

# LEGAL CONSTRUCTION OF LAND RIGHTS TRANSFER UNDER THE INDIGENOUS SYSTEM (TAYADE) IN GORONTALO IN RELATION TO THE PRINCIPLE OF HORIZONTAL SEPARATION

SAHARUDDIN<sup>1</sup>, ANDI SURYAMAN M. PIDE<sup>2</sup>, YUNUS WAHID<sup>3</sup>, MUHAMMAD ILHAM ARISAPUTRA

Doctoral Program Of Law-Universitas Hasanuddin Makassar-indonesia-

Law lecturer, Department of Law-Universitas Hasanuddin Makassar-indonesia

Law lecturer, Department of Law-Universitas Hasanuddin Makassar-indonesia

Law lecturer, Department Of Law-Universitas Hasanuddin Makassar-indonesia

Law lecturer, Department Of Law-Universitas Hasanuddin Makassar-indonesia

## Abstract

*The transfer of land rights through the Tayade customary system involves a two-part transaction. Firstly, there is the transaction of purchasing the rights to the land itself. Secondly, there is a separate transaction for purchasing the rights to what is on the land, such as buildings or crops. In other words, the landowner can sell or transfer the rights to the land to someone else while retaining ownership or control rights over the structures or crops on the land. Research on the Tayade Customary System reveals a legal phenomenon that does not align with Indonesian law, particularly concerning the transfer of land rights through transactions that contradict the Agrarian Law. The Agrarian Law separates ownership rights and does not specify a time limit for property transactions such as trees. The research methodology employed is normative empirical research with an anthropological legal approach. The conclusion drawn from this research identifies legal regulations to resolve issues related to the sale of land rights within the Tayade customary system.*

**Keywords:** Construction, Transition, Tayade, Gorontalo, Horizontal

## I. INTRODUCTION

The existence of indigenous communities in Gorontalo Province is firmly grounded in Regional Regulation Number 2 of 2016 concerning the Implementation of Customary Institutions. This regulation has provided a legal basis that recognizes, protects, and promotes the presence of indigenous communities and the local wisdom they uphold. Article 6b preserves, develops, and utilizes customs, cultures, and community practices to enrich customs and cultures in supporting the implementation of village and regional governance. However, the implementation and fulfillment of indigenous people's customary land rights still face various challenges, including conflicts with commercial interests or development. Therefore, it is crucial for the government and all stakeholders to collaborate in ensuring the recognition and protection of indigenous land rights and natural resources, aiming for justice and prosperity for all Indonesian citizens.

According to Hasan (Hasan, 2019), the ethnic group inhabiting Gorontalo is the Gorontalo people, who are scattered throughout the Gorontalo province, especially in coastal areas and urban areas. This community has lived in the Gorontalo region for many years. Gorontalo has a history closely related to the Islamic kingdom, and to this day, Islamic culture and traditions remain strong in the lives of the Gorontalo people. Gorontalo language is used by the local community. However, there are several other languages considered as Gorontalo dialects, such as Suwawa language, Bolango language, and Atinggola language. Currently, the Gorontalo language has also been influenced by the Manado language (Manado Malay) widely used in the daily lives of the Gorontalo people.

One of the indigenous legal systems known today is the land buying system with the Tayade customary law, which is still in use until now, by the Gorontalo people known as Tayade according to Dolot Alhasni (Hasni, 2020). The Gorontalo indigenous community applies the principle of horizontal separation long before the enactment of the Basic Agrarian Law Number 5 of 1960. This can be seen in the Gorontalo indigenous law known as Tayade. The word 'tayade' in Gorontalo language means division. This division is specifically applied to the inheritance of the parents' property to their



children. It includes the division of land, as well as its contents, which are separated or shared between land rights and rights over plants or buildings on that land.

Referring to the principle of Horizontal Separation (*Horizontale Scheiding Beginsel*) in the practice of land transactions, for example, the sale of land without trees is not regulated in the Basic Agrarian Law Number 5 of 1960. The application of the horizontal separation principle stipulated in the Basic Agrarian Law Number 5 of 1960 includes land leases, Building Rights, Business Rights, and Right of Use. This means that there is actually a legal vacuum regarding the practice of selling trees separately from the land or selling land separately from the trees.

Based on this phenomenon, it can be formulated as an issue that the Transfer of Land Rights using the Tayade Customary System, considered to be in conflict with the Basic Agrarian Law Number 5 of 1960 as it currently applies in Gorontalo society, does not provide legal guarantees for achieving the ideal legal objectives. This is due to the absence of a time limit between landowners and tree owners. Considering the problem discussed, the author proves that the system of transferring land rights using the Tayade customary law needs to be reconstructed with the fulfillment of legal standards, justice, participation, and recognition and respect for customary law.

## II. LITERATURE REVIEW

### 2.1. Customary Law in Indonesia

The understanding of customary law in Indonesia originates from the elaboration of Article 2 Paragraph (4), Article 3, and the General Explanation of the Basic Agrarian Law of 1960, which states that there is no concrete definition of customary law (Warjiyati, 2020). However, legal scholars have provided interpretations of customary practices. Ter Haar defines customary law as all regulations established in decisions that are explicit and authoritative, applied without exception, without considering whether these regulations have been officially established and fully binding (Suriyaman Masturi, 2014). Tayade Customary Law (Hasni, 2020) is the indigenous system of the Gorontalo people in the transfer of land rights through a separation between land and objects on the land. The transfer of land rights refers to the transfer or change of ownership or control of land from one party to another. This can occur through various legal mechanisms and processes regulated in accordance with the provisions of the Basic Agrarian Law Number 5 of 1960 and its implementing regulations in Indonesia.

### 2.2. Transfer of Land Rights

Urip Santoso defines the transfer of land rights as the ability for all land rights to change hands and be transferred. The term "change hands" means the shifting of land rights due to legal provisions, without any intentional legal actions to transfer those rights to another party (Santoso, 2010). In the context of transferring land rights, the term "transferred" refers to the process of moving these rights from one party to another. This transfer occurs through deliberate legal actions, with the intention of transferring ownership or control of the land rights to another party (Erna Sri Wibawanti and R. Murjiyanto, 2013).

### 2.3. Theoretical Foundation

According to Lawrence M. Friedman (Friedman, 1969) in his book titled "The Legal System: A Social Science Perspective," every legal system consists of three components: legal structure, legal substance, and legal culture. Friedman states that an operational legal system is a complex organism in which these three elements interact. Jeremy Bentham (Theory of Utilities) (F. Fios, 2012) believes that the purpose of law is to achieve happiness or utility, meaning that the law aims to ensure the well-being and benefit of as many people or society as possible. Friedrich Carl Von Savigny (1779-1861) was a German legal expert and philosopher considered one of the main figures in the field of historical law. He developed the concept of *Volkgeist*, which means "spirit of the people" or "national spirit," to explain the organic relationship between law and the cultural characteristics of a nation. According to Savigny, the law is a reflection or outcome of *Volkgeist*, encompassing a nation's unique character, traditions, beliefs, and values. *Volkgeist* shapes customary law that grows and evolves within society over centuries. Savigny's belief is that the law that emerges from this *Volkgeist* is the most authentic form of law, aligned with the life and needs of the respective society (Tanya, 2013).

### Objective of the Study

The objective of the study is to identify the nature of the implementation of the Tayade Land Rights Transfer System concerning land ownership among the Gorontalo community.

### Research Questions

What is the nature of the implementation of the Tayade Land Rights Transfer System concerning land ownership among the Gorontalo community?

### III. RESEARCH METHODS

This research was conducted in the Gorontalo Province, focusing on three districts: Boalemo District, North Gorontalo District, and Pohuwato District. The selection of research locations was based on their relevance to the study. The research type employed was Empirical Law (Social Legal Research) as defined by Irwansyah (2022). Data collection techniques involved surveys and interviews as the primary sources in this study, following the methods outlined by SUSENO (2023). The primary data for this research were collected using these two techniques, while published scholarly articles on the topic of land rights transfer were considered secondary sources. The studied population consisted of indigenous ethnic communities, traditional communities in the area, traditional leaders or community figures, local government officials, and land agencies

### IV. RESULTS

#### 4.1. Indigenous People of Gorontalo

The indigenous people residing in Gorontalo are the Gorontalo ethnic group, spread throughout the Gorontalo province, particularly in coastal and urban areas. This community has lived in the Gorontalo region for many years. Gorontalo has a history closely associated with the Islamic kingdom, and to this day, Islamic culture and traditions remain deeply ingrained in the lives of the Gorontalo people. The Gorontalo language is the local language, but there are other languages considered as dialects of Gorontalo, such as Suwawa, Bolango, and Atinggola. Currently, the Gorontalo language has also been influenced by the Manado language (Manado Malay) widely used in the daily lives of the Gorontalo people (Mustapa, 2022). The existence of the indigenous Gorontalo people is also documented by Van Vollenhoven, a customary law expert, who introduced the concept of the traditional law circle or Adat Rechtskringen in Indonesia. This system classifies hundreds of customs from various regions in Indonesia into 19 traditional law circles or ethnic groups. Examples include Aceh, Gayo, Alas, Batak, Minangkabau, South Sumatra, Malay, Bangka and Belitung, Kalimantan, Minahasa, Gorontalo, Toraja, South Sulawesi, Ternate/Ambon, Timor, Irian Jaya (now Papua), Bali and Lombok, Java, Yogyakarta, and West Java. According to Mr. van Vollenhoven's perspective, the Gorontalo indigenous people are placed in the 9th position on the list of traditional law circles or ethnic groups in Indonesia (Fasseur, 2007)

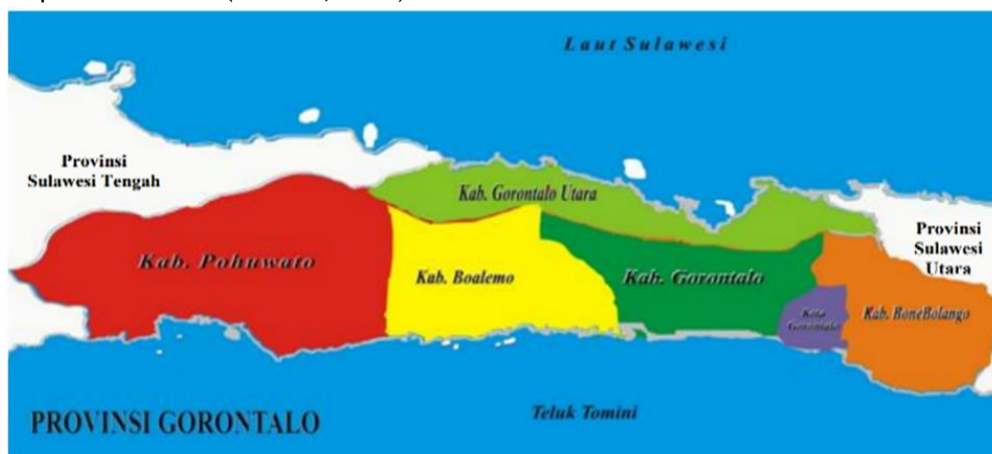


Image: Map of Gorontalo Province (source: <https://semuatentangprovinsi.blogspot.com> Accessed on October 10, 2023)

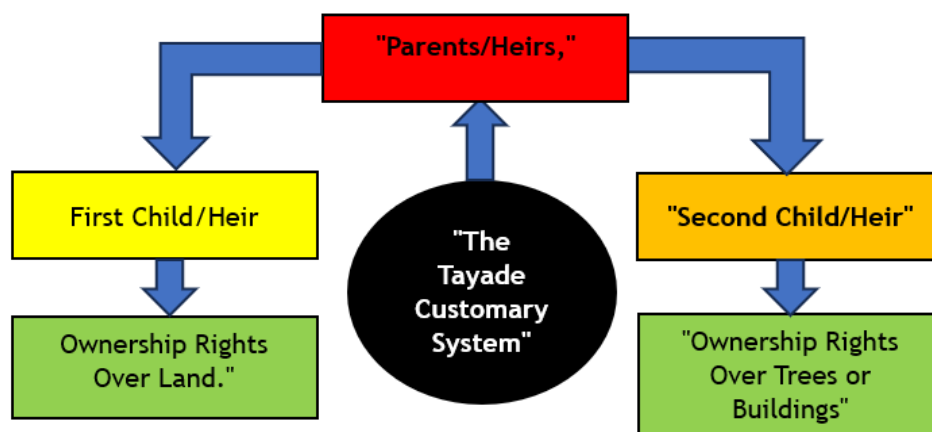
#### 4.2. The Essence of Implementing the Tayade Land Rights Transition System Regarding Land Ownership in the Gorontalo Community

##### 4.2.1. The Essence of the Tayade Customary System

The Tayade customary system practiced by the indigenous people of the Gorontalo tribe reflects a profound philosophy of kinship in inheritance distribution. In this context, the system grants each child the right to ownership of the legacy or gift from their parents, establishing a strong foundation for fairness in inheritance matters. Granting first-born children ownership rights over land and second-born children rights over the objects on the land demonstrates wisdom in maintaining the familial nature and supporting the concept of equality within the family. This approach underscores the importance of the relationship between humans and land, where land is considered an integral part of family identity and heritage. Ownership rights granted over various assets acknowledge the unique role and contribution of each child within the family, creating a fair and sustainable inheritance system.

Furthermore, the use of this kinship system not only preserves tradition but also fosters strong bonds among family members. It promotes cooperation, solidarity, and togetherness among siblings, fostering harmony in family relationships and the community as a whole. However, while the Tayade customary system recognizes individual ownership rights, it is also important to consider how this system can accommodate the changes of time and the needs of modern society. Wise development and adaptation can ensure the continuity of this tradition while still addressing fairness, sustainability, and diversity within the Gorontalo tribal community.

**The Chart of the Tayade Customary System in Inheritance Distribution among the Gorontalo Tribe:**



1. **Parents Heir:** Parents who bequeath land and trees/buildings to their children as inheritance.
2. **First Child/Heir:** The first offspring of parents recognized as the primary heir receiving (land ownership rights).
3. **Second Child/Heir:** The second offspring of parents, also an heir, receiving (ownership rights over trees/buildings).
4. **Ownership Right Over Land:** The owner of land rights granted to the first child.
5. **Ownership Right Over Trees or Buildings:** The owner of tree/building rights granted to the second child.
6. **The Tayade Customary System:** The inheritance distribution system in the Gorontalo tribe that distinguishes between land and trees/buildings.

Parents, as inheritors, leaving a piece of land with trees or buildings on it, will be passed down through the Tayade customary system. According to this tradition, the first child will inherit the land, while the second child will inherit the trees or buildings, all of which are owned as property rights. They have complete authority to manage and control these rights

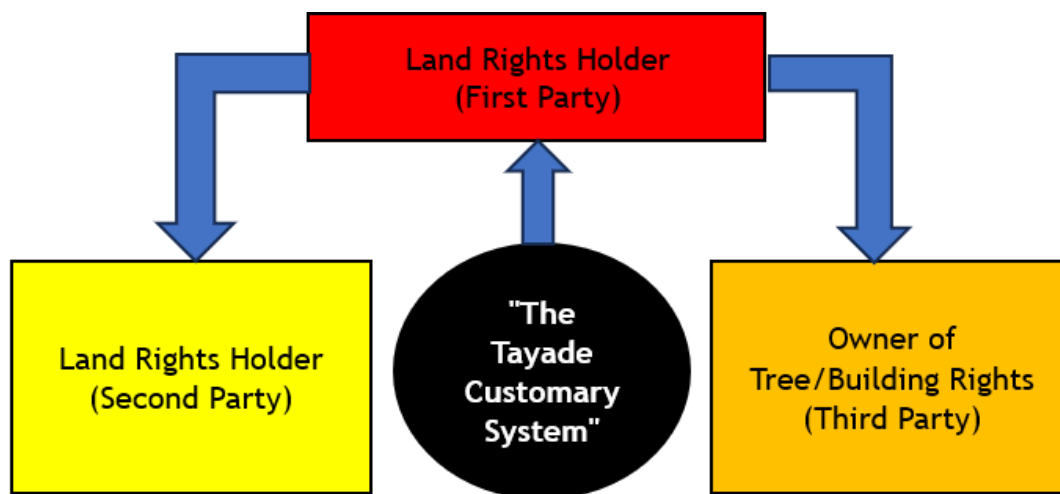
#### 4.2.2. Transition of Land Rights Through the Tayade Customary System

The practice of buying and selling land rights through the Tayade customary system is widely used among the indigenous people of the Gorontalo tribe, especially in certain areas in the Gorontalo Province such as Boalemo Regency, North Gorontalo Regency, and Pohuwato Regency. This customary system has become a tradition deeply rooted in the tribe, representing the continuity of culture and customs in executing land transactions within the Gorontalo indigenous community. Thus, the Tayade

customary system not only reflects the land ownership structure but also embodies the traditional values and local wisdom of the Gorontalo tribe. Within this context, this practice is not merely a legal transaction but also an expression of their cultural identity and integrity. By preserving this system, the Gorontalo tribe maintains their heritage while preserving the richness of their culture and history.

In the de facto realm, the buying and selling conducted by the Gorontalo indigenous community through the Tayade customary system involve two separate transactions. First, there is a transaction for purchasing the land rights itself. Second, there is a transaction for purchasing the rights to what is on the land, such as buildings or crops. In other words, landowners can sell or transfer land rights to others while retaining ownership or control rights over what is on that land.

#### The Following Chart of Buying and Selling Through the Tayade Customary System



1. **Land Rights Holder (First Party):** The first party as the owner of land rights.
2. **Land Rights Holder (Second Party):** The second party acquiring ownership rights over the land.
3. **Owner of Tree/Building Rights (Third Party):** The third party purchasing rights over trees or buildings.

In the Tayade customary system of buying and selling, the above chart illustrates that the Land Rights Holder (First Party) sells the land ownership rights to the Second Party as the buyer. The First Party also has the ability to separately sell the rights over trees or buildings to the Third Party. In this scheme, land rights and rights over trees/buildings are considered separate entities that can be traded independently according to the owner's needs and preferences.

#### 4.2.3. Transition of Land Rights Using the Tayade Customary System in Conflict with Land Law in Indonesia

In practice (de facto), the transfer of land rights through the Tayade customary system involves two separate transactions. First, there is a transaction for purchasing the land rights itself. Second, there is a transaction for purchasing the rights to what is on the land, such as buildings or plants. In other words, landowners can sell or transfer land rights to others while retaining ownership or control rights over what is on the land. Referring to the principle of Horizontal Separation (Horizontale Scheiding Beginsel) concerning the practice of land sales, such as land sales without trees, this practice is not regulated in the Basic Agrarian Law. The application of horizontal separation as regulated includes types of land rights outlined in Article 16 and Article 53 of Law Number 5 of 1960 concerning Basic Agrarian Law, which include:

1. Ownership rights,
2. Cultivation rights,
3. Building rights,
4. Usage rights,
5. Lease rights,





6. Land clearing rights,
7. Forest product collection rights.

Based on the above articles, there is a Legal Vacuum regarding the practice of selling trees without the land or selling land without the trees. In Gorontalo society, the horizontal separation system has several differences in implementation. The horizontal separation system means that the land rights holder fully delegates authority to the party wanting to buy the buildings or plants on the land owned by the rights holder. As a result, the land rights holder only controls the land rights, while the buildings or plants on the land transfer ownership to the buyer or heirs without any agreed-upon time limit or expiration date. Therefore, the main difference between the horizontal separation system in the Basic Agrarian Law and the horizontal separation system in Gorontalo society lies in the aspects of land use rights and the delegation of authority over buildings or plants on the land, which do not have a specified time frame.

The Tayade Customary System indicates a Legal Phenomenon considered no longer relevant to the legal system generally applicable in Indonesia. This is because the Tayade customary legal system regarding the transfer of land rights through buying and selling contradicts the Basic Agrarian Law, which recognizes horizontal separation only in land leases, Building Rights, Usage Rights, and Cultivation Rights but not in Ownership Rights. Furthermore, in the process of buying and selling property rights such as trees on the land, there is no established time limit agreed upon by the seller and the buyer.

## V. CONCLUSION

Based on the research findings and analysis, it can be concluded that the implementation of land rights transfer through the Tayade system in the Gorontalo community should adhere to the traditional inheritance system. In this regard, there is a need for regulations that govern the ownership period of trees or buildings to establish legal certainty for all parties involved. Such regulations not only provide clarity in ownership processes but also have the potential to enhance the local economy by attracting investor interest. Additionally, clear regulations can prevent potential monopolies in the agricultural sector, especially regarding plant ownership. Therefore, this approach can create a stable and fair legal environment, stimulate local economic growth, and encourage investments within the community.

## REFERENCES

- [1] Erna Sri Wibawanti dan R. Murjiyanto. (2013). Hak Atas Tanah Dan Peralihannya. Yogyakarta: Liberty.
- [2] F. Fios. (2012). Keadilan Hukum Jeremy Bentham Dan Relevansinya Bagi Praktik Hukum Kontemporer. *Humaniora* 3, no. 1, 299-309.
- [3] Fasseur, C. (2007). Colonial dilemma: Van Vollenhoven and the struggle between adat law and Western law in Indonesia. In *The Revival of Tradition in Indonesian Politics*. Routledge, 70-78.
- [4] Friedman, L. M. (1969). *The Legal System: A Social Science Perspective*. New York : Russell Sage Foundation,.
- [5] Hasan, A. D. (2019). *Kajian Ragam Hias Pada Kain Karawo Gorontalo Dalam Unsur Estetik Dan Simbolik*. Universitas Komputer Indonesia: Doctoral dissertation.
- [6] Hasni, D. a. (2020). Penerapan Asas and Pemisahan Horizontal, "Jual Beli Tanah Di Gorontalo. Dalam D. a. Hasni, Penerapan Asas and Pemisahan Horizontal, "Jual Beli Tanah Di Gorontalo (hal. 117). Gorontalo: Ideas Publishing.
- [7] Irwansyah. (2022). *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel*. Yogyakarta: Mirra Buana Media.
- [8] Mustapa, R. M. (2022). Analysis of Maqâshid Al-Sharî'ah on the Dutu Tradition in Hulondalo Tribe Wedding in Gorontalo. *INTERNATIONAL JOURNAL OF CONTEMPORARY ISLAMIC LAW AND SOCIETY* 4 (2), 28-38.
- [9] Santoso, U. (2010). *Pendaftaran Dan Peralihan Hak Atas Tanah*. Jakarta: Kencana.
- [10] Suriyaman Masturi. (2014). *Hukum Adat Dahulu Sekarang Dan Akan Datang*. Jakarta: Kencana.



- [11] SUSENO, S. W. (2023). THE REVITALIZATION OF AWIG-AWIG OF THE NORTH LOMBOK ADAT LAW PEOPLE TO REALIZE A JUSTICE AND A LEGAL CERTAINTY. . Russian Law Journal, 621.
- [12] Tanya, B. L. (2013). Teori Hukum, Strategi Tertib Manusia Lintas Ruang Dan Generasi. Yogyakarta: Genta Publishing.
- [13] Warjiyati, S. (2020). Ilmu Hukum Adat. Yogyakarta: Deep Publishing