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Customary Land Rights Versus Land Use Rights (HGU)

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Abstract

This study examines the legal conflict between *customary rights* (*hak ulayat*) of *customary law communities* (*masyarakat hukum adat*) and the *right to cultivate* (*Hak Guna Usaha*, or *HGU*) granted by the state to third parties, particularly large corporations. *Customary rights*, as communal entitlements of indigenous peoples, are acknowledged in a limited manner within the *Basic Agrarian Law* (*Undang-Undang Pokok Agraria*, or *UUPA*). However, in practice, these rights are frequently marginalized by economic interests through the issuance of *HGU*. The research utilizes a normative juridical approach, analyzing relevant statutes and regulations, legal doctrines, and judicial decisions. The findings indicate that the prioritization of *HGU* within agrarian policy frameworks, coupled with insufficient protection for *customary rights*, has led to persistent land conflicts and social injustice. Consequently, there is a pressing need to reformulate land policies to ensure greater equity and to support the rights of indigenous peoples, while still upholding the principle of the social function of land as mandated by the *UUPA* and the 1945 Constitution. The practical implications of this research suggest that current agrarian policies should be revised to guarantee fair protection for indigenous peoples' rights, in accordance with the social function principle articulated in both the *UUPA* and the 1945 Constitution.
Keywords: Customary Rights, Right to Use, UUPA, Indigenous Peoples, Agrarian Conflict

INTRODUCTION

In essence, *customary rights* (*hak ulayat*) and *business use rights* (*Hak Guna Usaha*, or *HGU*) are integral to the politics of Indonesian agrarian law (Rudy et al., 2021; Sopaheluwakan et al., 2023). Both types of land rights must be fostered, as they pertain to issues of land ownership and use that have the potential to infringe upon the rights of others, whether individuals or communities (Ansah & Chigbu, 2020; Bae, 2023; Nara et al., 2020, 2021; Olofsson, 2021). Therefore, the existence of these two land rights necessitates the involvement of the state as the regulatory authority, to achieve national objectives aimed at improving the welfare and prosperity of all Indonesian people. The state's involvement in land matters is not as a landowner (*domein*) as referred to in the *Agrarische Wet* 1870. Instead, Indonesian law adheres to the concept of the right of disposal (*recht van beschikking*), granting the state authority to regulate the designation, use, supply, and maintenance of land, as well as the legal relationship between legal subjects and the land under its control, including the transfer of rights to the land concerned.

Efforts to foster *customary rights* and *business use rights* require special attention, as Indonesian customary law has long recognized communal rights to land, one of which is *hak ulayat (Asteria et al., 2024; Ilyas et al., 2023; Ismail et al., 2023; Kristiani, 2020; Mutawali, 2022)*. These rights are known in various regions under different names, and according to R. Van Dijk and R. Supomo, are referred to as "lordship rights," while B. Ter Haar also uses the term "lordship rights," applicable both within and beyond the indigenous community's environment. Van Vollenhoven refers to these rights as *beschikkingsrecht*, a type of land right that cannot be transferred. Meanwhile, Yan Pramadya Puspa explains that the word *beschikking*

(Dutch) means decree or decision, while *recht* (Dutch) means law. However, B. Ter Haar interprets *beschikken* as the right to absolute control over land.

The existence of *beschikkingsrecht* across various customary areas in Indonesia is reflected in different local terms, but all are considered to have both economic and magical-religious significance (Al-Fatih & Muluk, 2023; Herman & Noor, 2017; Hidayat, 2023; Rogier, 2022). These rights are maintained by the Customary Chief and are upheld with full compliance by the indigenous communities concerned. For example: *patuan* (Ambon), *wewengkang* (Java), *panyampeto* or *pawatasan* (Kalimantan), *prabumian* or *payar* (Bali), *tatabuan* (Bolaang Mangondo), *torluk* (Angkola), *limpo* (South Sulawesi), *nuru* (Buru), *paer* (Lombok), and *ulayat* (Minangkabau). Customary rights are essentially *beschikkingsrecht* in the technical sense as a subjective right. Linguistically, the term *ulayah* or *ulayat* is interpreted as region or territory. Law No. 5 of 1960 concerning the Basic Agrarian Law (*UUPA*) uses the term *customary rights* as a translation of *beschikkingsrecht*. Thus, the *UUPA* recognizes the existence of customary rights with certain restrictions, meaning that as long as such rights exist in practice, they are recognized, but if they no longer exist, there is no obligation to revive them.

Similarly, the right to use land initially faced various obstacles because it was considered to have the potential to harm the people (for example, through forced cultivation). However, under pressure from large private companies, the colonial government enacted the *Agrarische Wet* 1870, which granted the broadest and most powerful land rights, with the possibility of extension. In fact, regulations provided that the authority to control and use such land was similar to *eigendom* rights, which could be encumbered by mortgages to obtain credit. Today, the existence of *erfpacht* rights is still recognized by the *UUPA* under the name *business use rights* (*HGU*), intended for agricultural, fishery, and livestock businesses. However, their existence is still based on the state's right to control and must not contradict prevailing laws and regulations, and applies only to the surface of the land (soil), not to the natural resources contained within it.

A previous study by Aditya and Mulyani (2020) examined the legal relationship between *customary rights* and *business use rights* under current Indonesian agrarian law, particularly focusing on the concept of *beschikkingsrecht*. The study found that while customary rights are recognized in the *UUPA*, these rights are often marginalized or overlooked in favor of business use rights, leading to conflicts and social unrest. However, the study was limited in scope, as it did not explore the practical implications of these conflicts in specific regions or provide recommendations on how to reconcile these competing land rights in the context of development.

A study by Pratama and Putra (2020) delved into the impact of *business use rights* on local communities, focusing on the implementation of these rights within the framework of large-scale industrial projects in rural areas. They concluded that *business use rights*, which are granted to private companies, often undermine the livelihoods of indigenous peoples, especially when the land's economic potential is exploited without proper compensation or involvement of the local communities. While the study acknowledged the importance of state involvement in regulating land use, it lacked a comprehensive analysis of how state policies could better balance economic development with the protection of indigenous land rights.

This research aims to analyze the legal relationship between *customary rights* and *business use rights* in Indonesia, examining the impact of these land rights on local communities and identifying solutions for balancing economic development with the protection of indigenous land rights. The benefits of this research include providing valuable insights for lawmakers, indigenous communities, and businesses on how to harmonize land use practices and create policies that respect indigenous rights while fostering sustainable economic development.

RESEARCH METHOD

This research employed a normative juridical approach, which focused on literature studies of laws and regulations, legal doctrines, and court decisions relevant to the issue of customary rights and business use rights (Hak Guna Usaha, or HGU) over land. This approach was selected because the problems examined were normative in nature, specifically concerning how the law regulated, recognized, and provided protection for the customary rights of customary law communities in the context of the granting of HGU by the state. To strengthen the analysis, legislative, conceptual, and case approaches were utilized to review and compare the application of the law in various contexts.

The data sources used consisted of secondary data, including primary legal materials (such as the UUPA, implementing regulations, and court decisions), secondary legal materials (such as books, journals, and previous research), and tertiary legal materials (such as legal dictionaries). The data collection technique was conducted through literature studies, while the data analysis technique employed the qualitative analysis method, namely by classifying, interpreting, and examining the content of relevant regulations and legal doctrines. This analysis aimed to provide a systematic understanding of the legal position of customary rights and business use rights, as well as to offer normative solutions to conflicts arising from both.

RESULT AND DISCUSSION

A Flashback of Customary Rights and Land Use Rights

Taking part in the previous description, it is clearly illustrated that the existence of land for humans is very much needed. Therefore, there needs to be rules that contain the values of justice, usefulness and legal certainty. However, it should be realized, that making land rules (laws) is not as easy and easy as imagined. Levelt was an expert in the field of autonomy and decentralization during the Dutch East Indies Government in his book: Handleiding voor locale belastingverordeningen (1933), stating that making laws was a difficult job. This was proven when the Government tried to make a UUPA, several times drafting a UUPA to be agreed upon as Indonesian land law. Therefore, it is very important to first look in the mirror (rearview mirror) which means trying to examine a flashback of a phenomenon that occurred (has occurred) in the process of forming land law, including the recognition of customary rights and business use rights over land as one of the legal norms regulated in the UUPA.

Discussions on Indonesian land law should have started in 1948 when the Jogya Agrarian Committee was formed (Presidential Decree dated May 21, 1948 No, 16), because this phenomenon could be a milestone in the beginning of efforts to reform agrarian law to replace the colonial legacy agrarian law (colonial) Agrarische Wet 1870 and various implementing rules that regulate land law. The Jogya Agrarian Committee proposed several principles as the basis of the new agrarian law, one of which is to release the principle of domein and give recognition to customary rights and consider the rights to tahah land proposed by Sarimin Reksodihardjo (including the right to use business).

Then through the Presidential Decree dated March 19, 1951 No. 36/1951 the Jogya Agrarian Committee was dissolved and replaced with the Jakarta Agrarian Committee, one of the valuable points in its report was that it was necessary to set the maximum and minimum limits of land tenure and legal entities were not given the opportunity to work on small farms, and customary rights were approved to be regulated by or by law in accordance with the basic principles of the State.

Furthermore, through the Presidential Decree dated March 29, 1955 NO. 55/1955 jo Presidential Decree dated January 14, 1956 No. 1/1956, the Jakarta Committee was dissolved, then the State Committee for Agrarian Affairs was formed, known as the Soewahjo Committee. One of the main points of the Committee's thinking is the abolition of the principle of domein

and the recognition of customary rights that must be subordinated to the public interest (the State), and recognizing the existence of the right to use business. Then through the Presidential Decree dated May 6, 1958 No.97/1958 the Soewahjo Committee was dissolved and then the Soewahjo Committee was formed, this committee adjusted several things from the Draft UUPA of the Soewahjo Committee so that it received approval from the Council of Ministers to be submitted to the House of Representatives for further discussion.

Based on the Presidential Decree of July 5, 1959, it was necessary to re-enact the 1945 Constitution with guided democratic political life, form a Work Cabinet and complete state institutions, namely the MPR (S), DPA and DPRGR. This is the reason for the withdrawal of the Soenarjo Committee Draft from the DPRGR, because it still refers to the 1950 Constitution (Presidential Official Letter dated May 23, 1960 No. 1532/HK-1960). Upon the adjustment of the 1945 Constitution and the Political Manifesto, the Draft UUPA called the Sadjarwo Draft was born, its discussion in Commission sessions (confidential) and after the plenary received approval to be established as a UUPA that recognizes customary rights with certain restrictions, especially on their existence and implementation (Article 3 of the UUPA), and the right to use business (Articles 28, 29, 30, 31, 32, 33, and 34 of the UUPA). Formulation of Article 3 of the UUPA: "Bearing in mind the provisions in articles 1 and 2 the implementation of customary rights and similar rights of customary law communities, as long as they still exist, must be in such a way that they are in accordance with the national and state interests, which are based on national unity and must not conflict with other higher laws and regulations". While the formulation of Article 28 paragraph (1) of the UUPA:

"The right to use is the right to cultivate land that is directly controlled by the State, within the period as mentioned in article 29, for agricultural, fishery or livestock companies".

Understanding Land Rights According to UUPA

Understanding Customary Rights to Land

The UUPA as a land law is prepared based on the customary law (original law) of Indonesia, but the customary law must be clean of its defects (first it must be sanitized) in order to eliminate the characteristics of feudalism as empirical evidence of the influence of the colonizers on the indigenous customary law of the Indonesian people. Therefore, by referring to the formulation of Article 3 of the UUPA, it becomes clearer that the State (Indonesia) recognizes the existence of customary rights to land if in fact the right still exists, meaning that if it no longer exists, it no longer needs to be held. Customary rights here are about communal land rights, so for legal certainty (according to Mhd. Yamin Lubis, et al., 2010) must be registered. However, from the results of my dissertation research (2006), I found a legal fact that the land plots in the Ammatowa Kajang customary area and customary lands in Tanatoraja, still receive legal certainty guarantees from the State even though none are (yet) registered according to Indonesian land registration law (further research is needed).

Maria S.W. Sumardjono provided criteria as a benchmark for determining whether or not customary rights still exist, as follows:

a. The existence of customary law societies that meet certain characteristics, as the subject of customary rights.
b. The existence of land/territory with certain boundaries as Lebensraum which is the object of customary rights.
c. C. The existence of the authority of customary law communities to carry out certain actions.
d. The existence of State recognition of certain plots of land as customary rights:
e. There is an obligation of customary law communities not to abandon customary land rights, carry out land maintenance, increase soil fertility, and preserve the environment.

Then what if the customary rights to land are no longer visible in reality in the midst of indigenous peoples?, the answer: the UUPA has emphasized that if it no longer exists, it no

longer needs to be revived. Meanwhile, even if the fact is that the customary rights still exist (for example: the customary rights of Ammatoa Kajang and Tanatoraja), then the implementation must be in accordance with the national and state interests (Article 33 paragraph (3) of the 1945 Constitution jo Article 2 of the UUPA. That is: customary rights, must not conflict with laws and other higher regulations (note Article 7 paragraph (1) of the Law. No.12 of 2011 concerning the Legislative Order). Even the UUPA itself emphasizes that strengthening customary rights must be followed by land use planning (/anduse planning) and land tenure and ownership overhaul activities (/andreform).

Understanding the Land Use Rights

According to the legal norms contained in the UUPA, the right to use business is only intended for agricultural, fishery or livestock companies to cultivate lands that are directly controlled by the State and given a certain period of time. Are customary rights lands included land controlled by the State, and can be built into land with business use rights? This needs to receive attention from the Government (State), because the existence of business use rights in the UUPA jo Regulation of the Head of BPN No. 3 of 1992 is given a maximum period of 35 years and can be extended for a period of 25 years, and can be applied for renewal for 35 years and can be extended again for 25 years (cumulatively for 120 years). and can be transferred and transferred to another party as long as it meets the conditions specified in the laws and regulations, meaning that it must not be based on regulations of a lower degree (hierarchy) and must be registered in accordance with the legal provisions on land registration.

How wise the Government is to provide the opportunity to control land for 120 years for entrepreneurs with large capital through the granting of business use rights, so that there needs to be regular supervision so that these land plots remain productive for the sake of improving the welfare of all Indonesian people. The policy of determining the non-business term is one of the government's efforts to attract investors to invest in Indonesia. However, entrepreneurs who hold business use rights who are proven to have violated the provisions of Indonesian land law, or no longer qualify as holders of business use rights, should be given relatively heavy sanctions in the form of elimination or revocation of business use rights.

In this regard, the UUPA also provides certain limitations that can lead to the abolition of business use rights, including:

1. The term ends
2. Terminated before the end of the term due to a condition not being met
3. Released by the rights holder before the end of the term
4. Revoked in the public interest
5. Abandoned
6. The land was destroyed
7. No longer qualified as a holder of the right to use uasaha.

Empirical Facts of Customary Rights vs Land Use Rights

What is the existence of customary rights, if they are linked to the land of the use of the business? Some of the results of the study provide scientific information about the existence of a reverse cycle, where customary rights are increasingly eroded (weakened) while business use rights are increasingly strengthened. One of the strengthening tools for business use rights is the issuance of the Regulation of the Head of BPN No. 3 of 1992. However, the substance regulated in it (the length of the period), is allegedly contrary to the basic regulations (Article 29 of the UUPA). Policies that violate the basic rules (Article 7 paragraph (1) of the Law. No. 12 of 2011 concerning the Legislative Order), if not anticipated, can trigger public turmoil to carry out resistance (demonstrations).

In Bandar Lampung, not a few land parcels of customary rights are gone, because they are converted into oil palm plantations with the status of business use rights, causing losses for

the indigenous people concerned. In addition, there are several indigenous groups who are suing over customary land parcels that have been controlled by businessmen with large capital through business use rights facilities. Such a government policy seemed to revive the right of erfacht as stipulated in the Agrarische Wet 1870). As a result, indigenous peoples are greatly disadvantaged, because they have lost agricultural land (plantations) that have been processed as a source of family income. At least it has shifted the legal principle of the UUPA, "land for farmers has changed to land for entrepreneurs with large capital".

Indonesian land law practitioners and theorists do not have the same perception of the existence of land expanses with customary rights so that it is used as an object to be determined as a right of use through the concept of the right of state control (Ihe right of disposal). The difference in perception is reminiscent of the land dispute between the residents (as the plaintiff) and Pertamina (as the defendant). Similarly, 300 hectares of agricultural land in Jatimulyo and Way Huy villages in South Lampung, where customary land plots are considered free state land (vrij landsdomein) so the government issues business use rights on the land in question.

Furthermore, regarding efforts to weaken customary rights and strengthen business use rights, it is inseparable from the regulations themselves (for example, the Regulation of the Head of BPN No. 3 of 1992). The same issue was highlighted by Boedi Harsono in his article "Land Law Reform in Favor of the People" edited by Brahmana Adhie and Hasan Basri Nata Menggala, finding the legal fact that through the issuance of laws and regulations various facilities and means to facilitate and ensure the acquisition, control and use of lands...., including customary lands of customary law communities in the form of forests. In fact, various television media have reported how many and extensive customary rights lands that have been used as "Tool Roads" have triggered demonstrations by the indigenous people concerned. The encouragement of demonstrations from indigenous peoples whose customary lands are used as a tool has been predicted in John Finley Scoot's theory as a reflection of human existence as a creature in society that responds very strongly to the interactions they carry out with other members of society. The goal is to jointly defend the land plots of customary rights.

Is it possible that in the middle of the metropolitan city there are plots of land with customary rights?, if possible then there will be no Koja Berdarah incident. The background of this embarrassing event is due to the difference in perception of "the right to control the state over the land" and the "customary land of the indigenous Betawi people". For example, the actions of the Jakarta Pamongpradja Police Unit (Satpol.PP), which on Wednesday, April 14, 2010 had made a fatal mistake. The mistake occurred during the eviction of land in Koja, North Jakarta, so that victims fell both from the Satpol.PP itself and from the community who defended the land, because on the land there was the tomb of one of the spreaders of Islam (Habib Koja). This embarrassing event is known as the Bloody Koja. If the Jakarta Regional Government officials, considering the call for "Social Function on Land" (Article 6 of the UUPA), it is likely that the Koja Berdarah incident would not have occurred.

The political pressure on land contained in Article 6 of the UUPA, reads: All land rights have a social function, intended so that every plot of land is really used as it should, beneficial to its owners and also beneficial to the community. Therefore, the social function of land rights can at least be used as a way of compromise to avoid the conflict of the weakening of customary rights from the strengthening of the right to use the business. The social function of land rights as stipulated in Article 6 of the UUPA, must still refer to the legal provisions contained in Article 33 paragraph (3) of the 1945 Constitution. Where the existence of the State is still awaited, in order to eliminate disputes between customary rights and business use rights.

CONCLUSION

The analysis highlights the urgent need to review and revise the *Basic Agrarian Law* (*UUPA*, Law No. 5 of 1960) to better align with the evolving dynamics of community law and land governance in Indonesia. Reforming the UUPA is crucial for safeguarding both *customary rights* and *business use rights* within the national land law system. *Customary rights* should be preserved as long as they remain accountable and do not conflict with existing legal provisions, ensuring the social function of land is upheld. Likewise, the long-term nature of *business use rights* (*Hak Guna Usaha*, or *HGU*) necessitates ongoing supervision, with clear sanctions for violations and revocation of rights when legal conditions are no longer met. For future research, it is recommended to conduct empirical studies on the effectiveness of current supervisory mechanisms and sanction enforcement, as well as to explore innovative legal frameworks that can harmonize economic development with the protection of indigenous land rights.

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