



## Legal Construction of Sale and Purchase of Land in Indonesia in the Perspective of Act No. 5 of 1960 Concerning Basic Regulations on Agrarian Principles

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### **Abstract**

The sale and purchase of land-based on customary law in daily practice is still practiced by some people in Indonesia. The sale and purchase of land in customary law adhere to the principle of "tunai and terang" which means that the handover of rights by the seller is carried out simultaneously with payment by the buyer and immediately the rights have transferred. This research discusses the Ratio legis of the use of the principle of "tunai and terang" in the sale and purchase of land in Indonesia. The research method used is normative legal research with a statutory approach and a conceptual approach as a problem approach method. The results showed that the use of "tunai and terang" in the formation of sale and purchase agreements for land rights in Indonesia is because UUPA accommodates Customary Law as the basis for the National Land Law. The existence of cash and light principles is expected to provide legal protection for sellers and buyers.

**Keywords:** *Land; Sale and Purchase; Legal Construction*

### **Introduction**

The main principle of Act no. 5 of 1960 regarding basic agrarian law (UUPA) based on the land law that applies in Indonesia is based on customary law. The legal concept in terms of buying and selling has different applications, for instance customary law adheres to the principle of "terang and tunai". *Terang* means that the legal act of buying and selling is carried out in the presence of a traditional leader who handles land issues or customary elders. Meanwhile, *tunai* is the transfer of rights from the seller to the buyer directly at the time of payment from the buyer to the seller. It is considered different from the western concept of buying and selling land. The different implementation of buying and selling land have occurred in the community in ancient times.

The customary law does not contain written law, so land transfer is carried out by adopting the concept of customary law in various ways through a land deed official (PPAT) or in a sale and purchase

agreement on a stamped paper seal or only in the form of a receipt.<sup>1</sup> Based on regulations, it is necessary to further examine national land laws which adopt customary law. The problem of this case is the problem of emptiness related to the principle of " *terang and tunai* ". It is associated with juridical control which underlies a right protected by law and given the authority to the right holder to physically control the land over the land they own. The juridical control even though it gives the authority to control the land physically. However, in reality there are land tenure rights, sometimes between physical and juridical differ between the owners of the land.

Sociologically, it is associated with other laws related to this process, namely customary law, in this case the principles or principles adopted in buying and selling according to customary law, namely cash, real and clear. In the case of an agreement that has met the conditions of cash, real and clear but in practice it is stated in a sale and purchase agreement with an authentic deed, is this acceptable in the land law, because both are contradictory matters.

### **Methods**

The present study uses normative legal research methods to find solutions to existing legal problems.<sup>2</sup> The research approaches used are the statute approach and the conceptual approach.

### **Discussion**

In general, it can be said that humans are always involved in association with each other, so that there is a relationship between humans which is also called the relationship between individuals. The relationship between individuals will lead to a relationship that can be normal and legal. A relationship is called a legal relationship if the relationship between two people or two parties is regulated by law. That is the relationship between fellow humans which is regulated by law whose consequences caused by the association are protected by law.

Buying and selling land based on customary law in daily practice is still practiced by some people in Indonesia. Especially people whose economic condition is weak and their education level is still low. It is due to the influence of customary law which determines that the sale and purchase of land rights is legal if the " *terang dan tunai* " conditions are met.

In the customary law, there is a system used with regard to the sale and purchase of land rights. It is known as " *jual lepas* ", which is clear and cash. It means that the transfer of land rights from the seller to the buyer must be carried out in the presence of the customary head or village head, as well as it is carried out simultaneously with the payment of the price (considered in full even though in fact it is only a down payment from the buyer to the seller).<sup>3</sup>

Regarding the sale and purchase of land rights according to customary law, Budi Harsono says that in the customary law "buying and selling land" is not a legal act which is what is called an "obligatory agreement". Buying and selling land in customary law is an act of transferring rights with cash payments. It means that the price agreed upon is paid in full at the time of the sale and purchase

<sup>1</sup> Hatta Isnaini and Hendry Dwicahyo Wanda, 'Prinsip Kehati-Hatian Pejabat Pembuat Akta Tanah Dalam Peralihan Tanah Yang Belum Bersertifikat', *Jurnal Hukum IUS QUIA IUSTUM*, 24.3 (2017), 467–87 <<https://doi.org/10.20885/iustum.vol24.iss3.art7>>.

<sup>2</sup> H Isnaini and W Utomo, 'The Existence of the Notary and Notarial Deeds within Private Procedural Law in the Industrial Revolution Era 4.0', *International Journal of Innovation, Creativity and Change*, 2019 <<http://www.scopus.com/inward/record.url?eid=2-s2.0-85079637568&partnerID=MN8TOARS>>.

<sup>3</sup> Mas Rachmat Hidayat, Krisnadi Nasution, and Sri Setyadi, 'Kekuatan Hukum Pengikat Hak Tanggungan Atas Jaminan Kredit', *Jurnal Akrab Juara*, 2020 <<https://doi.org/10.11693/hyhz20181000233>>.

concerned.<sup>4</sup> In customary law, there is no definition of juridical surrender as the fulfillment of the seller's legal obligations, because precisely what is called a "sale and purchase of land" is the transfer of rights over land that is sold to the buyer who at the same time pays in full to the seller a mutually agreed price. So the sale and purchase of land according to the meaning of customary law includes the regulation of land.

As evidence of the sale and purchase as well as the completion of the transfer of rights, a land sale and purchase letter is drawn up which is signed by the seller and the buyer witnessed by the head of customs / village head and the village secretary. They guarantee the truth about the status of the land, its rights holders, and the legality that it has been implemented in accordance with applicable law and also as representatives of the villagers. However, the participation of the customary head / village head and village secretary is not an absolute requirement for the validity of the transaction.<sup>5</sup>

Customary law does not recognize the terms and conditions of the validity of an agreement as regulated in the civil code. Basically, customary law recognizes that every act that results in a change in legal position (*recht potitie*) of a matter will only get legal protection if the legal act is valid, where the legal act is carried out in clear and cash. According to customary law, validating the sale and purchase of land rights that are not carried out to land deed official, but the buyer / final rights holder will obviously have difficulty proving their rights to the land they have purchased even though the land title is certified, without a sale and purchase certificate from land deed official. Without a Land deed official deed, it will be difficult for the buyer to register their land rights with the authorized land office.<sup>6</sup>

According to the provisions in the national land law / positive law, the sale and purchase of land is a formal agreement. It means an agreement which is required to be valid and must be fulfilled in a certain form. It requires that the sale and purchase of the land be made by a land deed official and only the sale and purchase of land / land rights with a sale and purchase deed by the land deed official which can be used as the basis for registration at the land office in the land registration section.

The definition of the sale and purchase of land according to customary law is the legal act of handing over land permanently with the seller receiving payment, namely the purchase price.<sup>7</sup> In the community, the customary law of buying and selling land is implemented in a clear and cash manner. Clear means that the legal act of buying and selling is actually carried out in front of the customary head or village head or now in the presence of the authorized land deed official. Cash means that there are two actions that are carried out simultaneously, namely the transfer of rights over land which is the object of sale and purchase from the seller to the buyer and the payment of the price from the buyer to the seller occurs simultaneously.

Thus, according to the customary law which is the basis of the current national land law as contained in the basic agrarian law (UUPA), the transfer of rights to land which is the object of sale and purchase has occurred since the signing of the sale and purchase deed in front of the authorized land deed official and the buyer pay the seller. Transfer of rights over land which becomes the object of sale and purchase means the transfer of control both juridically and physically at the same time. Thus, the cash requirements have been fulfilled.

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<sup>4</sup> Hari Wibisono, H. Moch. Isnaeni, and Endang Prasetyawati, 'Authorization Entities (Legal Guarantee Review)', *International Journal of Multicultural and Multireligious Understanding*, 2019 <<https://doi.org/10.18415/ijmmu.v6i6.1210>>.

<sup>5</sup> Agung Sakti Pribadi, Made Warka, and Slamet Suhartono, 'Laws of Authority and Uncertain Law On the Beach Reclamation Activities in The Gulf Coast of Jakarta', *International Journal of Scientific and Research Publications (IJSRP)*, 2019 <<https://doi.org/10.29322/ijsrp.9.12.2019.p9654>>.

<sup>6</sup> Hatta Isnaini Wahyu Utomo Hatta, 'Perlindungan Hukum Bagi Kreditur Atas Obyek Jaminan Berupa Bangunan Tanpa Tanah Dalam Perspektif Asas Pemisahan Horizontal', *Jurnal Selat*, 7.1 (2020), 50–64 <<https://doi.org/10.31629/selat.v7i1.1521>>.

<sup>7</sup> R.D. Soepomo, *Hukum Perdata Adat Jawa Barat*, cetakan 2, Jakarta: Penerbit Djambatan, 1982, h.126.

Sales and purchases made in front of the land deed official meet the “clear” requirements (not “dark” legal acts, which are carried out secretly). The deed signed by the parties clearly shows that the legal act of buying and selling was carried out. Thus, the three characteristics of buying and selling, namely cash, clear and real, are fulfilled. It proves that the legal act has actually been committed by the parties.<sup>8</sup>

The procedure of the sale and purchase of land according to the positive law is actually the same as the procedure of the sale and purchase of land which is valid according to customary law which is known as "sell off" and "clear" in its character. According to the national land law / positive law, the sale and purchase of land is the transfer of land rights in perpetuity, which in the customary law is called "sell off" and is "cash" in its character. It means that if there is a sale and purchase, at the same time there is a transfer of land rights and payment of a full price, so that the relationship between the old owner and the land has been permanently cut off.<sup>9</sup> The transfer of rights means the transfer of control both juridically and physically. However, the transfer of rights is sometimes only juridical because physically the land is still under the control of another person (for example because of a lease relationship that has not expired), so that physical handover will follow.

The procedure for the sale and purchase of land that has been registered (certified) begins with meeting the parties, both the seller and the buyer, to the land deed official. Then, they stated that they would buy and sell land. Furthermore, the land deed official requests a certificate of land rights to be sold, proof of identity and other documents from the parties. Next, he checks the certificate at the local land office to ensure that the certificate is free from confiscation, dispute and debt. After checking, if the certificate is "clean", then a sale and purchase certificate is made. The making of the deed is attended by the parties who have committed the legal act concerned and witnessed by at least 2 (two) witnesses who meet the requirements to act as witnesses in the legal act.<sup>10</sup>

With two witnesses, in front of the land deed official, the seller and the buyer sign the sale and purchase deed, and witnessed by the land deed official, the land price is paid according to the price stated in the sale and purchase deed. If payment is not made in front of the land deed official, he must ask: “Has the land price in accordance with the deed been submitted by the buyer to the seller and has the seller received the price of the land from the buyer?”<sup>11</sup>

According to Van Dijk, the sale and purchase of land according to customary law is a permanent transfer of land by receiving an amount of money that is paid in cash by the buyer and the buyer obtains full ownership rights over the land. This cash payment is done in front of the village head as a witness to the validity of the sale and purchase transaction.<sup>12</sup>

According to Wiryono Projodikoro, the sale and purchase according to customary law is not just an agreement between the two parties, but it is a transfer of rights over goods or objects on condition of paying a price. When an agreement is made between the two parties, according to customary law, the buyer is given a down payment to the seller. It is intended so that there is strength between the two parties.<sup>13</sup> There are two types of the sale and purchase of land in customary law. They are as follows:

<sup>8</sup> Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Cetakan Kesembilan, Jakarta: Djambatan, h. 333.

<sup>9</sup> Jonneri Bukit, Made Warka, and Krisnadi Nasution, ‘Eksistensi Asas Keseimbangan Pada Kontrak Konsumen Di Indonesia’, *DiH: Jurnal Ilmu Hukum*, 2018 <<https://doi.org/10.30996/dih.v0i0.1788>>.

<sup>10</sup> Hatta Isnaini Wahyu Utomo, ‘The Position of Honorary Council of Notary in Coaching Indonesian Notaries’, *Journal of Law, Policy and Globalization*, 92 (2019) <<https://doi.org/10.7176/jlpg/92-12>>.

<sup>11</sup> Soetomo, *Pedoman Jual Beli Tanah: Peralihan Hak dan Sertifikat*, Malang: Lembaga Penerbitan Universitas Brawijaya, 1981, h.22

<sup>12</sup> Van Dijk, diterjemahkan oleh A.Soehadi, *Pengantar Hukum Adat Indonesia*, Sumur, Bandung, 1979, h. 66.

<sup>13</sup> Wiryono Projodikoro, *Hukum Antar Golongan Di Indonesia*, Sumur, Bandung, 2000, h.73.

1. The legal action is one-sided, namely a group of people living in a place and building a house on the land, opening agricultural land, burying people in that place and so on. This legal action is only from one party.
2. Legal action is two-sided. The main point is the transfer of rights with cash payments. To carry out the sale and purchase, the assistance of the head of the association who is responsible for the legal action is required, so the action must be clear and cash.

The sale and purchase of land in customary law are as follows:<sup>14</sup>

- a. Selling a pawn, it means that those who receive the land have the right to work on the land and have the full right to collect income from the land. He was only bound by his promise that the land could only be redeemed by the one who sold the pawn. In general, land is returned in the condition when it was given.
- b. Selling off-hand, it means that the buyer gets ownership rights to the land he buys. Payments are made in front of the partnership.
- c. Selling annually, it is a form of renting out land in Java whose duration cannot be determined.
- d. Giving land (grant or inheritance), it means that the giving of land in which the right of ownership is immediately transferred to either the heir or another person. Even, the land owner is still alive or died.

The concept of national land law is based on customary law. The current implementation of agrarian law uses a system and principles of customary law, so the sale and purchase of land now must also be interpreted as a legal act in the form of the transfer of ownership rights or the handover of land permanently by the seller to the buyer who at that time also hands over the price to the seller.<sup>15</sup>

According to customary law, the legal requirements for the sale and purchase of land are the fulfillment of three elements, namely cash, real and clear. Cash is the transfer of rights by the seller which is carried out simultaneously with payment by the buyer and immediately the rights have transferred. The buyer does not have to pay in full. The price difference is considered as what the buyer owes to the seller. It is included in the legal scope of accounts payable so it is not land law. Then, real means that the seller and the buyer not only say their will but they also have to follow it with real actions. For instance, by receiving payment money by the seller and making an agreement in front of the village head. Next, clear is the sale and purchase is carried out in front of the village head to ensure that the act does not violate any applicable legal provisions.<sup>16</sup>

Regarding the participation of the village head / traditional leader in the sale and purchase of land, Supreme Court in its jurisprudence dated December 13, 1958 No. 4 / K / RUP / 1958 stated that the participation of the village head is an absolute requirement of customary law. The participation of the village head is a more convincing factor that the sale and purchase of land is legal. In the decision of the supreme court dated 12 June 1975 No. 952 / K / SIP / 1975 in their legal considerations states that the sale and purchase of land according to customary law is legal if it is done in real terms and in cash and is known to the village head. The decision of the Supreme Court is in accordance with the principles of customary law. If the sale and purchase is not carried out in front of a land deed official, the sale and purchase is still valid because the basic agrarian law (UUPA) uses the principles of customary law, namely concrete and real.

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<sup>14</sup> Endang Prasetyawati, 'Perlindungan Hukum Terhadap Para Pihak Dalam Pembiayaan Konsumen', *DiH: Jurnal Ilmu Hukum*, 2012 <<https://doi.org/10.30996/dih.v8i16.267>>.

<sup>15</sup> Boedi Harsono, *Hukum Agraria*, Djambatan, Jakarta, 2000, hal 23.

<sup>16</sup> *Ibid.*

In customary law, the system used for buying and selling land is known as the cash and clear system. It means that the transfer of land rights is simultaneous once payment of the land price is submitted to the buyer. Furthermore, the wills must be met by submitting a down payment so that it is legally binding. The land sale and purchase transaction can be made on seal paper or without seal paper and must be affixed with sufficient stamp duty. It is made by the parties in front of the village head concerned. It also means that the handover according to customary law of land has been transferred to the buyer.<sup>17</sup>

If the sale and purchase is not carried out in front of the village head, the sale and purchase can be considered valid as long as the parties have met the material requirements, namely the price has been paid by the buyer as well as the rights to the land being sold have been fully handed over by the seller to the buyer.

One of the things that need to be considered in buying and selling land is the subject. They are sellers and buyers. The seller who is entitled to sell a plot of land is the legal holder of the title to the land. If the owner of a plot of land is only one person, he has the right to sell it himself. But if the owner is more than one person, it must be done together. The result of the sale and purchase of land according to customary law by the unauthorized is that the sale and purchase is canceled by law.<sup>18</sup>

Based on Article 5 of the UUPA, the sale and purchase of land after the UUPA, it uses the system and principles in customary law. In the preamble of the UUPA, it is stated that the agrarian law that applies to the earth, water and space is customary law. In the form of customary law norms, in statutory regulations and as long as these regulations do not exist, customary law shall apply. In fact, the prevailing laws and regulations actually replace the norms of customary law that were previously valid. For instance, the provisions regarding the sale and purchase of land which were initially sufficient to be carried out in front of the village head, by Article 19 of Government Regulation No. 10 of 1961 changed to in front of land deed official. Boedi Harsono argues that in fulfilling the needs of an open modern society; for instance, land buying and selling institutions; according to agrarian law, it gets a modernization and adjustment model, without changing the essence of customary law, namely the legal act of transferring land rights with payment of the price in cash and the nature and characteristics as real and clear actions.<sup>19</sup>

The sale and purchase of land must be proven by a deed made up by a land deed official. The sale and purchase of land which was initially sufficient to be carried out in front of the village head, but now by agrarian regulations it must be carried out in front of a land deed official. It is a change that aims to improve the quality of evidence carried out according to customary law whose people have limited personal and territorial scope, that is, it is sufficient to make a letter by the seller himself and it is known by the village head. The change of procedure does not negate the provisions of customary law which regulate the material aspect of land buying and selling institutions.

## Conclusion

The legislative ratio for the use of "*Terang* and *Tunai*" in the sale and purchase agreements for land rights under the UUPA is because it accommodates customary law as the basis for the national land law. Land buying and selling transactions use clear and cash principles in customary law. *Tunai* means that the transfer of rights occurs instantaneously with a payment, whereas *terang* means that the sale and purchase is carried out in the presence of an official who has the authority to witness the sale and purchase. The existence of cash and clear principles in the sale and purchase of land means that with the payment of an agreed price and the legal action is carried out in front of local officials, ownership rights

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

<sup>18</sup> Christina Tri Kurniasari, Krisnadi Nasution, and Sri Setyadji, 'Dasar Hukum Pelaksanaan Mitigasi Resiko Kredit Pada Sektor Perbankan Di Indonesia', *Jurnal Akbar Juara*, 2020 <<https://doi.org/10.1016/j.solener.2019.02.027>>.

<sup>19</sup> Sudargo Gautama, *Tafsiran UUPA*, Alumni, Bandung, 1981, h. 204

over the land are transferred. The function of the appointed official is to record and become a witness that there has been a transfer of rights. It is also expected to provide legal protection for sellers and buyers.

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