

# Legal Reconstruction of Customary Land Rights under Mortgage Law

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## ***Abstrak***

*Penelitian ini mengkaji ketidakpastian hukum dalam penggunaan tanah adat sebagai objek jaminan dalam sistem hak tanggungan di Indonesia. Pluralisme hukum dalam Undang-Undang Pokok Agraria 1960 menimbulkan ketegangan antara rezim tanah adat dan sistem pendaftaran formal yang disyaratkan oleh Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan. Penelitian ini bertujuan menganalisis apakah tanah adat dapat memenuhi prinsip publisitas dan spesialisitas serta merumuskan model rekonstruksi hukum yang mengakomodasi kedua sistem. Metode yang digunakan adalah yuridis normatif dengan pendekatan peraturan perundang-undangan, konseptual, dan komparatif, melalui analisis doktrin, regulasi, dan studi kasus. Hasil penelitian menunjukkan bahwa tanah adat yang bersifat komunal dan tidak terdaftar belum dapat memenuhi prinsip publisitas dan spesialisitas akibat ketiadaan pendaftaran serta ketidakjelasan batas dan subjek hak, sehingga menimbulkan ketidakpastian hukum bagi kreditor, khususnya terkait eksekusi dan hak preferen. Namun demikian, rekonstruksi hukum adaptif dimungkinkan melalui formalisasi terbatas, pengakuan hak komunal*

*dalam administrasi pertanahan, serta pembentukan subjek hukum kolektif masyarakat adat. Perbandingan dengan Rwanda menunjukkan bahwa formalisasi penuh meningkatkan fungsi ekonomi tanah, tetapi berisiko menggerus nilai komunal. Kebaruan penelitian ini terletak pada konsep spesialisitas kolektif dan quasi-publisitas sebagai kerangka hibrid yang memungkinkan tanah adat berfungsi sebagai jaminan tanpa menghilangkan karakter komunalnya.*

***Kata kunci***

*Hak Tanah Ulayat, Kepastian Hukum, Hukum Adat, RUU Masyarakat Adat.*

**Abstract**

This study examines legal uncertainty in using customary land as collateral within Indonesia's mortgage system. Legal pluralism under Basic Agrarian Law 1960 creates tension between customary tenure and the formal registration regime required by Law Number 4 of 1996 concerning Mortgage Rights. The study aims to assess whether customary land can meet the principles of publicity and speciality and to formulate a reconstruction model accommodating both systems. Using a normative juridical method with statutory, conceptual, and comparative approaches, the research analyzes legislation, doctrine, and case studies involving collateral disputes. Findings indicate that customary land, being communal and unregistered, cannot directly satisfy publicity and speciality due to lack of registration and unclear ownership boundaries, resulting in legal uncertainty for creditors, particularly regarding enforceability and priority rights. Nevertheless, adaptive reconstruction is possible through partial formalization, including recognition of communal rights within land administration and establishment of collective legal subjects representing indigenous communities. Comparative analysis with Rwanda shows that full formalization increases economic utility but risks eroding communal values. This study introduces the concepts of collective speciality and quasi-publicity as a hybrid framework bridging customary and formal

systems, enabling customary land to function as collateral while preserving its communal character and ensuring balanced legal certainty and socio-cultural protection.

### **Keywords**

Customary Land Rights, Legal Certainty, Customary Law, Indigenous Peoples Bill.

### **Introduction**

The existence of customary law reflects the richness and diversity of land law in Indonesia. In this regard, Law Number 5 of 1960 on the Basic Agrarian Law (hereinafter referred to as UUPA), through a multidimensional approach, plays an important role in the recognition of land management. Thus, it not only respects the civil law system inherited from the Dutch but also provides space for customary law that has long grown and developed within our society. In this way, the UUPA not only creates rules but also appreciates and integrates local values that are part of our cultural identity. This shows the importance of land resource management that can reflect the diversity and traditions present in Indonesia.

The diversity formed in the national land law gives rise to complex land issues such as overlapping regulations and conflicts in the land law system, making land-related problems difficult to resolve. In aspects of life, land not only has value as an object of sale and purchase but can also be used as an object of collateral. The guarantee of land rights regulated in Law Number 4 of 1996 concerning Land Mortgages and Objects Related to Land (hereinafter referred to as UUHT), places Ownership Rights, Business Use Rights, Building Use Rights, and Use Rights over state land, which by their nature can be transferred, as objects of mortgage rights. The economic concept applied in UUHT aims to ensure legal certainty in various aspects of life.

In the case of collateral objects, the granting of mortgage rights over a piece of land is clearly given to a piece of land whose ownership is clear and can be proven based on the applicable regulations. As previously explained, the right to customary land is still difficult to be used as an object of collateral, referring to the provisions of Article 51 in conjunction with Article 25, Article 33, and Article 39 of the UUPA, which do not specifically state that customary land can be used as an object of collateral. Although Article 20 of the UUPA states that customary land has the same status as ownership rights.

On the other hand, customary law grants the community the right to use land in accordance with the traditions and norms prevailing in their community. However, conflicts arise when rights that should be used for the benefit of the community are proposed as objects of collateral, due to uncertainty in proving the ownership status of a piece of land. The ownership rights of customary land must be distinguishable, whether the land is owned by a group as in the case of customary land, or individual land ownership still referring to customary law such as: land tax/landrente, girik, pipil, kikitir, and Indonesian verponding, and other evidence with different names and/or terms as proof of land ownership rights as outlined in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 16 of 2021 concerning the Third Amendment to the Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration (hereinafter referred to as Permen ATR/BPN 16/2021) to discuss whether the land ownership rights can be pledged or not.

Customary land whose control is based on communal land rights, mortgaging that land is a violation that cannot be justified because this is an issue that is only handled within the customary community<sup>1</sup>. This

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<sup>1</sup> “Hak Ulayat Masyarakat Hukum Adat Papua,” papua.bpk.go.id, 2014, 7, <https://papua.bpk.go.id/wp-content/uploads/2014/12/Hak-Ulayat-Papua.pdf>.

certainly contradicts the original purpose of granting that right. Therefore, it is important for us to find a balanced approach between these two perspectives, so that the regulation of collateral rights continues to respect the values of customary law and provides legal certainty for all parties involved in the transaction. Thus, there needs to be a link between the horizontal separation principle in the UUHT and the recognition of community rights based on customary law, so that a more just and sustainable legal system is created for all.

The principle of horizontal separation binding land has become an interesting topic of discussion, with studies on customary ownership examining whether such customary recognition is granted communally to a community or individually. Therefore, if a piece of land is given as an object of collateral, the separation of ownership must be taken into account. However, in practice, the application of this principle is not always absolute, so often things on the land, such as buildings or plants, are also used as objects of collateral. Conversely, the government's conversion of land rights is predominantly applicable to land control recognized under civil law, including eigendom rights, opstal rights, erfpacht rights, gebruik rights, bruikleen rights, altijddurend erfpacht rights, agrarische eigendom rights, gogolan rights, hanggaduuh rights, grant rights, and concession and lease rights for large plantation enterprises, none of which fall under Indonesian customary law.

The issues outlined above illustrate that the existence of customary land within positive legal regulations lacks room for development in terms of the interests of its owners. The separation of ownership must be clear, and the form of proof that is only recognized by the national land administration becomes a gateway to the problem of guaranteeing land for the interests of the owners of customary land. Besides the issue of land ownership proof, the lack of public understanding also contributes to the worsening of the land law situation in Indonesia. Previous research conducted interviews focusing on aspects of legal knowledge, legal understanding, as well as the legal attitudes and behaviors of each respondent. That the majority of respondents do not yet have adequate legal awareness. As many as 20 people or 54% do not have legal knowledge, 23 people or 62% do not yet

have legal understanding, 28 people or 76% do not yet have a legal attitude, and 32 people or 86% do not yet have legal behavior. The contributing factors include minimal socialization, low levels of education, lack of interest, limited information, and distrust towards the relevant institutions<sup>2</sup>.

For example, there is the case that occurred in Banjar Traditional Village, Tabanan. The actions taken by the irresponsible individual led to this issue culminating in land execution. The case that occurred in 2022 is an example of unlawful conduct, where the disputed object has permanent legal force as evidenced by the Ownership Certificate (hereinafter referred to as SHM) No.6607/Banjar Anyar, Measurement Letter dated 22-12-2006, Number: 3348/Banjar Anyar/2006, covering an area of 469 square meters, in the name of the right holder Ni Nengah Sulastri, as the collateral object processed by PT. BPR Pande Artha Dewata. Through the Tabanan District Court Decision dated February 22, 2022, Number 2/Pdt.Eks/2022/PN. Tab, the land is valid and can be executed. However, there is resistance from the customary authorities, especially from the customary leaders and legitimate heirs. The traditional chief of Banjar Anyar, I Made Raka, stated that the land had previously been certified and used as collateral for a bank loan. However, he emphasized that the certification process was invalid because the village's customary land cannot be used as loan collateral<sup>3</sup>.

Thus, the legal issues that can be raised to provide an explanation regarding the legal uncertainty of customary land as an object of

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<sup>2</sup> Fitriana Trinengsi Taolin, Dian Aries Mujiburohman, and Koes Widarbo, "Kesadaran Hukum Masyarakat Dalam Pendaftaran Peralihan Hak Atas Tanah," *Tunas Agraria* 7, no. 1 (2024), <https://doi.org/10.31292/jta.v7i1.277>.

<sup>3</sup> "Eksekusi Tanah 'Karang Ayahan Desa' Di Banjar Anyar, Bendesa Adat: Kami Akan Tetap Lakukan Upaya Hukum - Pos Bali," March 8, 2023, <https://www.posbali.net/tabanan/1422698175/eksekusi-tanah-karang-ayahan-desa-di-banjar-anyar-bendesa-adat-kami-akan-tetap-lakukan-upaya-hukum>; Hari Puspita, "Kalah Gugatan, Tanah Dieksekusi, Desa Adat Banjar Anyar Bakal Pidanakan Penyertifikat Tanah - Radar Bali," March 9, 2023, <https://radarbali.jawapos.com/hukum-kriminal/70867303/kalah-gugatan-tanah-dieksekusi-desa-adat-banjar-anyar-bakal-pidanakan-penyertifikat-tanah>.

collateral include: can customary land be used as collateral if the UUHT requires a certificate of ownership?; and does customary land have the potential to become an object of collateral?

This study does not merely examine the incompatibility between customary land tenure and the mortgage rights regime, but also seeks to offer a reconstructive legal framework within Indonesian agrarian law discourse. The originality of this research lies in the formulation of the concepts of collective speciality and quasi-publicity as a hybrid approach for integrating customary land into the mortgage system without eliminating its communal character. Through this approach, the study aims to contribute both theoretically and practically to the development of a more inclusive land security system capable of balancing legal certainty, economic accessibility, and the protection of indigenous communal values.

## Method

This research uses the normative legal research method, commonly referred to as doctrinal research. With the type of normative legal research, the research examines document studies, namely using various secondary data such as legislation, court decisions, legal theories, and can include opinions from scholars. This type of normative research uses qualitative analysis, which explains the existing data with words or statements rather than with numbers<sup>4</sup>. This research uses a legislative approach, conducted by reviewing all laws and regulations related to the legal issues being addressed. The data collection technique is a guide used to obtain the data needed in the research aimed at acquiring research data<sup>5</sup>.

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<sup>4</sup> Mukti Fajar and Yulianto Achmad, "Pengertian Penelitian Hukum Normatif," *wislah.com*, 2022.

<sup>5</sup> Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia, 2018), 302.

## Results and Discussion

### 1). Proving Customary Ownership of Mortgage Rights

Referring to the Explanation section point 5 of the UUHT, which can be used as a mortgage right is only based on land ownership recognized by the national land administration, in this case is Hak Milik, Hak Guna Usaha, and Hak Guna Bangunan.

The case that occurred on Ni Nengah Sulastri's land, if referred to many issues of customary law and positive law intersect. According to the statement of Bendesa Adat Banjar Anyar, I Made Raka, the ownership is based on customary law which is referred to as village land. As part of customary rights, customary lands are basically owned by customary villages or pakraman villages, which are manifestations of customary law communities. In its position as a customary institution, the village pakraman is tasked with regulating the management of these customary lands, led by a Bendesa adat. In Bali, customary land is known as Tanah Prabumian, Karang Ayahan, and Tanah Druwen Desa<sup>6</sup>.

The problem involving PT BPR Pande Artha Dewata, according to the rules of collateral law, the mechanism taken is appropriate. However, the issue of legal certainty regarding proof of ownership is the most highlighted element. Indeed, the land owned by Ni Nengah Sulastri has been made in the form of a Certificate of Ownership, as previously explained. The stipulation of the Chief of the District Court through decision No.2/Pdt.Eks/2022/PN.Tab caused losses to the legal heirs of Ni Nengah Sulastri.

The basis of the decision led to the execution whose minutes were recorded with the determination of the decision of the minutes of the auction number 32/65/2022 dated January 12, 2022, creating an uproar because the indigenous people argued that the village ayahan land should not be allowed to become an object of collateral. The right

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<sup>6</sup> Made Oka Cahyadi Wiguna, "Ketentuan Penguasaan Tanah Karang Ayahan Desa Pakraman Di Bali Oleh Krama Desa," *Jurnal Analisis Hukum* 2, no. 1 (2019): 62.

to village ayahan land has restrictions that must be adhered to by the krama who controls it, namely the prohibition to change the form of the father reef, to charge it as debt collateral and most importantly, it is prohibited to transfer it to other parties, especially parties who are not the krama of the village without the approval of the village meeting<sup>7</sup>. The strict rules regarding village ayahan land can actually be inherited, because there is no certainty regarding the length of time of control. Although the context of customary law can be erased and taken back if the father's coral has no heirs who will continue or continue the obligations inherent in the field of coral ayahan. In addition, the right to use the land parcel can be removed if it is voluntarily relinquished by the right holder, revoked by the Bendesa Adat as the customary leader based on the results of the village paruman or village meeting and also includes if the coral ayahan parcels are abandoned<sup>8</sup>.

The proof of ownership of customary land, refers to the customary law of each region with the highest authority held by the customary stakeholders. In the case of the village's ayahan land, the act of pledging the land as an object of collateral has violated the customary rules of Desa Adat Banjar.

The State, through Constitutional Article 18 letter B paragraph 2 of the 1945 Constitution of the Republic of Indonesia (hereinafter UUD NRI 1945), has provided a guarantee of legal certainty over land tenure through the recognition of customary law. Dominikus Rato in his book entitled *Komtemporer Customary Law*, formulates Article 18 letter B paragraph 2 of the 1945 Constitution of the Republic of Indonesia as follows:<sup>9</sup>

1. The Constitution guarantees the unity of indigenous peoples and their traditional rights;
2. The constitutional guarantee is as long as the customary law is still alive;

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<sup>7</sup> Wiguna, "Ketentuan Penguasaan Tanah Karang Ayahan Desa Pakraman Di Bali Oleh Krama Desa."

<sup>8</sup> *Ibid.*

<sup>9</sup> Dominikus Rato, *Hukum Adat Komtemporer* (Surabaya: Laksbang Justitia, 2015), 92.

3. In accordance with the development of society
4. In accordance with the principle of the Unitary State of the Republic of Indonesia; and
5. Regulated in law.

A sense of justice towards the recognition of customary land is something that must exist in law called the state, especially the Indonesian state which is known for the diversity of its society. all aspects of individual life under the supervision of state law and administration, justice is goodness in the sense of harmony and balance. Justice needs to be balanced, comparability, and harmony between personal interests, common interests or the interests of society, including the state<sup>10</sup>.

Regarding the validity of PT BPR Pande Artha Dewata's approval of the object as collateral, there is no mistake, because the proposed customary land already has proof of valid ownership certificates according to statutory regulations. The error can be seen in the process of issuing the certificate. The position of the ayahan land inherited by Ni Nengah Sulastri is between two laws, namely recognition of customary law justified by Bendesa Adat and getting recognition by the state through SHM No.6607/Banjar Anyar, and SHM Number: 3348/Banjar Anyar/2006.

In terms of legal certainty to direct the land parcel as a collateral object, PT BPR Pande Artha Dewata should be careful in tracing proof of ownership. The journey, PT BPR Pande Artha Dewata filed a PKPU to the Tabanan District Court due to the default made by the perpetrator of the filing of the mortgage, PT BPR Pande Artha Dewata filed an execution against the land because it did not fulfill the agreed debt payment obligations. In a legal context, execution is carried out when the losing party in a case does not want to carry out the court's decision voluntarily. This is in accordance with the execution procedure

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<sup>10</sup> I Nyoman Prabu Buana Rumiarta, *Ius Constituendum Pengaturan Tanah Adat Pada Masyarakat Hukum Adat Berdasarkan Nilai-Nilai Pancasila* (Banyumas: CV. Pena Persada, 2021), 72.

stipulated in the law, where after the verdict is legally binding and if there is no good faith from the debtor to execute the verdict, the creditor has the right to apply to the court for execution.

The Law on Mortgage Rights, regarding existing land that can be used as an object of collateral is not clearly regulated, and even creates a legal vacuum, because land tenure over customary land is not included in the recognition of national land administration as stipulated in the explanation point 5 of the UUHT and Article 51 of the UUPA.

So that recognition of customary land is only used as evidence of ownership clues and is not included as proof of land ownership. Legal uncertainty is very contrary to the theory of legal certainty put forward by Gustav Radbruch, who argues that the law must have clarity and consistency. The UUPA recognizes the existence of customary land tenure based on customary law, but with regard to other legal acts, it has not provided clarity that can accommodate the evidentiary power of customary land as proof of ownership, such as *petuk pajak bumi/landrente, girik, pipil, kikiitiir, verponding*.

The biggest reason customary rights are not given clear legal certainty is because the recognition of indigenous peoples is still a matter of debate so that the presence of conflicts and recognition of their rights are eroded<sup>11</sup>. The problem of ownership status due to buying and selling is a separate highlight, because customary law considers the granting of rights to manage land intended for the use of the results given and maintain the fertility of the land. Therefore, heirs are not allowed to buy and sell customary land, which is a village asset<sup>12</sup>.

The core problem in applying the principles of publicity and speciality in mortgage rights to customary land lies in the structural

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<sup>11</sup> Genta Tenri Mawangi and Fransiska Ninditya, "APHA: Akar Konflik Adat Disebabkan Ketidakpastian Batas Hak Ulayat," 2022, <https://www.antaraneews.com/berita/2927701/apha-akar-konflik-adat-disebabkan-ketidakpastian-batas-hak-ulayat>.

<sup>12</sup> Hartana Ni Ketut Suriati, "Penyelesaian Sengketa Tanah Adat Kabupaten Buleleng Bali," *Jurnal Pendidikan Kewarganegaraan Undiksba* 8, no. 3 (2020): 223.

tension between a security rights system grounded in administrative formalism and the nature of customary land, which operates within an unwritten and communal legal framework. Under Law Number 4 of 1996 concerning Mortgage Rights, the principle of publicity requires registration so that the security right is enforceable against third parties, while the principle of speciality demands clear determination of the object, subject, and the secured debt. The issue is that customary land is generally not registered within the national land administration system as regulated under Basic Agrarian Law 1960, resulting in the failure to meet the requirement of legal publicity. Additionally, its communal nature and boundaries, which are often defined through social and cultural recognition, make it difficult to precisely individualize the object, thereby conflicting with the principle of speciality. This situation generates legal uncertainty for creditors, particularly regarding the certainty of the collateral object and priority rights in the event of default.

Nevertheless, this issue does not preclude the possibility of adaptive legal reconstruction. The application of publicity and speciality to customary land may be pursued in a limited manner through partial formalization by encouraging the registration of such land as recognized communal rights without eliminating its collective character. In this context, publicity should not be understood solely as individual registration, but rather as administrative recognition of a communal legal entity with legitimate standing. The principle of speciality can be reformulated through the concept of collective speciality, where the land remains communal yet possesses clearly delineated boundaries and is represented by a defined legal subject, such as a customary institution or a community-based legal entity. Thus, although a doctrinal incompatibility exists between customary land and mortgage rights, a reconstructive approach enables their integration

within a more inclusive legal framework while expanding access to financing without undermining customary legal values.

## **2). Collaboration between Government and Indigenous Peoples: The Key to Realizing Legal Certainty**

Referring to the problems experienced by the Banjar Indigenous Community, proves that the state is unable to provide legal protection for land recognized under customary law. The executed land is village karang ayahan or customary land that should not be transferable or titled as private property. The village claims that the land belongs to the indigenous community and is not valid to be used as collateral for loans by other parties. Bendesa Adat Banjar Anyar, I Made Raka, stated that the villagers were disappointed with the court's decision and surprised, as they believed that the land belonged to the indigenous village for a long time. In addition, they also allege the forgery of land certificates by individuals claiming to be heirs in order to obtain loans from banks, which is considered illegitimate and detrimental to the villagers<sup>13</sup>.

The state's indifference in recognizing indigenous peoples, in political years, is always used as one of the flagship programs to attract public sympathizers. The Indigenous Peoples Bill (hereinafter referred to as the MHA Bill), in the period of the President's leadership and even the change of members of the House of Representatives (hereinafter referred to as the DPR), became a hot issue by making it part of the National Legislation Program (hereinafter referred to as Prolegnas), so that Prolegnas 2025, at the suggestion of various DPRs according to the ratification of the MHA Bill must be discussed immediately, as a form of obedience to obey constitutional orders<sup>14</sup>. The presence of the MHA Bill is very important to create a legal umbrella to provide protection to

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<sup>13</sup> Puspita, "Kalah Gugatan, Tanah Dieksekusi, Desa Adat Banjar Anyar Bakal Pidanakan Penyerifikat Tanah - Radar Bali."

<sup>14</sup> Nandito Putra, "DPR Janji Sahkan RUU Masyarakat Adat Pada 2025," Tempo, November 20, 2024, <https://www.tempo.co/politik/dpr-janji-sahkan-ruu-masyarakat-adat-pada-2025-1170686>.

indigenous peoples, to guarantee their rights. In this case, it is in the form of rights that they have received from generation to generation, such as rights to territory, culture, land, and natural resources<sup>15</sup>.

Article 30 paragraph 3 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 18 of 2021 concerning Procedures for Determining Management Rights and Land Rights (hereinafter referred to as Permen ATR/BPN 18/2021), provides space for legal certainty for customary land, in this case, customary land. The submission of management rights (hereinafter referred to as HPL) to the state that can be carried out by indigenous peoples provides a glimmer of hope regarding legal protection, an argument built on Article 32, which states “Management Rights derived from Customary Land as referred to in Article 30 paragraph (3) shall be granted to Indigenous Peoples whose existence has been determined and recognized in accordance with the provisions of laws and regulations”.<sup>16</sup>

Certainty related to the identity contained in the attachment to the application for management rights provides clarity regarding who is the holder of the management right originating from customary land. Through the submission of HPL on customary land, land administration will be integrated nationally. So that legal certainty, especially avoiding land conflicts, can be minimized.<sup>17</sup>

HPL discussed in this Permen does not necessarily provide a clear legal basis for allowing it to be used as an object of collateral, this opinion was expressed by Urip Santoso, explaining that aspects of the

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<sup>15</sup> Charliesta, “Urgensi Pengesahan RUU Masyarakat Hukum Adat Demi Menjamin Hak-Hak Masyarakat Adat,” LK2 FHUI, 2023, <https://lk2fhui.law.ui.ac.id/portfolio/urgensi-pengesahan-ruu-masyarakat-hukum-adat-demi-menjamin-hak-hak-masyarakat-adat/>.

<sup>16</sup> Clarabella Marella and Ana Silviana, “Digital Revolution in Land Affairs: Transformation of Land Certificates Through Electronic Mortgage Service,” *The Indonesian Journal of International Clinical Legal Education* 6, no. 4 (2025), <https://doi.org/10.15294/iccle.v6i4.18929>.

<sup>17</sup> *Ibid.*

characteristics of land rights are also owned by Management Rights, namely:<sup>18</sup>

- a. In the UUPA and Government Regulation No. 40 of 1996 concerning Cultivation Rights, Building Rights and Land Rights (hereinafter referred to as PP HGU, HGB, HAT), there are land rights that are “right to use”, not “right of disposal”. This land right is the Right of Use, which only entitles the land to be used for the purpose of carrying out its duties or business. This right cannot be transferred in any form and cannot be used as collateral for debt encumbered by Mortgage Rights. This Right of Use can be owned by Departments, Non-Departmental Government Institutions, Provincial Governments, Regency/City Governments, Representatives of Foreign Countries, Representatives of International Agencies, as well as religious and social bodies.
- b. Land rights can be released or surrendered by the right holder for the public interest or the interests of other parties, with or without compensation. Management Rights can also be released or surrendered by the right holder for the public interest or the interests of other parties, with or without compensation.
- c. Land rights can be nullified due to abandonment by the right holder, in accordance with the provisions stipulated in the UUPA and PP HGU, HGB, HAT. Management Rights can also be abolished due to abandonment by the right holder, which is regulated in Government Regulation No. 36 of 1998 concerning the Control and Utilization of Neglected Land (hereinafter referred to as PP Pendayagunaan Tanah Terlantar), which was later declared invalid by Government Regulation No. 11 of 2010 and updated by Government Regulation No. 20 of 2021 concerning the Control of Neglected Areas and Land.

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<sup>18</sup> Urip Santoso, “Eksistensi Hak Pengelolaan Dalam Hukum Tanah Nasional,” *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 24, no. 2 (2012): 286, <https://doi.org/10.22146/jmh.16130>.

What can be aimed for in Permen ATR/BPN 18/2021 is to provide legal certainty for customary land on top law and open up opportunities for cooperation according to the local customary management system<sup>19</sup>. Clarifying what Urip Santoso said, in a seminar conducted by the Ministry of Finance of the Republic of Indonesia. Ana Silviana explained that HPL given to the community cannot be used as an object of collateral, but on top of it can be given HGB / HP land rights with SPPT (Land Use Agreement Letter-red)<sup>20</sup>.

Regarding HPL, the opinion explained by Oemar Moechthar, explains that the granting of HPL to indigenous peoples is a reduction in the authority of indigenous peoples in the environment where they live. Settlement of indigenous peoples' claims to customary land that was originally given to the state and has had its rights removed and in fact the customary land still exists, needs to be done by considering the rights of indigenous peoples to their territory<sup>21</sup>. The submission of claims to customary land that still exists should be done by considering the concept of the position of customary land as an independent entity in accordance with the legal relationship between the state and land. This process involves handing over state land to indigenous peoples so that it can be controlled again as their customary rights<sup>22</sup>.

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<sup>19</sup> Hilda B Alexander, "Sertifikasi Tanah Ulayat Milik Masyarakat Hukum Adat Tuntas 2024-2025," *kompas.com*, October 17, 2023, <https://www.kompas.com/properti/read/2023/10/17/150000021/sertifikasi-tanah-ulyat-milik-masyarakat-hukum-adat-tuntas-2024-2025>.

<sup>20</sup> "HPL Bukan Merupakan Hak Atas Tanah Sebagaimana HM, HGU, HGB, Dan HP," DJKN Kementerian Keuangan Republik Indonesia, March 26, 2014, <https://www.djkn.kemenkeu.go.id/berita/baca/4972/HPL-Bukan-Merupakan-Hak-atas-Tanah-sebagaimana-HM-HGU-HGB-dan-HP.html>.

<sup>21</sup> Septhian Eka Adiyatma, Ana Silviana, and Dorcas Adesola Thanni, "Criminalizing the Guardians: Eco-Justice and Indigenous Struggles in Indonesia and Nigeria," *Indonesian Journal of Criminal Law Studies* 10, no. 2 (November 2025): 901–50, <https://doi.org/10.15294/ijcls.v10i2.33536>.

<sup>22</sup> Oemar Moechthar, "Pemberian Hak Pengelolaan Dalam Konteks Perlindungan Hak Masyarakat Hukum Adat," *unairnews*, August 6, 2024, <https://unair.ac.id/pemberian-hak-pengelolaan-dalam-konteks-perlindungan-hak-masyarakat-hukum-adat/>.

The government through Government Regulation No. 20 of 2021 concerning the Curbing of Abandoned Areas and Land Article 15 paragraph 3 is one form of protection given to indigenous peoples when the HPL granted is nullified by the minister or voluntarily released. The article illustrates that HPLs that are erased can still be managed by indigenous peoples with the status of customary land, but the return of this status provides the potential for legal uncertainty regarding the recognition of customary land to occur again.

Recognition of customary land is still a questionable matter in providing guarantees to indigenous peoples as part of Indonesian citizens. The government's contribution is needed, and the role of supporting elements regarding the legal certainty of customary land as collateral charged with mortgage rights must work together. Deed Officials who are authorized by law to make Deeds of Granting Mortgage Rights must actively cooperate with the Land Office in their working areas, and have a role in providing input on the approval of guarantees issued by Banks/Financial Institutions.

In addition, the government has an obligation to implement the constitutional order by passing the Indigenous Peoples Bill. The passing of the MHA Bill is important for the existence of MHA in Indonesia. If the MHA Bill continues to be stalled in its ratification, there is a possibility that the culture inherited by MHA today will become extinct and the success of environmental sustainability is threatened. The lack of human rights felt by MHA is also an urgency why the MHA Bill must be passed immediately so that MHA can feel their rights as human beings. Rights that cannot be disturbed and deprived by anyone<sup>23</sup>.

And the involvement of indigenous peoples is also given space so that such as the example of the *ayahan* land case found in the Banjar Anyar Traditional Village, indigenous peoples are not involved. In fact, the traditional atmosphere that is still thick on the island of Bali should be a mirror that diversity in synergizing with the rule of state law,

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<sup>23</sup> Charliesta, "Urgensi Pengesahan RUU Masyarakat Hukum Adat Demi Menjamin Hak-Hak Masyarakat Adat."

especially in providing space to explain about customary land which is still a community asset.

### **3). Mortgage Rights and Agrarian Reform on Customary Land**

Government Regulation No. 86/2018 on Agrarian Reform (hereafter PP No. 86/2018) aims to restore the system of land use, ownership, control, and utilization in Indonesia to enhance public welfare. The primary objective of agrarian reform in this process is community well-being. Customary land liens are a significant consideration in this context. The general population encounters challenges in utilizing property to find legal avenues for finance due to its frequent absence of official legality. This may impede the overall well-being of the community and economic progress. The Draft Land Law, henceforth known as the Land Bill, is crucial for safeguarding individuals' rights and legal protections. Challenges persist in executing the bill's explicit directives regarding community customary rights. Unlike the more explicit stipulations of the UUPA, the bill introduces the concept of *sarusun* for foreigners with the requisite credentials. This suggests that the colonial state's involvement in property ownership may extend land tenure in Indonesia.

In Indonesia's agriculture sector, structural issues frequently arise from the suboptimal execution of the LoGA. Land Governance Assessment (LoGA) is a tool used to evaluate and improve land management, particularly relevant to agrarian reform in Indonesia as outlined in Government Regulation No. 86/2018 and the Draft Land Law. These policies aim to promote equity in land ownership and address disparities. Agrarian reform in Indonesia focuses on restructuring land tenure to enhance welfare, with a key emphasis on land redistribution to prevent inequality. However, challenges remain, particularly regarding the legality of customary land, often unrecognized officially. LoGA helps assess the effectiveness of agrarian reform policies and the Land Bill, especially in regulating customary

land. It supports identifying strengths and weaknesses in land management systems and improving mechanisms for granting legality to customary land, enabling indigenous peoples to use their land as collateral for financing. Additionally, LoGA promotes transparency and accountability, ensuring fair and non-discriminatory land redistribution. By fostering an inclusive legal framework, LoGA strengthens indigenous communities' land rights and economic welfare.

Many small-scale communities continue to struggle to secure legal status for their assets, hindering their ability to utilize them as collateral in financial transactions. The Land Bill and PP No. 86/2018 are anticipated to resolve this issue by providing more complete and transparent legal guidance. Simultaneously, concerns have emerged concerning the efficacy of these two approaches in addressing structural challenges within the agriculture industry. Both techniques must be effectively executed with the participation of all societal members to achieve the goals of agricultural reform. Structural issues in agriculture can be alleviated if communities and governments collaborate without conflicting interests. Critics of the Land Bill assert that the proposed remedies are predominantly sectoral and lack innovation in effectively resolving agricultural problems. To address these issues, agrarian reform in Indonesia must prioritize social advancement and the protection of individual legal rights. Consequently, tackling progressive land degradation, a longstanding concern in Indonesia's agricultural system, and maintaining public welfare will significantly rely on equitable and inclusive land policy. Governments, communities, and corporations must collaborate to formulate prudent investment strategies and safeguard small-scale communal assets. Customary land tenure in Indonesia can be addressed through agrarian reform, particularly with the enactment of the Draft Land Law and Government Regulation No. 86/2018. The objective of GR No. 86/2018 is to establish a more sustainable and equitable framework for land usage, ownership, utilization, and management. Agrarian reform, emphasizing land redistribution, aims to rectify historical inequities in land ownership, particularly those impacting the rights of indigenous populations. The historical illegitimacy of communal property ownership represents a

primary challenge for these groups. The economic potential of these communities will be constrained, as customary land cannot be leveraged for financial purposes without express legal authorization. The asset redistribution and legalization processes specified in PP No. 86/2018 may be utilized in this context to legitimize customary land through agricultural reform. Regulations concerning customary land enable communities to use it as collateral for securing loans or business capital. The Land Bill specifically acknowledges communities ruled by customary law, affirming their existence and ensuring land protection. A holistic approach is believed to enhance individuals' comprehension of the law, while the implementation requires certain specifics. Establishing explicit regulations concerning commercial rights, construction rights, and military rights may enhance public impression of legal adherence related to land ownership and utilization.

Nonetheless, obstacles persist in the execution of agrarian reform and the recognition of customary land rights. Numerous individuals contend that these methods may inadequately tackle more significant structural difficulties in agriculture, including disputes between small communities and enterprises. This new strategy has been questioned for potentially discriminating against marginalized communities.

The existence of the Land Bank exemplifies agrarian reform. The Land Bank, established by Law Number 11 of 2020 on Job Creation, is anticipated to effectively manage land and execute planning, acquisition, procurement, management, utilization, and distribution of land. The Land Bank's purpose poses a risk of exploitation by organized crime or huge corporations to acquire land, particularly customary land. Article 19 of Government Regulation No. 64 of 2021 stipulates that the Land Bank ensures and facilitates the availability of land for development to enhance economic growth and investment. This aligns with PP No. 18 of 2021 regarding Management Rights, which pertains to state territory, including community land that remains uncertified and without demonstrable ownership. Based on this study, a scenario in which indigenous peoples lack documentation of land ownership will be very susceptible to land grabs by the Land Bank. This situation is

intensified if, in the future, the Land Bank leases customary land to the private sector, thereby worsening the underlying structural tensions.

The Land Bank's land acquisition is governed by Articles 6 to 8 of Government Regulation No. 64 of 2021. Article 6 delineates that the Land Bank is authorized to purchase land through governmental provisions or from other entities, whilst Article 7 specifies the categories of land subject to control, including former rights, abandoned territories, and reclaimed land. Moreover, Article 8 governs the acquisition of land from other entities via mechanisms such as purchase, grant, exchange, and relinquishment of rights. The land purchase process commences with planning that entails determining property requirements for public, social, and developmental purposes. The Land Bank operates as a management entity with authority over land rights, however it cannot possess ownership of those rights. Consequently, all land acquisitions must adhere to prevailing legal constraints, including the stipulation that property rights cannot be associated with the Land Bank.

Agrarian reform has demonstrated efficacy in alleviating land reliance; thus, government committees are urged to execute this initiative consistently and comprehensively. Agrarian reform can potentially address customary land issues if executed effectively and equitably for all societal members. Indonesia requires comprehensive and sufficient rules to mitigate land inequities and guarantee public safety. Through the collaboration of all stakeholder's government, communities, and entrepreneurs agrarian reform may be effective, yield tangible benefits for communities, and enhance their economic welfare. By rectifying land inequities and guaranteeing public safety, agricultural reform in Indonesia can foster a more fair society and advance sustainable development. Government committees must collaborate with all stakeholders to guarantee the effective implementation of agrarian reform initiatives.

#### 4). A Comparative Legal Analysis of Rwanda and Indonesia

Agrarian reform in Rwanda reflects a systematic and far-reaching approach to transforming customary land tenure into a nationally registered and formal legal regime.<sup>24</sup> Through the Land Tenure Regularisation (LTR) program, the Rwandan government conducted nationwide land identification, adjudication, and certification to establish legal certainty over land ownership.<sup>25</sup> This program was not merely administrative in nature but constituted a deliberate state strategy to eliminate legal dualism by integrating all land, including land previously governed under customary tenure, into a single centralized legal system. Within this framework, registered land is issued formal title certificates that serve as legal proof of ownership and enable its use as an object of security. Rwandan legal practice recognizes a mortgage as an agreement granting the creditor the right to seize, sell, or manage property in the event of debtor default, provided that such mortgage is formally registered to be legally enforceable. Consequently, customary land that has undergone formal registration in Rwanda can be used as mortgage security, as it fulfills the principles of legal certainty, publicity, and specificity required under property security law.

This transformation aligns with the theory of property formalization advanced by Hernando de Soto,<sup>26</sup> which posits that informal assets such as customary land can only reach their full economic potential when incorporated into a formal legal system.

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<sup>24</sup> Daniel Ali, Klaus Deininger, and Marguerite Duponchel, *Sustaining the Success of the Systematic Land Tenure Registration in Rwanda, Sustaining the Success of the Systematic Land Tenure Registration in Rwanda*, 2016, <https://doi.org/10.1596/24707>.

<sup>25</sup> Alfred R. Bizoza and James Opio-Omoding, "Assessing the Impacts of Land Tenure Regularization: Evidence from Rwanda and Ethiopia," *Land Use Policy* 100 (2021), <https://doi.org/10.1016/j.landusepol.2020.104904>.

<sup>26</sup> Hernando de Soto, *The Mystery of Capital, Basic Books* (New York: Basic Books, 2007), [https://www.google.co.id/books/edition/The\\_Mystery\\_of\\_Capital/m-I3DgAAQBAJ?hl=id&gbpv=1](https://www.google.co.id/books/edition/The_Mystery_of_Capital/m-I3DgAAQBAJ?hl=id&gbpv=1).

Without legal documentation, land cannot function as capital because it cannot be effectively traded or used as collateral in credit systems. In the Rwandan context, land formalization has converted customary land into a bankable asset, enabling landholders to access financing through formal financial institutions and supporting land-based economic growth.<sup>27</sup> However, it is important to critically note that the relationship between land titling and access to credit is not always linear, as it is influenced by institutional capacity, financial market conditions, and the broader socio-economic context, including the risk of land loss through foreclosure.<sup>28</sup>

In contrast, the Indonesian legal system, grounded in the Basic Agrarian Law of 1960, maintains the recognition of customary land rights within a framework of legal pluralism. Customary land is acknowledged insofar as it continues to exist and does not conflict with national interests, yet it is not automatically integrated into the formal land registration system. This has significant implications for property security law, as under Law No. 4 of 1996 on Mortgage Rights, only registered land rights can be encumbered with mortgage rights. As a result, customary land in its original form cannot be directly used as collateral and must first be converted into formally recognized land rights. This conversion process is not only administrative but also socially consequential, as it often entails the transformation of customary land relations into individualized ownership structures, thereby introducing the risk of commodification.

A comparison between Rwanda and Indonesia reveals fundamentally different paradigms in the governance of customary land. Rwanda adopts a legal centralism approach through comprehensive formalization, whereby customary land is fully absorbed

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<sup>27</sup> D. Benjamin Barros, *Hernando de Soto and Property in a Market Economy*, *Hernando de Soto and Property in a Market Economy*, 2010, <https://doi.org/10.4324/9781315586724>.

<sup>28</sup> Daniel Ayalew Ali, Klaus Deininger, and Markus Goldstein, "Environmental and Gender Impacts of Land Tenure Regularization in Africa: Pilot Evidence from Rwanda," *Journal of Development Economics* 110 (2014), <https://doi.org/10.1016/j.jdeveco.2013.12.009>.

into the national legal system and immediately acquires economic functionality, including its use as collateral. This model is effective in promoting legal certainty and economic efficiency while facilitating land-based financing. Conversely, Indonesia retains a legal pluralism framework that preserves the existence of customary law and customary land values but limits the integration of customary land into formal financial systems. As a consequence, customary land in Indonesia often exists in a paradoxical position: socially recognized and normatively protected, yet economically underutilized within modern legal and financial structures.

Within a broader analytical framework, the concept of utilizing property as wealth refers to the transformation of land from a static object of possession into a productive capital asset capable of generating economic value. Property is no longer viewed merely as a physical asset but as an economic instrument that can be leveraged through legalization, collateralization, and productive use such as investment and commercialization. Without formal legal recognition, land tends to remain “dead capital” that does not contribute optimally to the owner’s welfare. In this regard, Rwanda demonstrates relative success in transforming land, including customary land, into economically productive and bankable assets through legal and financial integration. In contrast, Indonesia’s limitations in formalizing customary land and enabling its use as collateral restrict its function as an economic asset in the modern sense.

From a critical perspective, both models present distinct advantages and limitations. Rwanda’s model is effective in enhancing economic growth and legal certainty but risks overlooking the social, cultural, and communal dimensions of customary land, as well as creating potential vulnerabilities such as dispossession through market mechanisms. Meanwhile, Indonesia’s model reflects sensitivity to legal pluralism and the protection of communal values but faces structural challenges in optimizing the economic function of customary land and addressing persistent agrarian conflicts. Therefore, a hybrid approach is necessary, one that combines the strengths of both systems by ensuring

legal certainty and economic accessibility while preserving the communal character of customary land. In this way, property derives its value not merely from ownership but from the legal framework that enables it to function effectively as a tool for equitable and sustainable development.

## **Conclusion**

This study demonstrates that the tension between the communal character of customary land and the formal structure of mortgage rights cannot be viewed as an absolute legal obstacle. The unregistered and socially legitimized nature of customary land remains incompatible with the principles of publicity and speciality because the mortgage system requires administrative registration, certainty of legal subjects, and clearly defined objects. An adaptive legal reconstruction model, however, creates space for integrating customary land into the security rights regime while preserving indigenous values and communal identity. The reconstruction proposed in this study introduces a hybrid framework based on quasi-publicity and collective speciality. Quasi-publicity refers to administrative recognition of communal entities within the land administration system, whereas collective speciality emphasizes the determination of territorial boundaries and collective legal representation without converting communal land into individualized ownership. Such a framework enables customary land to operate within financing and security arrangements while maintaining its collective nature. Comparative analysis with Rwanda indicates that comprehensive formalization strengthens the economic utility of land and expands access to financing, yet simultaneously creates risks to communal and socio-cultural structures. Indonesia therefore requires a balanced model capable of combining legal certainty, economic accessibility, and protection of customary law values. Through this approach, customary land transforms from socially recognized but economically limited property into a productive legal and economic

asset that remains attached to the collective identity of indigenous communities.

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**Generative AI Statement**

The author(s) declare that generative artificial intelligence was used as a supportive tool during the preparation of this manuscript. Specifically, ChatGPT and Grammarly was utilized to enhance the language quality and overall readability of the text.

All outputs generated were subsequently critically reviewed, edited, and verified by the author(s) to ensure accuracy and uphold scientific integrity. The author(s) assume full responsibility for the final content of the manuscript.

The use of AI was strictly limited to a supportive role and does not constitute authorship. Furthermore, no data analysis or interpretation was carried out by the AI without active human oversight and involvement.

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