



Customary Land Rights in Positive Law (Agrarian Law) and Islamic Law in Indonesia

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Abstract

This study examines the intersection of customary land rights (hak ulayat) and Islamic inheritance law within Indonesia's positive legal framework. Customary land rights, deeply embedded in the social fabric of indigenous communities, represent collective ownership and stewardship that have been integral to Indonesia's agricultural system. These rights are formally recognized in the 1945 Constitution and the Basic Agrarian Law of 1960, reflecting the nation's cultural heritage and communal values. The integration of adat law and Islamic law highlights the adaptability of these legal systems, particularly through concepts such as musha' (collective ownership) and ihya' al-mawat (revitalizing unused land), which align with the principles of maqasid syariah to ensure justice, public welfare, and sustainability. Despite their alignment, the implementing of these principles faces challenges, including regulatory complexities and conflicts between national development goals and indigenous claims. This paper employs a qualitative, descriptive-analytical approach to explore how communal land rights and inheritance practices are recognized and adapted within Islamic and national legal frameworks. It underscores the potential for harmonizing customary law with modern legal structures to promote equitable resource management, protect indigenous rights, and achieve sustainable development. The findings emphasize the critical role of maqasid syariah in reconciling traditional practices with contemporary governance, offering insights into fostering legal and social integration in Indonesia.

Keyword: Land Rights, Positive Law, Islamic Law

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Introduction

Customary land rights (Hak Ulayat) represent ownership and rights that are inherently recognized as the domain of indigenous communities. These rights have been exercised since ancient times, reflecting the agrarian character of Indonesian society alongside its maritime identity. Indonesia, with its vast landmass and rich natural resources, has historically achieved milestones such as self-sufficiency in food production two decades ago. This accomplishment underscores the importance of preserving established systems, including customary land rights and supporting social structures, which serve as foundational pillars of governance and societal development. (Marta et al., 2019; Buana, 2023; Hutama, 2021).

In Indonesia's inheritance law context, customary law plays a significant role. The relationship between customary law and Islamic law is often associated with the concept of 'urf in Islamic jurisprudence, which refers to practices, behaviors, and expressions commonly accepted by the majority. In Islamic legal systems, customary practices (*adat*) are considered in the formulation of laws, showcasing the adaptability and tolerance of Islamic law toward customary norms. However, this recognition is conditional, requiring compliance with specific criteria. (Djazuli, 2005)

This research aims to explore the relationship between customary inheritance law and its transformation within Islamic inheritance law, particularly focusing on the status of communal land rights (*hak ulayat*) under Indonesia's positive law framework.

The term *ulayat* originates from Arabic, meaning “managed” or “supervised.” In the Indonesian context, *hak ulayat* refers to the collective rights of indigenous communities to manage, supervise, and control land and its resources within their territorial domain. Defined by the *Kamus Besar Bahasa Indonesia*, *hak ulayat* encompasses the rights of customary law communities over land, often linked with ancient authority and stewardship. (Departemen Pendidikan Nasional, 2016)

Law, in essence, is a set of rules accompanied by sanctions to regulate human behavior, maintain order, uphold justice, and prevent chaos. The role of law extends to ensuring legal certainty within society. Therefore, every community has the right to seek legal protection and justice. Law, whether written or unwritten, serves as a framework to govern societal life and enforce sanctions on violators.

Customary land rights are inherently tied to the social fabric of indigenous communities, passed down through generations and recognized within local societies. These rights hold significant importance in addressing the evolving complexities of positive law, as demonstrated by numerous land disputes across Indonesia, (Marta et al., 2019; Bola, 2017) such as the reported violation of Hak Guna Usaha No. 11 by PT AMP Plantation in West Sumatra. (sumbar.antaranews.com)

Bridging theoretical frameworks and practical realities remains a challenge in legal discourse. However, Indonesia must remain optimistic in its pursuit of becoming a true state of law (*rechtstaat*). (Soekamto, 2024) Recognizing and integrating the living laws within communities is vital to building a robust national legal system. As societal dynamics evolve alongside economic demands and business competition, the interplay between positive law and customary law often sparks debates regarding precedence. (Zahro, 2012) Misconceptions persist, such as the belief that customary law supersedes positive law due to its perceived sacrosanct nature. For instance, practices like the *tunggu tubang* tradition—where inheritance is passed solely to the eldest daughter without division—contrast sharply with the provisions of Indonesia’s Civil Code and Islamic inheritance law, which emphasize equitable distribution.

The efficacy of social governance often depends on the role of law. This raises the critical question: to what extent should positive law or customary law take precedence within the social order? Positive law, as articulated in the Basic Agrarian Law (UUPA), acknowledges customary law as long as it does not conflict with national interests, as stated in Article 5. This integration emphasizes the importance of aligning customary practices with religious and national principles.

Religion and law are two pivotal forces shaping social order and stability. The moral integrity of law is deeply influenced by religious values, highlighting the interdependence of legal and ethical systems. (Abdullah, A. 2002) In the context of inheritance law, customary law plays a pivotal role in Indonesia, particularly when it intersects with Islamic law. The concept of ‘urf in Islamic jurisprudence illustrates how customary practices are integrated into legal frameworks, demonstrating the adaptability of Islamic law to local customs (Muharam & Suparno, 2022; Luawo & Amalia, 2019). This relationship is particularly relevant in the context of inheritance, where customary practices often dictate the distribution of property. For instance, the Minangkabau community's practice of inheritance, which emphasizes matrilineal descent, contrasts with the more egalitarian principles found in Indonesia’s Civil Code and Islamic inheritance law (Muharam & Suparno, 2022; Luawo & Amalia, 2019). The coexistence of these legal systems necessitates a nuanced understanding of how customary practices can be recognized and integrated within the broader legal framework of Indonesia (Afriani, 2023; Tarigan, 2018).

The role of law in social governance is critical, as it establishes a framework for legal certainty and justice within society. Customary law, viewed as a reflection of communal values and relationships, continues to hold relevance in Indonesia despite the existence of a national legal framework (Warjiyati, 2023; Kristanto, 2023). The integration of customary law into the national legal system is essential for addressing the complexities of land rights

and inheritance, particularly as societal dynamics evolve alongside economic demands (Umanailo, 2021; (Marta et al., 2019; . The recognition of customary rights not only supports indigenous communities but also contributes to the broader goals of social justice and sustainable development (Buana, 2023; Redi et al., 2020). In conclusion, the interplay between customary land rights and inheritance law in Indonesia illustrates the complexities of integrating traditional practices within a modern legal framework. The recognition of Hak Ulayat and the role of customary law in inheritance are vital for ensuring the rights of indigenous communities while fostering a cohesive legal system that respects both local customs and national interests.

Method

The research methodology encompasses five key components: the approach and method, types and sources of data, data collection techniques, data analysis techniques, and the timing and location of the analytical study. This research adopts a qualitative approach utilizing a descriptive-analytical method, as outlined by Darmalaksana (2020). The data collected in this study are qualitative in nature and do not involve statistical figures.

The primary sources of data include literature related to *hak ulayat* (customary land rights), customary law, agrarian law, and Islamic law in Indonesia. Additionally, secondary sources consist of references relevant to the main topic, including articles, books, and previous research documents. (Costa et al., 2023). Data collection was a literature review. (Li, 2024) Data analysis involves processes of inventorying, classifying, and analyzing the data. (Grunbaum, 2023).

Result and Discussion

The social and cultural life across various regions in Indonesia varies significantly. These differences are influenced by several factors, including civilization, connectivity, knowledge, and technological development. The diverse characteristics of social and cultural life in different parts of Indonesia are evident in aspects such as religion and cultural practices. Indonesia's rich cultural heritage is both a source of pride and a challenge to preserve and pass on to future generations. The uniqueness and vast diversity of Indonesia's local cultures are highly esteemed. However, the evolution of modern lifestyles has led to a shift in societal preferences toward newer, potentially more practical cultural practices. (Damayanti, 2023).

In discussing the role of customary law within Indonesia's positive legal framework, particularly the Agrarian Law No. 5 of 1960, it is evident that this law considers customary law. However, certain aspects of land rights are regulated based on the customary laws of specific regions. In customary law systems, communal land rights are typically managed by traditional leaders, village heads, or village administrators. (Siombo, M.R. 2021)

Understanding social structures in Indonesia requires grasping fundamental concepts of social order. As outlined above, social order significantly influences the social mobility of communities, as seen in the elements within society. A community comprises groups that form complex social organizations governed by norms, values, and social institutions. These components shape the sociological conditions of individuals and their interactions, including issues like the intertwining of customary land rights and individual ownership (eigendom). (Haq et al., 2022; Yusdani, 2018).

Social organizations inherently contain behavioral regulations, which interact change the preposition societal dynamics. Both rural and urban communities experience social dynamics driven by interactions among individuals and groups, leading to mutual influences and societal changes. Social dynamics in communities may involve shifts in social values, prevailing norms, individual and organizational behavior patterns, social institution structures, social stratifications, power, and authority. (Yusdani, 2018). In essence, social changes encompass transformations in social organization, status, institutions, and societal structures.

Legal anthropology focuses on the relationship between law and culture. From this perspective, law is seen as an aspect of culture. In society, individuals are expected to uphold specific cultural values, although these values may not hold equal importance across different communities. Cultural values are concretely manifested in social norms, which guide individuals in performing various social roles. Legal anthropology seeks to explore the functionality of both positive law and customary law within cultural contexts. (Hartiman, A.H., 2001)

According to Selo Soemardjan and Soelaiman Soemardi, as cited by Soerjono Soekanto, society can be examined from structural and dynamic perspectives. The structural aspect, also referred to as social structure, includes interconnected elements such as social norms, institutions, groups, and stratifications. (Soekanto, 2014)

Historically, Indonesia's legal system has been influenced by Dutch colonial legal concepts (*rechtstaat*). This influence is evident in the use of the term "*rechtstaat*" in the pre-amendment explanatory notes of the 1945 Constitution. The omission of this term post-amendment marks a shift toward a prismatic approach to legal principles, combining various concepts to adapt to modern developments. This framework emphasizes justice and the flexibility to disregard written provisions that obstruct fairness. Indonesia thus integrates the principles of *rechtstaat*, rule of law, (Haq et al., 2022) and spiritual dimensions of religious law. (Idi, 2023; Daheri et al., 2023).

In post-revolutionary Indonesia, the structural similarities between its legal system and the Dutch colonial framework are apparent. However, these structures have been adapted to align with the aspirations of the Indonesian people. Customary law, which differs fundamentally from codified legal systems, continues to play a significant role. Its implementation often relies on local judges or traditional leaders, emphasizing consensus-based conflict resolution.

Customary law reflects living values that evolve with societal changes, such as shifts in economics, politics, and social culture. As Van Vollenhoven noted, customary law is distinct from colonial regulations and rooted in societal traditions. In cases of disputes, traditional leaders mediate resolutions through consensus, reflecting societal values and cultural norms. This approach fosters acceptance of decisions, emphasizing both formal and substantive justice.

F. D. Holleman identified four general characteristics of Indonesian customary law (Sudiyat, 2000):

1. Religio-magical: A blend of animism, taboos, and mystical beliefs.
2. Communal: Prioritizing collective interests over individual ones.
3. Immediate (constant): Transactions occur simultaneously.
4. Concrete: Legal actions are performed directly at the moment.

The acknowledgment of customary and Islamic law as integral to Indonesia's legal framework highlights the country's heterogeneous society. Despite challenges in integrating these systems with codified law, their recognition underscores the necessity of balancing tradition with modern governance. Customary law, deeply embedded in local cultures, ensures harmony within communities, reflecting a broader definition of law beyond written statutes.

The concept of communal land rights (*hak ulayat*) in Islamic law emphasizes collective ownership of land, aligning with principles of justice and public welfare (*italicize*). Within this framework, the principles of *musha'* (collective ownership) and *ihya' al-mawat* (reviving dead land) serve as foundational elements for the management of communal land by indigenous communities. While *musha'* acknowledges shared ownership, *ihya' al-mawat* provides a legal basis for individuals or communities to transform unused land into productive assets, thus benefiting society as a whole (Wahyuni, 2024; Suhendra, 2017; Syarbaini, 2024). In this context, land is not merely an economic asset but also a trust (*amanah*) from Allah, to be wisely managed for future generations (Nasution, 2023).

The principles of *maqasid sharia* are particularly relevant in analyzing communal land rights, focusing on the protection of wealth (*hifzh al-mal*), lineage (*hifzh an-nasl*), and dignity (*hifzh al-'ird*). These protections aim not only to ensure the sustainable use of natural resources but also to preserve the cultural and spiritual identity of indigenous communities (Jabarudin & Karmila, 2022; Nurhikmah, 2023). In the context of Islamic economic transactions (*muamalah*), communal land rights align with cooperative principles in land management, such as *musaqah* and *muzara'ah*. These practices emphasize collaboration to achieve mutual prosperity while prohibiting *israf* (wastefulness) and *tabzir* (misuse), which can lead to social inequality (Umar, 2023; Souliisa et al., 2020).

Specifically, practices like *musaqah* and *muzara'ah* facilitate equitable profit-sharing between landowners and cultivators, ensuring productive use of land. This approach reflects a commitment to social welfare and sustainability, in line with Islamic legal principles (Shafiai & Moi, 2015). Furthermore, sustainable agreements underscore the communal welfare inherent in communal land management (Mubarroq & Latifah, 2023). The prohibition of *israf* and *tabzir* highlights the importance of resource management in Islamic law, resonating with the emphasis on sustainable practices in communal land governance (Mubarroq & Latifah, 2023). Similarly, the prohibition of *ihtikar* (hoarding or monopolization) protects communities from economic exploitation (Munib, 2018). Ultimately, empowering indigenous communities through the proper management of communal land rights, consistent with Islamic principles, safeguards them from external domination and fosters economic independence and collective welfare (Aziz & Jamali, 2008).

Despite the alignment between Islamic law and communal land rights, implementation in Indonesia often encounters significant challenges. Conflicts of interest between development agendas and indigenous claims, along with the lack of formal recognition of communal land, remain pressing issues (Munif, 2018; Jabarudin & Karmila, 2022). Additionally, the complexity of regulations involving customary law, national law, and Islamic law complicates the enforcement of indigenous rights (Jabarudin & Karmila, 2022; Nurhikmah, 2023). Addressing these challenges requires a *maqasid sharia* approach, strengthening *fatwas* from Islamic scholars, and fostering synergy between Islamic and customary laws. Empowering indigenous communities to understand and legally advocate for their rights is also essential (Syarbaini, 2024; Umam, 2024). Thus, communal land rights not only serve as instruments for equitable resource management but also embody Islam's commitment to collective welfare and environmental sustainability.

In the Islamic legal context, managing communal land must adhere to principles of justice and accountability. Research indicates that applying *shariah* principles in land management can balance economic and social interests (Ridwan, 2013; Hasan et al., 2020). Hence, communal land rights can function as tools for achieving sustainable and inclusive development.

In conclusion, communal land rights from the perspective of Islamic law represent a complex and multidimensional concept. They encompass aspects of justice, public welfare, and ownership protection, serving as mechanisms to achieve collective prosperity. While implementation faces challenges, approaches grounded in *maqasid sharia*, indigenous community empowerment, and the integration of Islamic and customary laws offer potential solutions. Thus, communal land rights not only facilitate equitable resource management but also reflect Islam's broader commitment to sustainability and societal welfare.

Conclusion

Customary land rights (*hak ulayat*) of indigenous communities form an integral part of Indonesia's agrarian law, as recognized in the 1945 Constitution and the Basic Agrarian Law of 1960. Adat law, as an unwritten legal system rooted in community practices, plays a vital role in land rights regulation. Despite Indonesia's legal system being influenced by Dutch colonial law, adat law retains a strategic position as a reflection of the nation's cultural heritage. It embodies local values, collective ownership, and consensus-based dispute

resolution mechanisms. The role of judges in applying adat law demonstrates its adaptability in addressing the evolving needs of indigenous communities.

From the perspective of Islamic law, customary land rights emphasize justice and societal welfare. The concepts of *musha'* (collective ownership) and *ihya' al-mawat* (revitalizing abandoned land) are particularly relevant in the management of communal land, aligning with the principles of *maqasid syariah*, which safeguard wealth (*hifzh al-mal*), lineage (*hifzh an-nasl*), and dignity (*hifzh al-'ird*). Islamic law also encourages collaboration through mechanisms such as *musaqah* and *muzara'ah*, which promote wise land utilization and avoid wastefulness. This alignment underscores the harmony between adat law and Islamic law in maintaining ecological, social, and economic balance within communities.

The recognition of *hak ulayat* within Indonesia's national legal system illustrates the enduring relevance of adat and Islamic law, even amidst the complexities of modernization. The state accommodates these legal systems, as reflected in laws governing *waqf* (endowment) and other agrarian policies, aiming to achieve justice and societal welfare. By integrating traditional values with modern needs, adat law and Islamic law play crucial roles in preserving cultural identity while supporting inclusive national development goals.

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