

THE EXPANSION OF INVESTOR ACCESS TO CULTIVATION RIGHTS: A Socio-Legal Analysis on Agrarian Injustice in Indonesia

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Abstract: Granting cultivation rights for investment interests and ignoring equitable distribution of land ownership can create injustice and agrarian conflict. This is socio-legal research to analyze agrarian conflict through an interdisciplinary lens. All the data obtained is analyzed qualitatively. Based on the study, disharmony is found between the Basic Agrarian Law, which regulates that cultivation rights can only be granted on state land, and the Job Creation Law, which stipulates that cultivation rights can be given over management rights. This overlapping regulation marks a difference in legal policy between the Job Creation Law, which wants to provide convenience to entrepreneurs, and the Basic Agrarian Law, which considers the strategic position of cultivation right so that it is merely granted on state land. This overlapping of legal policy creates legal uncertainty and brings economic implications, creating a higher land ownership inequality between entrepreneurs and the community. Higher landownership inequality brings social implications, namely, higher conflicts in the agrarian sector. This is not according to the principle of protection for weak parties in Indonesian Agrarian Law.

Keywords: Cultivation Rights, Investor, Agrarian Injustice, Socio-Legal Analysis.

Abstrak: Pemberian hak guna usaha untuk kepentingan investasi dan mengabaikan pemerataan kepemilikan tanah dapat menimbulkan ketidakadilan dan konflik agraria. Penelitian ini merupakan penelitian sosio-hukum untuk menganalisis konflik agraria melalui sudut pandang interdisipliner. Semua data yang diperoleh dianalisis secara kualitatif. Berdasarkan penelitian, ditemukan ketidaksesuaian antara Undang-Undang Pokok Agraria yang mengatur bahwa hak guna usaha hanya dapat diberikan di atas tanah negara dengan Undang-Undang Cipta Kerja yang mengatur bahwa hak guna usaha dapat diberikan di atas hak pengelolaan. Pengaturan yang tumpang tindih ini menandai adanya perbedaan kebijakan hukum antara Undang-Undang Cipta Kerja yang ingin memberikan kemudahan bagi pengusaha dengan Undang-Undang Pokok Agraria yang menganggap posisi hak guna usaha sangat strategis sehingga hanya diberikan di atas tanah negara. Tumpang tindih kebijakan hukum ini menimbulkan ketidakpastian hukum dan membawa implikasi ekonomi, yakni semakin tingginya ketimpangan kepemilikan tanah antara pengusaha dan

masyarakat. Semakin tingginya ketimpangan kepemilikan tanah membawa implikasi sosial, yakni semakin tingginya konflik di sektor agraria. Hal ini tidak sesuai dengan asas perlindungan bagi pihak yang lemah dalam Hukum Agraria Indonesia.

Kata Kunci: Hak Guna Usaha, Investor, Ketidakadilan Agraria, Analisis Sosial Hukum.

Introduction

Analysis of agrarian conflict and injustice must be based on socio-legal studies, which are interdisciplinary, to provide a comprehensive understanding of the issue. In this case, the change of agrarian legal policy brings economic inequality and social implications. This causality can also be seen in Indonesian Agrarian history. Colonial agrarian law, closely related to the principle of trade, creates dependency, exploitation, domination, and discrimination against Indigenous people. In the end, colonial agrarian law produces oppression for the indigenous people. Indeed, it does not create the welfare of the indigenous people because, from the beginning, colonial agrarian law was designed only for the benefit of the colonized country and the interests of large entrepreneurs (capital owners). Privilege for entrepreneurs during the colonial period can be seen from partisan land or extensive land tenure. Dutch entrepreneurs had land rights and comprehensive access to land after the passing of the *Agrarische Wet* in 1870. The neglect of the people and exploitation of natural resources (including land) in Indonesia became one of the drivers of the struggle for Indonesian independence, culminating in the reading of the Proclamation on August 17, 1945. The Proclamation has two crucial meanings for developing national agrarian law: ending the enforcement of colonial agrarian law and becoming the foundation of national

agricultural law. The established law overhauled the philosophy and objectives of colonial agrarian law. The liberal-capitalist philosophy of the colonial era turned into religious communalism. A change also followed this in the purpose of colonial agricultural law, which was for the benefit of colonizers and businesspeople to create the greatest prosperity for Indonesians. Various practical steps were arranged, starting with the affirmation of the Indonesian people's rights to land, the abolition of private land, the abolition of fixed objects owned by individual Dutch citizens, and various other policies.¹ The historical journey to abolish colonial agrarian law and establish national agrarian law climaxed on September 24, 1960, with the enactment of Basic Agrarian Law, an umbrella act in the agrarian sector that contains the foundation of national agricultural law and is the basis for other legislation in that sector.

Basic Agrarian Law can be categorized as responsive legislation.² A factor that causes this responsive character is the substance of Basic Agrarian Law, which emphasizes social justice and aims to create the greatest prosperity for the people. To achieve this goal, the government is authorized to regulate legal relationships and legal actions with land by granting land rights. One of these land rights is cultivation rights. This right is granted for large-scale agricultural, fishery, livestock, and plantation activities. Even the minimum land given for the holder

¹ Iswanto, Bambang, and Miftah Faried Hadinatha. "Sharia Constitutionalism: Negotiating State Interests and Islamic Aspirations in Legislating

Sharia Economic Law." AHKAM: Jurnal Ilmu Syariah 23 (2023): 235-58.

² Moh. Mahfud M.D., *Politik Hukum di Indonesia* (Depok: RajaGrafindo Persada, 2012).

of cultivation rights is 5 hectares with a period of 35 years, which can be extended for 25 years and renewed for 35 years.³

The width of the land and the length of the correct period make the granting of cultivation rights according to the objectives of national agrarian law, namely the true prosperity of the people because it brings out the direct social, economic, and ecological impact. The magnitude of the effects caused by activity with cultivation rights causes business. These rights can be granted only on state land to prevent land ownership imbalances.⁴ Unfortunately, the granting of cultivation rights, especially to investors, has also created inequality in land ownership. Moreover, the current government policy strongly encourages investment, making it easier for entrepreneurs to obtain cultivation rights. One regulation that facilitates the acquisition of cultivation rights is the Job Creation Law, which states that cultivation rights can be granted over state land and management rights. In contrast, Basic Agrarian Law outlines that land for cultivation rights can only be granted on state land. Still, the Job Creation Law expands the land that can be the basis for obtaining Cultivation Rights, namely management rights.⁵ State land and management rights have different characteristics. The state directly controls state land, so the state's authority is broader and fuller. Meanwhile, management rights have rights holders, limiting the state's authority.

This problem is not only related to the overlapping regulations between Basic Agrarian Law and Job Creation Law but also has the potential to cause injustice because entrepreneurs are getting easier access to cultivation rights while the community is getting less control over land.⁶ In other words, this further exacerbates the inequality of land ownership in Indonesia, which has now reached 0.79, meaning that 1% of people control 79% of the land, so 21% of people in Indonesia have to fight over 99%. This agrarian injustice brings out agrarian conflict in Indonesia. The dispute over agricultural land in Indonesia is getting wider. This means that the change in agrarian legal policy has social implications, namely economic injustice and agricultural conflict.

This article aims to analyze the legal politics underlying the strengthening of cultivation rights in Job Creation Law and its derivative regulations, overlapping regulations between Basic Agrarian Law and Job Creation Law regarding the regulation of land rights as the basis for obtaining cultivation rights, overlapping policies between Job Creation Law and the rules relating to the utilization of regional asset land as well as analyzing the impact of strengthening cultivation right in the Job Creation Law.⁷ Gunanegara's article reviewed the anomaly of the enactment of the Job Creation law regarding land rights

³ Nafis, M. Cholil. "Dhamânu Muntijâti al-Halâl li Himâyati Huqûqi al-Mustahlikîn." AL-IHKAM: Jurnal Hukum & Pranata Sosial 15.2 (2020): 301-325.

⁴ Astuti, Miguna, et al. "Addressing MSMEs Customer Complaints in Indonesia's Digital Economy: Insights from Sharia and Consumer Protection Law." JURIS (Jurnal Ilmiah Syariah) 23.2 (2024): 395-409

⁵ Johan, Arvie. "Justifikasi hukum Islam atas pajak dalam perspektif hukum dan ekonomika." Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan 18.1 (2018): 1-16.

⁶ Fahmi, Chairul, et al. "The State's Business Upon Indigenous Land in Indonesia: A Legacy from Dutch Colonial Regime to Modern Indonesian State." Samarah: Jurnal Hukum Keluarga Dan Hukum Islam 8.3 (2024): 1566-1596.

⁷ Yunus, Fakhrurrazi M., Husni A. Jalil, and Shafiratunnisa Shafiratunnisa. "Analisis Yuridis Terhadap Pembagian Harta Warisan Ahli Waris Pengganti Pada Putusan Mahkamah Syar'iyah No 245/Pdt. G/2017/MS. Bna." El-Usrah: Jurnal Hukum Keluarga 5.1 (2022): 183-195

policy.⁸ Earlene and Djaja show inequalities in agrarian reform policy through the lens of human rights.⁹ However, both studies focus on land rights in general and do not show a sharp discussion of justice in the agrarian context. The understanding of land inequality and agrarian conflict has not deeply explained the relationship between justice, inequality, and agricultural conflict. In contrast to these two studies, this research presents a sharp and systematized analysis of the legal politics underlying the expansion of business use rights in the Job Creation Law, the relationship between justice, inequality of land ownership, agrarian conflict, and its impact on disadvantaged people.

Method

This is socio-legal research that uses interdisciplinary analysis to bring a comprehensive understanding of the issue of agrarian injustice.¹⁰ It is an analytical and evaluative research project. The data collected will be sorted based on its relevance to the object of discussion in this article and grouped according to themes. Next, the data will be interpreted or analyzed systematically and qualitatively based on values, principles, theories, and legal concepts. In the final stage, conclusions will be drawn and presented.

Result and Discussion

Legal Politics Underlying the Strengthening of Cultivation Rights

Legal politics is a fundamental policy determining the laws' direction, form, and content (regulations).¹¹ The discussion of legal politics about cultivation rights will

examine the reason behind the strengthening of cultivation rights in various laws and the objectives to be achieved. From Ronald Dworkin's perspective, regulation goes through three stages: pre-interpretive, interpretive, and post-interpretive. In the pre-interpretive stage, a person tries to understand a regulation in the text and the background of the regulation text. By following this logic, this paper will first analyze the substance of the Presidential Regulation on National Medium-Term Development Plan for 2020 to 2024 (hereinafter referred to as NMTDP 2020-2024).

The analysis of NMTDP is essential because it serves as a guideline in forming laws and policies. There are several basic NMTDP policies, namely (1) human resource development, (2) infrastructure development, (3) regulatory simplification, and (4) economic transformation. This NMTDP basic policy aims to make Indonesia a developed country through an increasing income strategy derived from the industry, tourism sector, and creative economy. This will also get Indonesia out of the *Middle-Income Trap* by 2036. The National Medium-Term Development Plan above shows that the industrial sector will achieve an increase in income. The increase in revenue in this sector will occur if there is a simplification of regulations and infrastructure development. So far, the number of rules and the lack of infrastructure availability have caused the ease of doing business index to remain low.

⁸ Gunanegara Gunanegara, "Kebijakan Negara Pada Pengaturan Hak Atas Tanah Pasca Undang-Undang Cipta Kerja," *Refleksi Hukum: Jurnal Ilmu Hukum* 6, no. 2 (2022): 161-84, p.162-165

⁹ Felishella Earlene dan Benny Djaja, "Implikasi Kebijakan Reforma Agraria terhadap Ketidaksetaraan Kepemilikan Tanah Melalui Lensa Hak Asasi Manusia," *Tunas Agraria* 6, no. 2 (2023): 152-70, p.155
<https://doi.org/10.31292/jta.v6i2.223>

¹⁰ Rosalind Raine, Ray Fitzpatrick, dan John de Pury, "Challenges, Solutions and Future Directions in Evaluative Research," *Journal of Health Services Research and Policy* 21, no. 4 (2016): 215-16, p.215
<https://doi.org/10.1177/1355819616664495>, p.

¹¹ Herdiansyah Hamzah, "Legal Policy of Legislation in the Field of Natural Resources in Indonesia," *Hasanuddin Law Review* 2, no. 1 (2017): 108-21, p.111
<https://doi.org/10.20956/halrev.v1n1.218>.

2019, Indonesia's ease of doing business ranking was only 73rd.

The desire to encourage investment in the industrial sector causes government policies and facilities to be more directed to support investment activities through infrastructure development, ease of licensing, and simplifying regulations. Based on this orientation, the government made the Job Creation Law through omnibus. This regulation revises 79 laws consisting of 1,244 articles, which can be broadly divided into 11 clusters, including land clusters. Land clusters are both strategic and essential to be fully considered because every investment activity requires land, so providing large-scale land to support investment activities is necessary.

Changes in the land cluster are certainly directed to encourage business or investment activities by the objectives of the Job Creation Law. Changes in this cluster include changes to articles that make it easier to obtain land for entrepreneurs, the establishment of a new institution to facilitate land acquisition by investors, namely the Land Bank, and opening up opportunities for customary law community land as an object of investment by entrepreneurs. One of the regulatory changes in the Job Creation Law is the regulation of cultivation rights, which are one of the land rights closely related to investments that require land on a large scale. Moreover, Basic Agrarian Law has stated that cultivation rights are granted on land with a minimum area of five hectares.

Regarding the previous explanation, Basic Agrarian Law stipulates that the scope of cultivation rights is for large-scale agricultural, fishery, and livestock activities. The scope of activities that can be granted cultivation rights is then increased by including plantations stipulated under Article 15 paragraph (1) of Government Regulation No. 40/1996 on Cultivation Rights, Building Rights, and Land Rights.

However, in the Regulation of the Agrarian Minister on Procedures for Determining Management Rights and Land Rights, plantations are included in agricultural business activities with food crops and/or horticultural crops.

The various strengthening of cultivation rights to support investment activities include expanding the types of land that can be granted cultivation rights, namely state land and also management right land, as well as the extension and renewal of cultivation rights can be carried out at the same time after the age of the crop or other business is effectively utilized by the holder of the cultivation right and the opening of space for customary law communities' customary land to become the object of cultivation right through agreements with investors because currently customary law communities are holders of management rights. Easy access for entrepreneurs or investors to acquire large-scale land through cultivation rights causes problems. Due to this, there is still no limit to the land area that can be used as an object of cultivation rights for legal entities.

Based on the above explanation regarding the politics of agrarian law in Indonesia, which expands the access of entrepreneurs to obtain cultivation rights to increase investment as regulated under the National Medium-Term Development Plan and the Job Creation Law, this can have a negative impact, namely inequality, and not according to the purpose of the greatest prosperity of the people as the objective of Indonesian agrarian law.

The Change of Legal Policy Regarding Cultivation Rights on Management Rights

1. The Overlapping of Regulations Regarding the Type of Land on Cultivation Rights

A critical aspect of cultivation rights is the overlap between Article 28, paragraph (1) of Basic Agrarian Law, which clearly defines cultivation rights as the right to cultivate land directly controlled by the state, and the text

submitted by the government on August 1, 1960, which also clearly mentions state land instead of the phrase land, which is directly controlled by the state. The terminology of state land in national law is first found in Government Regulation on the Control of State Lands.¹² However, it must be understood that state land cannot be interpreted as state-owned land (*Staats land domain*) because the relationship between the state and land is not a private relationship but a public one, namely a relationship of control.

The phrase land directly controlled by the state is then defined as state land regulated under Article 1 point 2 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency on Procedures for Granting and Canceling State Land Rights and Management Rights. In Article 1 point (2) of Government Regulation on Management Rights, Land Rights, Flat Housing Units and Land Registration, the definition of state land is stated more fully, namely that the land is not attached to any land rights, is not waqf land, customary land and/or is not an asset of state-owned or regional-owned goods. For this state land, the state's power becomes broader and fuller so that the state can directly grant rights on the land.

The provision in Basic Agrarian Law differs from the source of management rights as regulated under Article 21 of Government Regulation on Management Rights, Land Rights, Flat Housing Units, and Land Registration, which states that cultivation rights can be granted on state land and management rights land. The addition of management rights as one of the foundations of cultivation rights brings several consequences, including providing opportunities for holders of management rights to enter cooperation in utilizing their asset land with third parties and granted

cultivation rights above this land. In the past, cooperated land could only be given the right to use and build, but now it has been developed by adding the right to cultivate.

The author's reading of the Academic Paper of Basic Agrarian Law leads to an understanding of three reasons for granting cultivation rights only on state land, namely:

1. Cultivation rights are granted on a large scale, so limited (strict) conditions need to be imposed because they are related to national interests and have social and ecological impacts, so direct state supervision is required in its use. Mr. Sadjarwo stated this in his speech at the Basic Agrarian Law discussion on August 1, 1960. Mr. Sadjarwo's statement aligns with the Draft of Basic Agrarian Law submitted on that date; article 27, paragraph (2) of this draft explicitly regulates that cultivation right is only granted to companies whose social and economic significance for the welfare of the state and the people.
2. The Elucidation of the Draft BAL dated August 1, 1960, clearly states that cultivation can only be held on state land and not freehold land because its nature and purpose granted cultivation rights for an extended period. The length of the period of cultivation right is also significant to note because when it is given over other land rights or management rights, the land rights holder cannot use and work on the land. This is not in line with one of the principles in national agrarian law, namely that land and management rights holders must actively work their land.
3. The spirit in the various meetings to form Basic Agrarian Law was the spirit of self-reliance and the development of the national economy. The presence of cultivation rights was only an initial

¹² Julius Sembiring, *Pengertian, Pengaturan dan Permasalahan Tanah Negara* (Jakarta: Kencana, 2016).,p.24-35

instrument that led to self-reliance. This is because, when this regulation was formed, Indonesia still needed foreign capital to maintain its existence, even though the founders of the BAL wanted to eliminate the liberal and capitalistic social and economic structure. According to Soebagio Reksodipoero, such a financial structure would give birth to agrarian anxiety arising from farmers' poverty and deprivation.

The background of the provision that cultivation rights can only be granted on state land in the Basic Agrarian Law contradicts the provisions contained in the Job Creation Law and its underlying regulations. Two paragraphs in the Job Creation Law regulate cultivation and management rights. Namely, Article 129 paragraph (2) stipulates that management rights, cultivation rights, building use rights, and use rights can be granted. Then, Article 138, paragraph (2) specifies that management rights for land whose utilization is handed over to third parties can be granted cultivation rights, building use rights, and/or use rights.

The difference between the substance of Basic Agrarian Law and Job Creation Law is due to their different orientations. Basic Agrarian Law is based on the spirit of nationalism, which only makes cultivation right as a first step towards national independence in terms of the economy; the Job Creation Law emphasizes the spirit of basing national development on investment, both foreign investment and domestic investment. In this case, the investment is expected to spur economic growth to reach the desired target of 5.7% by 2045. The Academic Paper on the Job Creation Law explicitly states that the philosophical basis of this Law is to encourage investment, so what must be done is to create an investment ecosystem that

makes it easier for entrepreneurs, including obtaining land.

From this perspective, the provisions in the Job Creation Law only prioritize investments that will grant land to all cultivation rights applicants if they can increase economic growth. This contrasts with the spirit of Basic Agrarian Law drafters, who emphasized that cultivation rights must only be granted to investments with significant social and economic impact on the state and people's welfare. Lawmakers should consider this spirit and elaborate on it in various regulations, including making the indicators of companies that can entitle cultivation rights.

Another contradiction is that Basic Agrarian Law limits the cultivation right to be granted on state land. In contrast, Government Regulations on Management Rights, Land Rights, Flat Units, and Land Registration state that cultivation rights can be granted on state land and management rights land. This condition brings about legal uncertainty. Legal certainty requires consistency between various regulations so that they do not conflict.

One of the experts who discussed rule consistency is Jaap Hage in his journal article.

"Rule and Consistency." This article states that regulation inconsistency occurs when conditions and consequences are inconsistent, which means that the same conditions cause different impacts.¹³ In this paper, norm inconsistency occurs because a person can obtain a cultivation right over a management right if it is based on Government Regulation. However, one cannot get a cultivation right over a management right if it is based on the Basic Agrarian Law. In solving this norm inconsistency, the author will not be fixated on Hans Kelsen's view, namely *Stufen Bau Theory*, which only views that regulations are

¹³ Jaap Hage, "Rule Consistency," *Law and Philosophy* 19, no. 3 (2000): 369–90.,p.383

arranged hierarchically, where higher regulations override lower regulations. Stufen Bau's Theory has the consequence of bringing positivism-based law-making and enforcement.¹⁴ This paper aims to direct agrarian law to substantive justice, a bridge to creating prosperity for all people. Therefore, the author uses Riccardo Guastini's view, which introduces an axiological hierarchy that focuses on the compatibility between rules and other principles/values.¹⁵

Therefore, choosing the rules to be enforced is based on the value of substantive justice or social justice. The emphasis on social justice is based on the fifth principle of Pancasila. It emphasizes its difference from the concept of individual justice, which only emphasizes the protection of individuals' freedoms.¹⁶

2. Overlapping Regulations of Land Use Rights on Land Management Rights as Objects of Mortgage Rights and Their Implications

The Job Creation Law and its derivative regulations that allow the acquisition of cultivation rights over management rights have certainly affected the exercise of the authority of the holders of management rights. Article 5 of Government Regulation on Management Rights, Land Rights, Flat Units and Land Registration stipulates that the holders of management rights consist of central government agencies, local governments, State-Owned Enterprises/Region-Owned Enterprises, State-Owned Legal Entities; Land Bank entities and legal entities appointed by the central government.

The management right land that becomes a regional asset can then be used alone or cooperated with other parties (investors) through a land utilization agreement. This

agreement allows investors to apply for cultivation and local government management rights. The leasehold land that becomes the object of this cooperation can be encumbered by a mortgage as stipulated in Article 13 of Government Regulation on Management Rights, Land Rights, Flat Units and Land Registration and Article 48 of the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency on Procedures for Determining Management Rights and Land Rights. A mortgage is a security right imposed on land rights, including cultivation rights, along with or without other objects as integral parts of the land, to pay certain debts. Granting authority to pledge land use rights will benefit investors in accessing capital (capital loans) to develop their businesses in agriculture, fisheries, livestock, and plantations.

The provisions regarding the permissibility of investors to make land use rights on management rights land as debt collateral, as mentioned in the two regulations above, clearly contradict Article 49 paragraph 5 on State Treasury Law, which prohibits regional property (in this case land) from being mortgaged or used as collateral to obtain loans. This is also not by the prohibition of pledging land that is the object of utilization cooperation as stipulated in Article 33 paragraph 1 point f letter j of Government Regulation on Amendments to Government Regulation No. 27 of 2014 on Management of State / Regional Property and Article 80 and Article 171 of the Minister of Home Affairs Regulation on Guidelines for the Management of Regional Property.

¹⁴ Benítez Granados Teófilo, "The Theory Of Weighting In Robert Alexy , An Approach To Equity In The Electoral Contest In Mexico," *Серия: Юриспруденция* 8, no. 072 (2022): 56-63, p.57-60 <https://doi.org/10.18384/2310-6794-2022-1-56-63>.

¹⁵ Riccardo Guastini, "On legal Order: Some Criticism of the Received View," *Ethical Theory and Moral Practice* 3, no. 3 (2000): 263-72.,p.267

¹⁶ Thomas Patrick Burke, *The Concept of Justice : Is Social Justice Just?* (New York: Continuum Studies In Political Philosophy, 2011).

The issue of mortgage rights for cultivation rights on land management becomes more complicated because Article 50 of State Treasury Law prohibits confiscating immovable property (land) and other property rights owned by the state/region. The substance of this regulation means that if a third party defaults on a debt and credit agreement with another party, the cultivation right as collateral cannot be executed because the land is local government management land (registered as local property). This will undoubtedly be very dangerous for creditors.

The overlapping rules regarding cultivation rights over management rights as collateral objects create legal uncertainty. This legal uncertainty will undoubtedly confuse the implementation level regarding the issuance of the mortgage certificate. To overcome the contradiction between these laws and regulations and end confusion at the implementation level, it is appropriate to refer to legal principles with a higher level of abstraction and fundamental values in law. At the level of legal principles, the principle of *lex specialist derogate legi general* and the principle of *lex posterior derogate legi priori* can be referred to. However, these two principles still prioritize legal positivism, which various experts have criticized.

This paper will choose to rely on the value of justice or expediency. Regarding the value of justice, the state's interests are more important to prioritize than those of a group of entrepreneurs. Regarding expediency, allowing the pledge of cultivation rights over management rights will only benefit entrepreneurs and harm the state's and creditors' interests. It is dangerous for the state's interests because the confiscation of management rights land is state property. One of the state's obligations is to carry out

juridical safeguards against state property so that there are no legal claims against the land. It is also dangerous for creditors as holders of mortgage rights because confiscation cannot be carried out if the entrepreneur who pledged the land defaults. On the other hand, confiscation is very important to ensure the protection of creditors in the execution of their debts. Based on the above views and considerations, abolishing the regulation on the permissibility of cultivation rights over management rights is appropriate.

Expansion of the Scope of Land as the Basis for Granting Cultivation Rights: The Emergence of Injustice and the Increase of Agrarian Conflicts

Social Justice for All Indonesian People, as stated in Pancasila, has two meanings, namely: (1) social justice should cover all Indonesian people in all areas of life, including the agrarian sector; social justice has a relationship with the guarantee and protection of human existential freedom as a social being and equal in life so that humans should not be treated arbitrarily; (2) Humans or society in creating social justice can be the subject or perpetrator of justice and also the object of that justice. In this case, the government and the community must pay attention to and protect the weak or disadvantaged person and create a fair mechanism for distributing land ownership as an essential resource for developing their lives. A fair mechanism in the agrarian sector means that the government creates equal access for each individual or group to natural resources, especially land, which is the foundation of their lives. This means that the government's exercise of its right to control, including forming regulations, supervising, making policies, and managing land, must be oriented towards creating a fair mechanism.¹⁷

¹⁷ King Faisal Sulaiman, "Polemik Fungsi Sosial Tanah dan Hak Menguasai Negara Pasca UU Nomor 12 Tahun 2012 dan Putusan Mahkamah

Konstitusi Nomor 50/PUU-X/2012," *Jurnal Konstitusi* 18, no. 1 (2021): 091-111, p.103, <https://doi.org/10.31078/jk1815>.

The state's policy to expand access for entrepreneurs to obtain land use rights on a vast scale has the potential to narrow land controlled by the community so that land ownership inequality deepens. This reality is not in line with a fair mechanism for obtaining resources because it provides convenience to entrepreneurs and, on the other hand, does not provide easy access for the community to increase their land tenure. Moreover, based on land redistribution, the agrarian reform program is not running well, so land tenure in the community, especially the farming community, is getting narrower. As a result, land ownership inequality is widening.

One of the things that is very important to understand is that rules based on social justice have a tangible impact on overcoming the widening of the poverty gap and reducing social and economic inequality. In other words, regulations can be social just if they reduce the gap between the rich and the poor, between the highest and lowest income groups. Conversely, the wider the gap between the highest and lowest, the legislation can be considered not socially just.

¹⁸ The policy of expanding access for entrepreneurs to obtain cultivation rights over management rights is not based on the value of social justice in Pancasila because it widens the gap in land tenure inequality, which has reached a very worrying stage that is even higher than the colonial period. When this happens, the potential for increased poverty in the farming community will increase. Data from the Central Bureau of Statistics recorded that in August 2018, the number of Indonesian farmers was 8,544,705 people or 13.91% of the total workforce spread across various villages. A picture of

inequality emerges when this data is juxtaposed with data from the Central Statistics Agency in 2019, which shows that the poverty rate in rural areas is 12.85% or about double the urban poverty rate of 6.69%. This data indicates that Indonesian farmers living in rural areas still experience poverty due to the lack of farmer income.¹⁹

The structural poverty experienced by farmers due to regulations prioritizing land acquisition for investment purposes is also not in line with Wojciech Sadurski's view of justice. For him, social justice is created when an individual or group does not fall below the poverty line and cannot gain access to resources or land.²⁰ The various statistical data above show the poverty experienced by farmer groups and the inequality of access between entrepreneurs and the community in obtaining land. One of Sadurski's views that is also interesting to be referred to is the view of *preferential treatment*, which emphasizes siding with the weak as one of the elements of justice. According to him, there are two measures to determine whether someone deserves or is reasonable to get *preferential treatment*, namely:²¹

1. Comparison to the treatment given to other parties. At this point, it can be stated that there is unfair treatment in terms of access to land between the community and investors. The access of investors has been dramatically expanded through various policies, including the expansion of land that can be the source of cultivation rights to include management rights, the extension and renewal of cultivation rights at the same time, the absence of restrictions on the maximum area of land that can be controlled by legal entities holding cultivation right and various other pro-

¹⁸ Jimly Asshiddiqie, *Konstitusi Keadilan Sosial: Serial Gagasan Konstitusi Sosial Negara Kesejahteraan Sosial Indonesia* (Jakarta: Kompas, 2018).

¹⁹ Nurul Rahmawati, "Pengaruh Kesejahteraan Petani Terhadap Kemiskinan Di Perdesaan," *Jurnal Ilmu Ekonomi dan Pembangunan* 20, no. 1 (2020).

²⁰ Wojciech Sadurski, "Social Justice and Legal Justice," *Law and Philosophy* 3 (1984): 329–54.

²¹ Wojciech Sadurski, "Commutative, Distributive and Procedural Justice – What Does It Mean," *Legal Studies*, no. 09 (2009).

investment policies. On the other hand, the government has not made a comprehensive policy to increase community access to land, even though the amount of land owned by the community, especially farmers, is minimal.

2. Comparisons are made against specific standards that exist in society, such as poverty standards. One of the standards is the high Gini ratio of land ownership in Indonesia, even in regions such as Gorontalo; the figure reached 0.88 based on the National Land Agency report in December 2021. On the other hand, the poverty rate among farmers is also evident from the increasing number of smallholders or farmers who control less than 0.5 hectares of land. In 2013, the number of smallholders was 14,248,864 and increased to 15,809,398 in 2018. Compared to the total number of farmers in Indonesia, which reached 33,487,806, the percentage of smallholders reached 47.2%.²²

Based on the two indicators above, the farmers in Indonesia are the ones experiencing injustice. This injustice occurs because government policies are not based on the will to create a *common good*, especially the good for farmers.²³ Farmers should be protected and given ease of access to increase the area of land tenure instead of providing convenience for entrepreneurs. If the priority is investment through the easy acquisition of cultivation rights, it will exacerbate the land ownership inequality in Indonesia. Granting cultivation rights to investors can further aggravate the land ownership inequality in Indonesia. This is because entrepreneurs will control more and more land while people in Indonesia will control less and less land.

The high inequality of land ownership also does not align with the desire to create

equitable land ownership and equal access to natural resources in Indonesia. Referring to the World Bank's indicators, land inequality in Indonesia is so high that the gap ratio reached 0.79. This is ironic because one of the objectives of national agrarian law is to create justice and equality in the land sector, as stated in the elucidation of Basic Agrarian Law. The granting of cultivation rights on a large scale for the benefit of entrepreneurs will also have an impact on the increasing number of land conflicts in the plantation sector, which has been motivated by the inequality of land tenure between plantation entrepreneurs and surrounding communities. Land conflicts in the plantation sector have become the highest conflict in the field in the last twelve years. The following report is presented by the Consortium for Agrarian Reform from 2019 to 2021:

Table 1. Agrarian Conflicts Data
Year

Indicator

	2019	2020	2021
Number of Conflicts	87	122	74
Land Area (Ha)	239.39 5,1	230.087, 878	255.0 06,06

The data above shows that the land area of agrarian conflicts in 2021 is the highest in the last three years, even though the number of disputes has decreased. Agrarian conflicts in the plantation sector involve various actors, and the most common is the conflict between the private sector and the community. In its 2019 report, the Consortium for Agrarian Reform stated that there are several causes of agrarian conflicts in the plantation sector, including (1) the issuance of location permits and/or Cultivation Rights in community areas which have an impact on the eviction of land and community settlements, (2) the existence of company management or claims

²² Tim SUTAS, "Hasil Survei Pertanian Antar Sensus (SUTAS) Tahun 2018" (Jakarta, 2018).

²³ George Duke, "Finnis on the Authority of Law and the Common Good," *Legal Theory* 19, no.1(2013):44.

to land outside the Cultivation Rights area owned by them and (3) the overlapping of community property rights certificates with cultivation certificates owned by plantation companies. Referring to these causes, the ease of granting land use rights for investors will further exacerbate conflicts between communities and the private sector in the plantation sector.

The explanation above shows that the inconsistency of regulation regarding cultivation rights and inequality of land distribution, which brings more favor to the entrepreneur and the higher, can cause an increase in agrarian conflict. It does not follow the principle of protection for weak parties as stipulated in Article 11, paragraph (2), Article 15, and the elucidation of Basic Agrarian Law. Under such conditions, the government must focus on the land redistribution program to create the greatest prosperity for the people. There is an essential statement that policies at the macro level that favor the interests of the people are critical because they affect the welfare of society.²⁴

Conclusion

The change in Indonesian agrarian legal policy brings out economic implications, namely land ownership injustice and agricultural conflict. Basic Agrarian Law stipulates that cultivation rights granted on state land overlap with the substance of Job Creation Law and its derivative regulations, which expand the source of cultivation rights on state land and management rights on the land. This is due to the difference in orientation between Basic Agrarian Law, which views that cultivation law has a social and economic impact so that it can only be granted to the state, while the Job Creation Law and its derivative regulations view cultivation right as an essential element to

support investment interests so that this regulation facilitate the land acquisition by investors. The granting of cultivation rights over management rights land in Job Creation Law contradicts various rules governing the management of regional asset land managed by the Regional Government as the holder of management rights, which state that regional asset land, including cultivation rights over management rights, cannot be mortgaged. Still, Government Regulation No. 18 of 2021, as a derivative of the Job Creation Law, states that cultivation rights over management rights can be mortgaged. These overlapping arrangements lead to legal uncertainty and increase land ownership inequality in Indonesia because investors can increasingly control land while land tenure by the community is getting narrower. This increases the GINI ratio of land ownership in Indonesia, which is getting bigger. The inequality of land ownership and the partiality of government policies towards entrepreneurs will increase agrarian conflicts, especially in the plantation sector. The agricultural strife in Indonesia is high, and the width of conflict land is rising.

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²⁴ Francis Fukuyama, "Virtue and Prosperity Virtue and Prosperity," *The National Interest* 40 (1995): 21-27.

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