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RECONSTRUCTION OF CUSTOMARY LAW IN DEVELOPMENT AGRARIAN LAW IN THE FIELD OF MORTGAGE RIGHTS

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Abstract
Customary law as one of the sources of Indonesian national law that is local and traditional, has a great influence in the development of agrarian law, and has relevance in overcoming the problems faced by the Indonesian people in the era of globalization. This research has an important role in examining issues regarding: (1) Customary law as the basis of Indonesian national agrarian law; and (2) Reconstruction of customary law in Indonesian national agrarian law in the field of mortgage rights. The method used in this research, through a doctrinal legal research approach, descriptive analysis research specifications, types and sources of data come from secondary data sourced from primary legal materials, secondary legal materials, and tertiary legal materials, and data analysis is carried out qualitatively. The results of the study; (1) The enactment of Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles is not based on western colonial agrarian law, but is based on customary law as a manifestation of Indonesian legal politics to eliminate dualism in agrarian law; and (2) Reconstruction of customary law institutions in the land sector is carried out by incorporating the concepts and principles of customary law into new legal institutions, including land mortgages, which are a source of inspiration for the formation of national law.
Keywords: *Agrarian law; Customary law; Mortgage rights; Reconstruction*

1. INTRODUCTION

The existence of customary law as a living law in the midst of Indonesian society is increasingly marginalised.[1] Customary law, which used to be an effective life guide in solving various social problems in Indonesian society, is now losing its influence.[2] In fact, today there are often various problems faced by Indonesian indigenous peoples, when customary law conflicts with positive law.[3]

[1] Ayun Shukia Abdul Hafidz Miftahuddin, "Sejarah Dan Kedudukan Hukum Adat Dalam Pembangunan Hukum Nasional," *Jurnal Hukum Dan Ahwal Al-Syakhsiyyah* 3, no. 2 (2024): 114–31, https://ejournal.staidapondokkrempyang.ac.id/index.php/jmjh/article/view/559.

[2] Nurul Hidayah Zulfa Rusya Fadiyah, Salma Amalia Amanda, Siti Aydina, "Potensi Dan Tantangan Penerapan Hukum Adat Berbasis Kearifan Lokal Masyarakat Adat Suku Dani Di Era Modern," *Jurnal Hukum Dan Kewarganegaraan* 3, no. 11 (2024): 1–10, https://ejournal.warunayama.org/index.php/causa/article/view/3370/3171.

[3] Abdul Hafidz Miftahuddin, "Sejarah Dan Kedudukan Hukum Adat Dalam Pembangunan Hukum Nasional."

The marginalisation of customary law as one of the sources of law in Indonesia, is based on the reason and assumption that customary law is very traditional and unable to keep up with the times, such as globalisation and technological advances. [4]

The neglect of the existence of customary *law* as the *living law of the* Indonesian people, which was previously marginalised, because it was traditional and could not reach the times (globalisation and technology), turned out to have an important role in facilitating national economic activities.[5] Therefore, in addition to being a *source* or basic material for the formation of norms in the Basic Agrarian Law (UUPA), customary law also acts as a complement to the norms in the UUPA (*source and complement*) in guaranteeing bank credit, known as Mortgage on Land and other objects related to land, as a substitute for Mortgage on Land. [6]

The development of the legal system in Indonesia, which tends to adopt civil law and common law systems, as well as legal politics that focus on legal codification and unification, accelerates the loss of customary law institutions. This is especially evident in economic activities, where positive law is undergoing transformation towards the Islamic legal system (sharia). In business activities such as corporate law, financing law in banking, capital markets, insurance, and contract law, which results in the dualism of legal systems, namely conventional and sharia. [7]

Customary societies have a similar pattern of resolving conflicts, by controlling community life and imposing sanctions for violators, so that recovery is very effective.[8] Given that customary law reflects the personality and soul of the nation, it is believed that

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[4] N A Sinaga and R Nugraha, "Perspektif Hukum Adat Dalam Konstitusi Hukum Positif Di Indonesia," *Jurnal Ilmiah Hukum Dirgantara* 13, no. 1 (2022): 1–19, https://journal.universitassuryadarma.ac.id/index.php/jihd/article/view/1048.

[5] Iin Rahayu, "Menghidupkan Kembali Peran Hukum Adat Sebagai Landasan Hukum Dalam Pengembangan Sistem Hukum Indonesia," *Journal of Adat Recht* 1, no. 1 (2024): 1–7, https://nawalaeducation.com/index.php/JOAR/article/view/342/292.

[6] Ayu Prisca Gulo, "Hukum Politik Agraria Dalam Azas Hukum Agraria Di Indonesia," *Jurnal Penlitian Hukum* 3, no. 4 (2019): 12–16, https://aksiologi.org/index.php/courtreview/article/view/835/931.

[7] Lastuti Abubakar, "Revitalisasi Hukum Adat Sebagai Sumber Hukum Dalam Membangun Sistem Hukum Indonesia," *Jurnal Dinamika Hukum* 13, no. 2 (2013): 319–31, http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/213.

[8] Masrifa Fauza, "As-Sulhu Dalam Kasus Penganiayaan Berat (Suatu Tinjauan Keadilan Restoratif)," *Repository UIN Ar-Raniry*, 2024, https://repository.ar-raniry.ac.id/id/eprint/36720/1/Masrifa Fauza%2C 190104032 %282024%29.pdf.

some customary legal institutions are still relevant to be used as material in shaping the Indonesian legal system. Customary law is able to provide solutions to various problems in the social life of Indonesian society. In fact, it cannot be denied that currently, in economic activities, customary law has transformed into a basis for supporting business activities, such as the law of mortgage rights on land and other objects related to land, as well as production *sharing*.[9]

Apart from the issue of the position of customary law, Indonesian law also recognises land law as the basic law contained in legislation or also known as agrarian law.[10] In Indonesian terminology, agrarian law refers to agricultural land and plantation affairs. The development of agrarian law in Indonesia cannot be separated from regulations made since the Dutch East Indies colonial period, which were based on various rights that developed in society. Some of these are *eigendom rights* (property rights for a very long period of time), *erfacht* land (the right to make maximum use of another person's land for a very long period of time, such as the right to large-scale plantations), *postal* land (the property right to own buildings and plants on another person's land for 20 years), tanah ulayat (land controlled by customary law communities), tanah bengkok (land received for cultivation in lieu of salary for village officials), and tanah gogolan (land controlled communally by the indigenous population of a village in Java, although this right has been revoked since the enactment of UUPA (Basic Agrarian Law) in 1960).

Based on this background, it is considered very important to conduct a study in a scientific paper with the title: "Reconstruction of Customary Law in the Development of Agrarian Law in the Field of Mortgage Rights", given the importance of the existence of customary law in deciding various national agrarian law issues that are closely related to land cases in Indonesia, so as to be able to solve problems in juridical studies. The purpose of this research itself is to be able to develop how to reorganise or reconstruct customary law, so that it can be accepted and can be in accordance with the development of national agrarian law, especially in the field of mortgage rights in the present.

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[9] Eben Ezer Sinaga, "Pengimplementasian Hak Kekayaan Intelektual Dapat Dijadikan Sebagai Jaminan Fidusia Menruut Peraturan Pemerintah Nomor 24 Tahun 2022," *Repository Universitas HKBP Nommensen*, 2024, 1–45.

[10] Marie Remfan Raniah Arina Novizas Shebubakar, "Hukum Tanah Adat/Ulayat," *Jurnal Magister Ilmu Hukum* 4, no. 1 (2021): 14, https://doi.org/10.36722/jmih.v4i1.758.

2. METHOD

The research method used in this research is a normative juridical study method with a literature study approach. This method focuses on the analysis or interpretation of written material based on its context with a qualitative approach. This research describes in detail the reconstruction of customary law in the development of agrarian law in the field of mortgage rights. The legal materials in this research are also collected by documentation studies and then *analysed* using the *hermeneutics analysis* model, to find meaning and formulate it by providing an interpretation of the text that becomes the object to be interpreted in the context of space and time. Furthermore, data analysis is carried out qualitatively.

A qualitative approach will allow to understand observations in depth and is carried out by collecting library materials or secondary data only. The data used in this research is also sekudner data as the main material and secondary data as support, which is obtained through study.

3. RESULTS AND DISCUSSION

3.1 Customary law as the basis of Indonesia's national agrarian law

Land is one of the most important elements for human survival, so its management must be directed towards achieving the greatest prosperity of the people. In customary law, land issues are very important because humans have a close relationship with the land, which is a place of refuge and life. During the reign of the Dutch East Indies, the resolution of land issues was complicated by the dualism of land law. This dualism caused conflicts that contradicted the purpose of the law itself. Therefore, the Indonesian government established legislation on land, namely Law No. 5 of 1960 on the Basic Regulation of Agrarian Principles (UUPA). This law aims to unify national land law.

The change from colonial agrarian law to national agrarian law went through a long process of formulation and debate, starting from the Yogya Agrarian Committee, Jakarta Agrarian Committee, Soewahjo Committee, to Soenarjo's draft and finally Sadjarwo's draft.[11] There were different views among the drafting team, with some members wanting the new UUPA to take material from Western civil law, while others wanted to emphasise the original identity of the Indonesian people by applying customary law as the main basis

[11] Retno Sulistyaningsih, "Reforma Agraria Di Indonesia," *Jurnal Perspektif* 26, no. 1 (2021): 57–64, https://doi.org/10.30742/perspektif.v26i1.753.

of national agrarian law. Eventually, it was decided that customary law would be the main pillar in the formation of national agrarian law, as stipulated in Article 5 of Law No. 5/1960 on the UUPA.[12]

Based on Article 5 of UUPA, the position of adat law has an important role in the National Agrarian Law System. The customary law that forms the basis for National Agrarian Law is customary law that has been adapted to the values of Pancasila, free from foreign elements that are *individualistic-liberal* and *feudal*. This customary law becomes the main source in the development of national land law and also a complementary source for national land law. In line with this thinking, the UUPA emphasises the discussion of land law based on land law regulations that are in accordance with Pancasila, the structure and objectives of the Unitary State of Indonesia. According to Soepomo, customary law in the future remains a reference in the development of Indonesian law, both as material in the formation of legal codification and directly applied to areas that cannot yet be codified. Even in areas of law that have been codified, customary law as unwritten customary law will remain a new source of law for matters that have not been regulated in law. This confirms the position of customary law as the basis of the National Legal System.[13]

One of the principles of UUPA states that the agrarian law that applies to the earth, water and space in Indonesia is customary law, to the extent that it does not conflict with national and state interests, which are based on national unity, Indonesian socialism, as well as the regulations in this law and other regulations, with due regard to elements based on religious law. This shows that customary law acts as a primary source in the formation of national legal norms and as a complement to written law. With the enactment of the 1960 BAL, dualism in land law was eliminated, restoring customary law to its position as the main foundation of national agrarian law.[14]

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[12] Rani Pajrin Margaretha Boru Sitanggang, Irvanda Rizqi Maulana P, Laurensia Angelica, Ahmad Galih Prasetyo, Eka Putri Kurmiati, Melati Lintang Kirana, "Sejarah Terbentuknya UU Nomro 5 Tahun 1960 Tentang Ketentuan Dasar Pokok-Pokok Agraria (Uupa) Dan Implementasinya Ditinjau Dari Awal Lahirnya Hukum Agraria Di Indonesia," *Jurnal Hukum Dan Kewarganegaraan* 4, no. 5 (2024): 1–11.

[13] Vanisyah Yulinda Santoso, "Revitalisasi Hukum Adat Sebagai Sumber Hukum Dalam Membangun Sistem Hukum Indonesia," *Jurnal Dinamika Hukum* 13, no. 2 (2020): 1–12, http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/213.

[14] Allya Putri Yuliyani, "Peran Hukum Adat Dan Perlindungan Hukum Adat Di Indonesia," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 9 (2023): 860–65, https://doi.org/10.58812/jhhws.v2i09.648.

The history of the application of law in Indonesia shows that many jurists have studied customary law as the living law of Indonesian society. Van Vollenhoven, for example, stated that if one wants to understand the living law in the world, especially because of its diversity from the past to the present, then the entire rule in the Indies is an inexhaustible source to study.[15] This statement recognises that legal pluralism in the customary environment is something unique, interesting and characteristic of Indonesian society.

Customary law, which is held by most Indonesians, has a special position in the politics of national land law. In this legal unification process, customary law is used as the basis in the formulation of national agricultural law. The formation of this national agricultural law is based on customary law as its main foundation and as a complement to fill the gaps that may arise in the existing written law. By making customary law the basis of national agricultural law, it can be concluded that the existence of customary law is recognised in the development of national agricultural law. Customary law also has a very important role in the development of the country's land law, especially in the formation of the Basic Land Law No. 5 of 1960.[16] To develop the National Land Law, Customary Law becomes the main source to obtain materials such as concepts, principles, and legal institutions, which are then formulated into written legal norms compiled based on the Customary Law system.

Customary law is simple community law and its scope is limited to individuals and certain areas.[17] Meanwhile, national land law is considered the law of modern society that applies throughout the territory of the Unitary State of the Republic of Indonesia. Therefore, it is necessary to make adjustments to customary law to suit the interests of society in the context of a modern state and the international world.[18] Therefore, customary law is the main source of national land law by using the principles and structure of customary law in

[15] Muhammad Aldi, "Pengakuan Dan Perlindungan Masyarakat Hukum Adat Berdasarkan Peraturan Perundang-Undangan," *Repository Universitas Jambi*, 2023, 1–28, https://repository.unja.ac.id/55060/.

[16] Kadek Novi Darmayanti Hartana, "Peran Hukum Adat Dalam Perkembangan Hukum Agraria Di Indonesia," *Jurnal Pendidikan Kewarganegaraan Undiksha* 8, no. 3 (2020): 1–7, https://ejournal.undiksha.ac.id/index.php/JJPP.

[17] Divi Kusumaningrum Rizki Yudha Bramantyo, "Peran Pemimpin Informal Dalam Upaya Pemberdayaan Ekonomi Komunitas Kerajinan Lokal Bali," *Prosiding Mewujudkan Sistem Hukum Nasional Berbasis Pancasila* 1, no. 1 (2024): 253–62, https://conference.untag-sby.ac.id/index.php/shnbc/article/view/3649.

[18] Zulfa Rusya Fadiyah, Salma Amalia Amanda, Siti Aydina, "Potensi Dan Tantangan Penerapan Hukum Adat Berbasis Kearifan Lokal Masyarakat Adat Suku Dani Di Era Modern."

Indonesia. Based on these legal provisions, the UUPA provides a strong foundation. Thus, customary law applies in the context of the UUPA as a unified whole. The UUPA is also a crystallisation of the principles of customary law.[19]

3.2 Reconstruction of Customary Law in Indonesian National Agrarian Law in the field of Mortgage Rights

The reconstruction of legal policy in the land sector certainly has an influence on legal politics in Indonesia. Legal politics as a basis for directing the development of national law, one of which is in the field of land, which is conceptualised in the politics of land law. The politics of land law is a government policy in the land sector that is shown for the allocation and use of land ownership, allocation of use to ensure legal protection and improve welfare and encourage economic activity through the enactment of land laws and their implementing regulations.[20]

Customary land law does not recognise the term security institution for land rights or mortgages on land and objects located on it. The provisions governing land security institutions known as mortgages are juridically regulated in Book II of the *Burgerlijk Wetboek (BW)* concerning Objects (*Van Zaken)* Articles 1162 to 1232 of the Civil Code as a legacy of Dutch law which has influenced the development of security law in Indonesia.[21]

With the enactment of Law Number 5 of 1960 concerning UUPA, the provisions on mortgages are regulated in Article 57 which stipulates that: "As long as the Law on Collateralised Rights in Article 51 has not been enacted, the provisions regarding *hypootheek* in the Indonesian Civil Code and *credietverband* in *Staadblad* 1908 Number 542 as amended by *Staadblad* 1937 Number 190 shall apply".[22]

One aspect that has a connection with the law of guarantee is the legal relationship between land and other things related to it. In land law, it is known that there are 2 (two)

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[19] Agus Rahmad, "Harmonisasi Hukum Adat Dan Hukum Pertanahan Nasional Terkait Kepemilikan Tanah Dalam Rangka Proyek Strategis Nasional," *JHK: Jurnal Hukum Dan Keadilan* 1, no. 1 (2023): 1–12, https://jurnalhafasy.com/index.php/jhk/article/view/43.

[20] Sri Winarsi, Agus Sekarmadji, and Oemar Moechthar, *Buku Ajar Politik Hukum Pertanahan*, *Airlangga University Press, Surabaya*, vol. 1, 2017.

[21] Racjmadi Usaman, *Hukum Jaminan Keperdataan* (Jakarta: Sinar Grafika, 2009).

[22] Anastasia E. Gerungan Filia Rumengan, Anna S. Wahongan, "Eksistensi Lembaga Hipotek Sebagai Jaminan Kebendaan Setelah Berlakunya Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan Dengan Tanah," *Lex Privatum* IX, no. 3 (2021): 55–64.

conflicting principles, namely the principle of vertical relationship and the principle of horizontal separation. There is a big difference between these two land laws, where colonial land law made in BW is regulated by the principle of attachment or what is also known as the principle of natrekking / *accesie principle,* this attachment principle is expressly regulated in Articles 500, 571, and 601, which states that land ownership also includes ownership of everything that is on the land or soil.[23]

Unlike the concept of customary law that applies the principle of horizontal separation (*Horizontale Scheiding Beginsel*), where land ownership does not include everything on it. People can own land without owning buildings or plants on it, and vice versa, so that land and buildings are subject to different laws, land can be subject to land law, while buildings can be subject to perutangan law.[24]

Ter Haar, as cited by Imam Sudiyat, gives his view that the principle of horizontal separation separates land from other objects attached to the land. "The land is separated from everything that is on it or from the property of the land, whatever its contents, so that the owners of the land and the buildings, can be different".[25] And the principle of horizontal separation is to separate the land from everything related to the land.[26] Betty Rubianti cites Buddy Harson's view that in the principle of horizontal separation, land ownership can be different from building ownership, so that land and buildings are subject to different laws, land can be subject to land law, while buildings can be subject to land law.[27]

In realising the mandate of Article 51 of Law No. 5 of 1960, on 9 April 1996 the government passed Law No. 4 of 1996 on Mortgage Rights over land and objects related to land, commonly referred to as hak tanggungan, which is a security right imposed on land

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[23] Made Wiwin Dharma Lestari, "Pengaturan Asas Perlekatan Dan Asas Pemisahan Horizontal Dalam Kaitannya Dengan Rumah Susun Di Indonesia," *Jurnal Kertha Desa* 10, no. 8 (n.d.): 766.

[24] Dwiyatmi, Sri Harini. "The Principle of Horizontal Separation (*Horizontale Scheiding Beginsel*) and the Principle of Attachment (Verticale Accessie) in National Agrarian Law." Legal Reflection: Journal of Legal Science 5, no. 1 (2020): 125-144

[25] Imam Sudiyat, "Hukum Adat Sketsa Asas," *Jurnal Kertha Desa* 10, no. 8 (2012): 768.

[26] Cicilia Putri Andari and Djumadi Purwoatmodjo Program Studi Magister Kenotariatan, "Akibat Hukum Asas Pemisahan Horizontal Dalam Peralihan Hak Atas Tanah," *703 Notarius* 12 (2019): 707.

[27] Betty Rubiati, Yani Pujiwati, and Mulyani Djakaria, "Asas Pemisahan Horizontal Dalam Kepemilikan Hak Atas Tanah Dan Bangunan Satuan Rumah Susun Bagi Masyarakat Berpenghasilan Rendah (MBR)," *Sosiohumaniora* 17, no. 2 (August 2, 2015): 94, https://doi.org/10.24198/sosiohumaniora.v17i2.7295.

rights as referred to in Law No. 5 of 1960 on Basic Agrarian Regulations, along with or without other objects that form an integral part of the land, for the repayment of certain debts, which gives priority to certain creditors against other creditors.

The encumbrance of Mortgage Rights as a land security institution is carried out through two stages: (1) the encumbrance stage, which must be carried out in the presence of a Land Deed Official (PPAT), the deed made by the PPAT is evidence that the relevant legal action has actually been carried out; (2) the registration stage at the Land Office. This registration must be done in order to fulfil the requirement of publicity for the validity of the birth and validity of the security right granted to third parties.[28]

Underlining the definition of mortgage rights as stipulated in Article 1 of Law No. 4 of 1996 where the object of pledge is "... along with or without other objects that constitute an integral part of the land", shows that the enactment of the Mortgage Rights Law is based on the principle of horizontal separation as a customary law concept, where every legal act of pledging land rights does not necessarily involve legal acts relating to objects on the land.[29]

Thus, the reconstruction of the application of customary law in the field of land mortgages has a positive influence on the development of national law in ensuring the legal certainty of granting bank credit. Including the conceptions and principles of customary law that really live in the community, especially the application of the "principle of horizontal separation" into the provisions of land mortgages as a new legal institution that can be in accordance with the demands of the times towards the formation of national law.[30]

4. CONCLUSION

The existence of the UUPA as a codification of land law in Indonesia is built on Indonesian customary law. Customary law that originates from the nation's consciousness and culture, and the legal feelings of the Indonesian people will play an important role in the development of national law. The reconstruction of the application of customary law in the

[28] Djoko Soetrisno and Onesimus Yoku, "Tinjauan Yuridis Tentang Kedudukan Hukum Adat Dalam Perkembangan Hukum Agraria Nasional," *Journal Review of Justisia* 3, no. 2 (2019): 58–66.

[29] Nurhasan Ismail, "Arah Politik Hukum Pertanahan Dan Perlindungan Kepemilikan Tanah Masyarakat (Political Direction Of Land Law And Protection Of People's Land Ownership)," *Rechtsvinding* 1, no. 1 (2012): 33–51.

[30] Winarsi, Sekarmadji, and Moechthar, *Buku Ajar Politik Hukum Pertanahan*.

field of land mortgage rights has a positive influence in enriching the development of functional national law. Customary law as the main source in the validation of land mortgage rights shows a dynamic nature that can easily adapt to the times and has bridged the development of the national economy as well as in the era of globalisation.

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