



Legal Review of Settlement of Customary Land Disputes Through Mediation According to Positive Law

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ARTICLE INFO

Keywords: Dispute Resolution, Customary Land, Mediation, Positive Law, Customary Law

Received : 18 December 2024

Revised : 03 January 2025

Accepted: 06 February 2025

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ABSTRACT

Resolving customary land disputes through mediation is a relevant approach in the context of Indonesian people who have a diversity of customs and cultures. This article aims to analyze the mediation mechanism as an alternative to resolving customary land disputes within the framework of Indonesian positivist law. This study uses normative juridical methods and empirical approaches with literature and literature studies. The results of the analysis show that mediation as part of the alternative dispute resolution (ADR) system has been regulated in various laws and regulations in Indonesia, including Supreme Court Regulation No. 1 of 2016 concerning Mediation procedures in Court. In the context of customary land, mediation allows the integration of customary law values with positive law, resulting in a more accommodating and fair solution for the parties to the dispute. However, the implementation of mediation at the practical level often faces obstacles, such as differences in the interpretation of customary law and lack of understanding of mediation by the parties. Therefore, it is necessary to strengthen the capacity of mediators, clearer recognition of customary law and the national legal system, as well as harmonization between customary law and positive law to increase the effectiveness of resolving customary land disputes through mediation.

INTRODUCTION

Indonesia is known as a country rich in cultural diversity and customs, including in terms of land ownership by indigenous communities. Customary land, which is owned and passed down through generations by indigenous peoples, is an essential element in their lives as it encompasses economic, social, and cultural values. For indigenous communities, land is not merely a material asset but also holds spiritual significance and identity tied to their survival. The ownership of customary land is recognized and preserved based on customary legal principles inherited from their ancestors.

However, over time, pressures on customary land have intensified, especially due to rapid infrastructure development, industrial growth, and increased investment in the agrarian sector. These developments often lead to conflicts between indigenous communities and other parties, such as the government or private companies that seek to utilize the land for large-scale projects, including plantations, mining, housing, or infrastructure development. Such conflicts frequently result in complex customary land disputes, where indigenous communities feel that their rights are being violated, while external parties rely on legal claims governed by national law.

In land law, the term "land" is used in a juridical sense as a concept officially defined by the Basic Agrarian Law Number 5 of 1960 (UUPA). The UUPA differentiates between the concepts of "earth and land," as stated in Article 4, paragraph (1), which reads:

"Based on the state's right of control as referred to in Article 2, various rights over the surface of the earth, called land, may be granted to and possessed by individuals, either alone or jointly with others and legal entities."

Humans and land share a close relationship. Besides serving personal needs, land is also required for broader interests. Here, public interest comes into play, though it has not been rigidly defined. Hundreds of years ago, public interest had a meaning nearly identical to the interests of indigenous legal communities. Such a definition of public interest is too narrow or localized. Over time, its meaning has expanded to include legal associations, villages, clans, regions, and the combined interests of several villages or areas, culminating in what is now known as "common interest," "public interest," "national interest," "national welfare," and "state interest."

From a legal perspective, the relationship between humans and land has become increasingly important. In addition to communal rights, individual rights also exist. Communal rights are inherent in humans as social beings; however, for survival, individuals must also possess private rights.

Customary land is a form of land ownership passed down through generations by indigenous communities in Indonesia. This land holds immense value, not only economically, socially, and culturally, but also because it contains historical significance and serves as an identity marker for the communities that own it. However, with changing times and increasing land demands, particularly for investment and development, conflicts often arise between indigenous communities and other parties, such as the government or private corporations.

These disputes frequently stem from differences in perspectives regarding land ownership, territorial boundaries, and land use.

In 1660, the concept of customary law was documented by Jalaludin Tunsam, an Arab residing in Aceh, who noted that the term "adat" originated from the Arabic language, meaning "community customs." Such customs include mutual cooperation, helping one another, and deliberation, which have become integral to Indonesia's national identity. Over time, customary law evolved, influenced by religion, royal institutions, and the arrival of foreign nations in Indonesia. Thus, customary law constitutes the legal system of Indonesia, both written and unwritten.

According to customary law, the relationship between humans and land is not only legal but also cosmological, magical, and religious. This relationship extends beyond individuals to groups within an indigenous legal community (*rechtsgemeenschap*) in relation to *ulayat* rights. In certain regions, recognition from indigenous legal leaders is necessary for a plot of land to become private property. During the colonial era, land ownership transfers also occurred through government intervention in the form of forest-clearing permits, while non-indigenous people received land rights such as *eigendom*, *erfpacht*, and *opstal* from the Governor-General or through court rulings (*eigendom uitwijzing*).

The authority (rights and obligations) of indigenous legal communities arises from both physical and spiritual relationships with land that have been maintained over generations. This relationship is not only external but also internal, bearing religious-magical significance. It is based on the belief of indigenous legal communities that land is a gift from supernatural forces or a legacy from ancestors meant for their survival and that of future generations. Fundamentally, this relationship is eternal.

This relationship establishes the rights of indigenous legal communities over land, namely the right to control the land and all its resources. Soerojo Wignjodipiero highlighted the close connection between communities and land by pointing out that land serves as a settlement for indigenous communities, a source of livelihood, a burial ground for deceased members, and a residence for guardian spirits protecting the community. The Indonesian Constitution also recognizes this relationship in Article 18B, paragraph (2) of the 1945 Constitution, which states:

"The state acknowledges and respects indigenous legal communities and their traditional rights as long as they remain alive and align with societal development and the principles of the Unitary State of the Republic of Indonesia, as regulated by law."

This article affirms that the state recognizes and respects customary law. The Basic Agrarian Law (UUPA) further reinforces this recognition. This law allows landowners to register their land to obtain proof of ownership in the form of land certificates, thereby providing legal certainty. Rights to land existing before the enactment of the UUPA, particularly customary land rights, were converted into one of the types of land rights regulated under Article 16 of the UUPA, which include: Ownership Rights, Cultivation Rights, Building Rights,

Usage Rights, Lease Rights, Land Clearing Rights, and Forest Product Collection Rights.

In the Indonesian legal framework, indigenous communities are theoretically protected through various legal instruments. One such protection is the recognition of *ulayat* rights, as stipulated in Article 18B, paragraph (2) of the 1945 Constitution. However, the implementation of these protections faces numerous challenges, particularly the limited recognition of customary law within the national legal system, which prioritizes a positivist legal approach. Indonesia's positive law, which is based on codified regulations, often contradicts the dynamic and locally rooted nature of customary law. As a result, indigenous communities frequently find themselves in a weak position when dealing with land disputes. In such cases, court litigation often fails to yield satisfactory outcomes for indigenous communities. The formal, complex, and costly judicial process poses a significant obstacle. Additionally, court rulings tend to favor parties with formal legal documentation, such as land certificates, which indigenous communities often lack.

To address these challenges, mediation has emerged as a more effective alternative for resolving customary land disputes. Mediation is a dispute resolution process in which the involved parties strive to reach a mutual agreement with the assistance of a neutral third party, known as the mediator. Unlike court litigation, which is adversarial, mediation emphasizes dialogue, consensus-building, and win-win solutions.

Mediation offers several advantages over litigation. First, it is more flexible as it is not bound by formal procedures, allowing for a resolution that aligns with the needs and cultural context of the involved parties. Second, mediation is more cost-effective and time-efficient, whereas litigation can take years and incur significant expenses. Third, mediation fosters direct communication between the disputing parties, which can help repair damaged relationships—an essential aspect in indigenous communities where social ties are crucial.

However, implementing mediation in customary land disputes faces challenges. One major issue is the gap between customary law and positive law. Since customary law is unwritten and deeply rooted in local values, integrating it into a formal legal framework can be difficult. Additionally, mediators often lack sufficient knowledge of indigenous customs and cultural contexts, potentially leading to unfair outcomes.

Another challenge is the power imbalance between disputing parties. Indigenous communities often find themselves at a disadvantage compared to corporations or government entities with greater legal and financial resources. This imbalance can hinder the achievement of truly fair agreements.

Thus, a specialized approach is needed to ensure the protection of indigenous land rights in mediation. This study seeks to analyze how mediation can be effectively applied in resolving customary land disputes within the framework of positive law.

LITERATURE REVIEW

1. Definition of Customary Land

Customary land is generally defined as land owned and controlled by indigenous legal communities based on prevailing norms and traditions passed down through generations. This land is typically not formally registered within the state's land administration system but is recognized based on local customary law. According to Boedi Harsono, customary land is land controlled by indigenous legal communities under communal rights (*hak ulayat*), governed by customary norms, and reflecting the collective relationship between indigenous people and the land as part of their way of life.

2. Definition of Dispute Resolution

According to Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, dispute resolution is a process aimed at reaching a mutually agreed-upon solution by prioritizing the principles of justice, mutual interest, and time efficiency in resolving disputes outside the court system.

3. Definition of Mediation

Etymologically, the term "mediation" originates from the Latin word *mediare*, meaning "to be in the middle." In English, "mediation" refers to a dispute resolution process involving a third party acting as a mediator. According to Gary Goodpaster, mediation is a problem-solving negotiation process in which an impartial and neutral third party assists disputing parties in reaching a mutually satisfactory agreement.

4. Definition of Positive Law

Positive law, in the context of legislation, refers to a set of written rules created and enforced by authoritative institutions (typically the government) to regulate social life. These rules have binding legal force and can be enforced.

METHODOLOGY

This publication employs two different research methodologies: **normative juridical legal research** and **empirical approach** to provide a comprehensive understanding of the role of customary law in the mediation of customary land disputes.

- **Normative juridical legal research** focuses on the study of written legal norms found in legislation, legal doctrines, and court decisions.
- **The empirical approach** focuses on observing real-life practices. In this study, the empirical approach is used to gather direct information from those involved in customary land disputes, such as indigenous communities, mediators, and customary leaders, through interviews, observations, or case analysis. This approach provides insight into how customary law is applied and integrated into the mediation process.

Additionally, the legal sources used in this research consist of **Primary and Secondary Data**:

- **Primary data** is obtained directly from the field, including interviews with individuals involved in mediation processes (e.g., indigenous communities, mediators, and lawyers) as well as observations of mediation proceedings.
- **Secondary legal materials** complement and explain primary legal materials, such as previous research, journals, articles, and books related to the research topic.

This research aims to **describe facts with legal and practical analysis** regarding the process of resolving customary land disputes. Field studies are also conducted to support the research by helping address issues and provide a better understanding of customary land dispute resolution.

A **qualitative analysis** method is used to process the collected data, whether from interviews, observations, or literature reviews. The data will be processed by describing and analyzing each aspect related to the application of mediation in customary land disputes.

RESULTS AND DISCUSSION

1. Mediation Process in Resolving Indigenous Land Disputes According to Positive Law

The resolution of indigenous land disputes through mediation is one of the prominent mechanisms for resolving conflicts in Indonesia, particularly those involving indigenous communities. As a country with diverse customs and cultures, indigenous land disputes often arise due to clashes between the traditional interests of indigenous communities and formal policies or laws imposed by the state. In this context, mediation serves as an alternative that not only upholds the principle of deliberation and consensus but also respects the customary values held by local communities.

The mediation process in resolving indigenous land disputes has advantages over litigation in court. One of its benefits is its flexibility, lower costs, and the ability to maintain good relationships between the disputing parties. In Indonesian positive law, mediation is also recognized and regulated in various legal provisions, thus providing legitimacy to the mediation outcomes achieved.

Certificate as Proof of Rights

One of the objectives of land registration, as stipulated in Article 3 of Government Regulation No. 24 of 1997, is to provide legal certainty and protection to rights holders of a plot of land, apartment units, and other registered rights so that they can easily prove their ownership. To ensure legal certainty and protection, a land title certificate is issued to the rightful owner. Article 19 Paragraph (2) Letter c of the Basic Agrarian Law (UUPA) states that the final stage of land registration conducted by the government is the issuance of a certificate as proof of ownership, which serves as strong evidence.

The UUPA does not explicitly name the proof of ownership document for registered land. It was only in Article 13 Paragraph (3) of Government Regulation

No. 10 of 1961 that it was stated that the document proving registered land ownership is called a certificate, which is a copy of the land book and measurement letter bound together with a cover sheet determined by the Minister of Agrarian Affairs.

Land ownership can be understood in both physical and juridical senses, as well as in public and private aspects. Juridical ownership is the legal right protected by law, granting the rights holder authority over the land, provided it does not conflict with public order, morality, and legal provisions. Conversely, physical possession does not always belong to the legal rights holder, as in cases where land is occupied through legal agreements such as leasing. Concerning land rights, Article 4 Paragraph (1) of the UUPA states that land rights derive from the state's control over land, further detailed in Article 16 Paragraph (1) of the UUPA, which includes lease rights.

The land rights stipulated in Article 16 Paragraph (1) of the UUPA can be granted to individuals, whether Indonesian citizens or foreigners, groups of people, legal entities, whether private or public. These land rights are certified to ensure legal certainty through land registration, providing legal proof in the form of certificates. Regarding lease rights under Article 16 Paragraph (1) Letter e of the UUPA, they are further regulated in Articles 44-45 of the UUPA. Article 44 states that a person or legal entity has the right to lease land if they are entitled to use another person's land for building purposes by paying rent to the owner.

Article 44 Paragraph (1) of the UUPA explains that individuals and legal entities can lease land, but it does not specify whether public or private legal entities are included. However, the main subject is the entity leasing the land, which, according to the provision, must be private landowners. Article 20 Paragraph (1) of the UUPA defines ownership rights as the strongest, most absolute, and inheritable rights. Meanwhile, Article 20 Paragraph (2) states that ownership rights can only be granted to individuals and exclusively to Indonesian citizens.

a) Stages of the Mediation Process

The mediation process for resolving indigenous land disputes begins with registering the dispute with a mediation institution or an agreed-upon mediator. In indigenous land cases, parties often prefer a mediator who understands local customs, such as traditional leaders or indigenous institutions. This choice ensures that mediation proceeds effectively and yields fair solutions for both parties.

In the initial stage, the mediator meets with the parties to confirm their readiness and willingness to participate in the mediation process. The mediator explains the fundamental principles of mediation, including confidentiality, mediator neutrality, and the necessity of openness and good faith from both sides. At this stage, the mediator collects information related to the dispute, including supporting documents such as proof of ownership, land maps, or customary documents supporting each party's claim.

After the preparation phase, the mediator initiates the mediation session. This process typically begins with an opening session where each party is given

an opportunity to present their perspective on the dispute. This stage is crucial in identifying each party's interests and needs, as well as uncovering the root cause of the conflict. The mediator acts as a facilitator, ensuring that discussions remain constructive and do not escalate into confrontation.

The next stage is negotiation, where the mediator assists the parties in exploring various mutually acceptable solutions. In the context of indigenous land disputes, the mediator often employs a cultural approach, involving customary institutions or referring to local customary laws. This ensures that the solutions align not only with positive law but also with the customary values upheld by the community. If the parties reach an agreement, the mediator helps draft a written agreement documented as a formal settlement. This agreement is signed by all disputing parties and holds legal force as a binding contract. Under Article 1338 of the Indonesian Civil Code (KUH Perdata), this agreement obligates the parties to comply with its terms. If necessary, the agreement can also be registered with a court or relevant government institution for formal validation and enforcement.

Although mediation offers many advantages, its implementation in indigenous land disputes faces challenges. One major challenge is the differing perspectives between customary law and positive law. In many cases, indigenous communities feel that positive law does not fully accommodate their values and norms. As a result, mediators often struggle to bridge these differing viewpoints.

Additionally, the involvement of third parties such as companies or the government in indigenous land disputes can complicate the mediation process. These third parties often have interests that differ from those of the indigenous communities, necessitating a special approach to ensure effective mediation. In such situations, mediators must possess strong communication skills and a deep understanding of the social and cultural context of the region.

b) Modern Customary Law as Positive Law

Customary law, which continuously evolves to adapt to contemporary developments, has been able to absorb concepts and institutions from foreign legal systems when necessary for modern societal realities. This adaptation rejuvenates customary law, enriching it with new concepts and institutions previously unknown. Once integrated, these foreign legal concepts and institutions become part of customary law, transforming it into modern customary law. This modern customary law applies uniformly across Indonesia, evident in areas such as international trade, banking, insurance, corporate entities, and modern 21st-century communication and information technology. Legislation issued by the Indonesian government should ideally accommodate the legal needs of the people, ensuring that regulations reflect the people's sense of justice and customary law. Examples include Law No. 22 of 2009 on Traffic Accidents, Law No. 13 of 2003 on Employment, Law No. 11 of 1964, and Law No. 5 of 1960 on Basic Agrarian Principles:

1. Moral Leader and Symbol of Wisdom

Traditional elders are regarded as symbols of wisdom and moral leaders. They possess a deep understanding of customary norms and laws, which serve as the foundation for dispute resolution.

2. **Neutral Mediator**

As figures trusted by all disputing parties, traditional elders act as neutral mediators who facilitate dialogue between the involved parties. Their goal is to find a fair solution that aligns with customary law.

3. **Promoter of Consensus through Deliberation**

Traditional elders employ a deliberative approach, emphasizing the importance of reaching a consensus to maintain harmony and balance within the community.

4. **Decision-Makers Based on Customary Law**

In certain cases, traditional elders provide binding decisions based on local customary law. These decisions are often more accepted by the community compared to formal court rulings.

5. **Guardians and Preservers of Customary Values**

Traditional elders ensure that dispute resolution not only addresses conflicts but also preserves the customary values that form the foundation of indigenous community life.

CONCLUSION AND RECOMMENDATION

In Indonesia's positive legal system, mediation is one of the primary dispute resolution methods before a case proceeds to court. This process involves a neutral third party, the mediator, who facilitates dialogue between disputing parties to reach a mutual agreement. Land disputes involving customary land, which often raise complex issues related to communal land rights and traditional ownership, can also be resolved through this mechanism. Positive law provides a formal basis for mediation, as regulated in Supreme Court Regulations and Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. Mediation is considered effective due to its non-confrontational nature, cost efficiency, and ability to maintain good relations between parties. In the context of customary land disputes, mediation offers advantages as it allows for more flexible solutions compared to court rulings, making it more acceptable to the indigenous communities involved.

Traditional elders play a crucial role in resolving customary land disputes because they are respected figures who understand customary law and the traditions upheld by the community. As guardians of local wisdom, traditional elders are often involved as mediators or facilitators in customary land disputes. They bring a consensus-based approach that emphasizes the principles of harmony, justice, and social sustainability. In the mediation process, traditional elders not only act as intermediaries but also as advisors who provide insights and perspectives on customary values relevant to the dispute. Decisions reached through mediation led by traditional elders usually hold strong legitimacy within the indigenous community, making them more widely accepted and minimizing the potential for ongoing conflict. Their role is particularly significant because customary land disputes often involve family or community relationships that must be carefully managed to preserve social harmony.

ADVANCED RESEARCH

In writing this article the researcher realizes that there are still many shortcomings in terms of language, writing, and form of presentation considering the limited knowledge and abilities of the researchers themselves. Therefore, for the perfection of the article, the researcher expects constructive criticism and suggestions from various parties.

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