welfare of the people in these two provinces.

The revision of the Papua Special Autonomy Law (UU Otsus) has had a significant impact on indigenous communities in Papua, particularly regarding the regulation and implementation of

customary rights (ulayat rights to land and natural resources). Some of the legal implications and challenges that have emerged following the revision of the Special Autonomy Law are as follows:

1. The revised Special Autonomy Law provides an opportunity for indigenous communities to claim rights to their customary land. However, the process is not always clear or transparent, which can lead to overlap between indigenous peoples' rights and rights to land managed by the state or third parties, such as companies.
2. The revised Special Autonomy Law for Papua stipulates that customary rights for indigenous peoples must be recognized within the national legal framework. However, the technical regulations accompanying this law are still limited. There are still differing interpretations regarding whether these customary rights are equivalent to land ownership rights or merely limited customary control rights.
3. The revised Special Autonomy Law allows indigenous communities to manage natural resources in their territories, but in many cases, the central and regional governments still retain strong control over natural resource utilization, including through mining, plantation, and forestry concessions.
4. Government development in Papua often fails to consider the customary rights of indigenous peoples. The Special Autonomy Law recognizes the right of indigenous peoples to be involved in development planning, but this is often merely procedural, without fully involving them in decision-making.
5. The revised Special Autonomy Law introduces recognition of customary institutions, which play a role in mediating and preserving indigenous culture. However, in practice, customary institutions often lack sufficient legal authority to assert or protect their rights under state law.
6. The revised Special Autonomy Law aims to improve the fulfillment of human rights for indigenous peoples, including their rights to land and culture. The Indonesian government is obligated to uphold the principles of social justice and human rights in the implementation of customary rights. One of the main challenges in implementing customary rights is the ineffective coordination between the Papuan regional government and the central government in implementing the new Special Autonomy Law. Regional autonomy policies, which should provide regional governments with flexibility in managing their territories, often conflict with policies issued by the central government, particularly regarding the management of natural resources and the customary rights of indigenous communities.

Furthermore, the biggest challenge in implementing customary rights for indigenous communities is the dominance of economic interests, particularly those originating from the mining, plantation, and forestry sectors. Many customary territories are rich in natural resources, so the government and companies often ignore the rights of indigenous communities in favor of economic development. In many cases, indigenous communities are excluded from decision-making regarding the management and utilization of natural resources in their territories. Indigenous communities often struggle to utilize the rights granted by the revised Special Autonomy Law due to limited knowledge and resources. Therefore, empowering indigenous communities in terms of legal education, organizational skills, and natural resource management is crucial. However, many empowerment programs have not been implemented effectively due to limited support from the government and relevant institutions. Conflicts over customary land rights often drag on without a clear resolution. Indigenous communities are frequently marginalized in land disputes, while companies and the government dominate decision-making. Unmanaged conflicts can lead to social tensions and human rights violations.

Efforts to Ensure the Respect and Protection of Indigenous Peoples' Rights Within the Applicable Legal Framework

According to the Court, the granting of special autonomy to Papua Province should recognize, guarantee, and protect the rights of the indigenous peoples existing and continuing to live in Papua Province. These rights should not be diminished or eliminated by the existence of the People's Consultative Assembly (MRP), as the MRP is not a naturally occurring indigenous peoples' unit and does not oversee the various indigenous peoples' units in Papua Province. Rather, it is a regional government institution established by the state pursuant to law. Furthermore, according to the Court, the MRP was established by the state as a cultural representative body representing indigenous peoples, religious groups, and women's groups in Papua Province, and therefore cannot represent all indigenous peoples in Papua. Therefore, according to the Court, the rights of indigenous peoples' units, regarding the criteria, mechanisms, and procedures for becoming members of an indigenous peoples' unit, must be based on the internal provisions of the respective indigenous peoples' unit, not on MRP decisions. To ensure that the rights of indigenous peoples are respected and protected within the applicable legal framework, various efforts are needed involving the government, legal institutions,

indigenous peoples, and various related parties. Here are some of the efforts that need to be undertaken:

1. Formulation and implementation of regulations that support the recognition of customary rights
While the Papua Special Autonomy Law provides the legal basis for the recognition of customary rights, there needs to be more detailed and clear derivative regulations governing how these customary rights can be recognized and protected. This includes recognizing the forms of customary rights accessible to indigenous communities, such as management rights, control rights, and rights to natural resources within their customary territories.
The government needs to formulate regulations that facilitate indigenous communities' access to legal recognition of their land and natural resources. The process of certifying customary land and recognizing rights by the state must be simplified, transparent, and involve the active participation of indigenous communities.
2. Empowering indigenous communities through legal education and training
One of the main challenges faced by indigenous communities is a lack of understanding of the applicable laws and procedures related to their rights. Therefore, there is a need for indigenous community empowerment programs that educate them about their rights, how to protect those rights, and accessible legal procedures for resolving disputes.
The government and non-governmental organizations (NGOs) must provide legal training for indigenous communities, provide them with access to the national legal system, and equip them with skills in sustainable natural resource management.
3. Fair and inclusive dispute resolution
Indigenous communities are often marginalized in resolving disputes related to their land and natural resource rights. Therefore, dispute resolution mechanisms must be designed with a fair, transparent, and inclusive approach.
The establishment of customary courts or mediation systems involving customary institutions can be a solution for resolving land or customary rights disputes more equitably. The government must support these systems by providing clarity regarding the legality and authority of customary institutions in resolving disputes at the local level.
4. Involvement of Indigenous Communities in Decision-Making Processes
Decision-making related to the use of natural resources in customary territories often does not actively involve indigenous communities. In many cases, infrastructure projects or natural resource exploitation are carried out without the consent or adequate consultation of affected indigenous communities.
The government must ensure that indigenous peoples are involved in every decision-making process related to their customary territories, whether related to development policies, natural resource exploitation, or infrastructure projects. The principle of Free, Prior, and Informed Consent (FPIC) must be strictly implemented, meaning that indigenous peoples must give their consent in advance, freely, and after receiving sufficient information.
5. Improving access to justice
Many indigenous peoples are hindered from accessing the justice system due to distance, cost, or a lack of understanding of legal procedures. This makes it difficult for them to assert their rights.
Providing easier and more affordable access to courts or dispute resolution institutions must be a priority. Furthermore, legal assistance provided by lawyers or institutions that understand indigenous peoples' rights is necessary so that indigenous peoples can effectively assert their rights.
6. Protection of the environment and natural resources
Indigenous communities are often the guardians and preservers of the environment in their customary territories. However, they face threats from large-scale projects that exploit their natural resources without considering their impact on the environment and their sustainability.
The government must ensure that development and natural resource management policies do not harm indigenous communities or damage the environment. Policies that support the sustainability and rights of indigenous communities must be an integral part of national and regional development policies.
7. Capacity Building of Indigenous Institutions
Customary institutions play a crucial role in preserving the culture and traditions of indigenous communities, as well as safeguarding and protecting customary rights. However, customary institutions often lack the capacity to deal with rapid social and legal changes.
Strengthening the capacity of customary institutions through training in organizational, legal, and natural resource governance is crucial. Customary institutions also need government support in

carrying out their functions as mediators or arbitrators in legal disputes involving indigenous communities.

8. Support Indigenous Peoples' Initiatives and Movements

Indigenous peoples' movements fighting for their rights are often hampered by a lack of support from various parties, including financial, political, and social support.

The government, non-governmental organizations, and civil society need to support these movements by providing platforms for indigenous peoples' voices to be heard, providing funding for advocacy activities, and strengthening solidarity networks among indigenous peoples at the local, national, and international levels.

9. Oversight of the Implementation of the Special Autonomy Law

Although the Special Autonomy Law recognizes the rights of indigenous peoples, its implementation often falls short of expectations, particularly regarding the recognition of customary land rights and natural resource management.

Stricter oversight of the implementation of the Special Autonomy Law, including transparent and participatory evaluation mechanisms, is crucial to ensure that indigenous peoples' rights are respected and protected. Indigenous peoples need to be involved in this oversight process so they can provide feedback and report any violations.

CONCLUSION

The revision of the Papua Special Autonomy Law offers new hope for indigenous communities in gaining recognition and protection of their customary rights. However, significant challenges remain in its implementation, particularly in terms of proving rights, managing natural resources, and fair dispute resolution. The successful implementation of customary rights for Papuan indigenous communities depends heavily on sound coordination between the central and regional governments, as well as on strengthening the capacity of indigenous communities to address existing legal and economic challenges.

Efforts to ensure that indigenous peoples' rights are respected and protected must be comprehensive and sustainable. Recognizing indigenous peoples' customary rights requires not only regulatory changes but also increased capacity, involvement in decision-making, and protection of environmental and natural resource rights. The involvement of all parties, including the government, legal institutions, indigenous communities, and civil society, is crucial to creating an inclusive and just legal framework for indigenous communities.

REFERENCES

Moonti, R. M. (2017). Hakikat otonomi daerah dalam sistem ketatanegaraan di Indonesia. *Jurnal Fakultas Hukum UMI*, 19(2).

Pamungkas, C., Oktafiani, I., & Imbiri, L. (n.d.). Makna pembangunan bagi orang asli Papua: Studi terhadap marginalisasi dan depopulasi di Tanah Papua. <https://doi.org/10.26593/jih.v0i00.5970>

Priyani, A. P. (2019). Implementasi tugas dan wewenang Majelis Rakyat Papua menurut Undang-Undang Nomor 21 Tahun 2001 tentang otonomi khusus Papua. *El-Iqtishady*, 1(2).

Sakti R. S. Rakia, A. (2021). *Kewenangan khusus Majelis Rakyat Papua terhadap pembentukan Perdasus*. Justisi: Jurnal Fakultas Hukum Universitas Muhammadiyah Sorong, 7(1).

Sumule, A. I., et al. (2019). *Kajian pemanfaatan dana otonomi khusus Papua dan Papua Barat 2002–2018*. Kompak.

Sumule, A. (Ed.). (2003). *Mencari jalan tengah otonomi khusus Provinsi Papua*. Gramedia Pustaka Utama.

Soekanto, S., & Mamudji, S. (2007). *Penelitian hukum normatif: Suatu tinjauan singkat*. Rajawali Pers.