

land-08-00117.pdf

by

Submission date: 17-Sep-2020 10:54AM (UTC+0800)

Submission ID: 1389125133


File name: land-08-00117.pdf (611.61K)

Word count: 6990

Character count: 37142

Article

Legal Certainty in the Management of Agricultural Land Pawning in the Matrilineal *Minangkabau* Society, West Sumatra

Zefrizal Nurdin ^{1,*} and Hilaire Tegnan ² 

¹ Department of Civil Law, Faculty of Law, Andalas University Padang, Padang 25163, Indonesia

² Department of Constitutional Law, Faculty of Law, Andalas University Padang, Padang 25163, Indonesia

* Correspondence: zefrizalnurdin@law.unand.ac.id; Tel.: +62-853-5565-7575

Received: 20 May 2019; Accepted: 23 July 2019; Published: 30 July 2019



Abstract: Agricultural land pawning is not a new phenomenon to the traditional communities (*Masyarakat Adat*) in Indonesia, especially the matrilineal *Minangkabau* people who rely on their agricultural land for economic transactions. Based on the national law, customary law (referred to as *Adat* Law hereafter) is to prevail over agrarian issues in Indonesia. But even so, agrarian issues remain under the influence of national law. This study discusses the management of agricultural land pawning in the matrilineal *Minangkabau* society according to national, *Adat*, and Islamic laws. Despite its popularity, the *Adat* law approach in dealing with land issues, especially agricultural land pawning, has not been well accommodated under National Law. This paper investigates how agricultural land pawning is regulated in Indonesia, with a focus on the *Minangkabau* society in West Sumatra. This paper does not seek to promote one legal system over another, but instead, it intends to promote legal certainty in agricultural land pawning in West Sumatra. To show how the lack of legal certainty can lead to confusion and conflict, this study relies on the contradicting verdicts of an agrarian conflict case from lower courts to the Supreme Court. The study reveals that the contradiction between national agrarian laws, *Minangkabau Adat* law and West Sumatra local Regulation No. 16/2008 on Communal Land Tenure causes confusion within the community and the judiciary. Legal certainty is crucial to strengthening the rule of law and democracy in Indonesia, and the conflicting interpretations of agrarian laws belittle this concept. This study suggests that one way to deal with legal uncertainty regarding agrarian law in West Sumatra, and throughout Indonesia, is to promote a stronger and more just decentralization, which is increasingly important as the country faces the question of legal unification. The suggested decentralization effort would leave local issues to the authority of local legislations.

Keywords: legal certainty; agricultural land pawning; matrilineal *Minangkabau* society

1. Introduction

Land administration has always been a delicate issue throughout the history of Indonesia, a country where a significant number of the population lives a pastoral life [1]. Land is one of the most important productive assets and sources of livelihood for a vast majority of the Indonesian population, whose main income is derived from agricultural activities. As a valuable asset, land, especially agricultural land, is used as collateral by Indonesians to secure loans from banks or private money lenders. This phenomenon is known to the Indonesian people as *gadai tanah pertanian*. Nagarajan Geetha et al. (1991) define agricultural land pawning as a situation in which the owner of land temporarily transfers his/her cultivation rights to a loan provider who agrees to return the land after it has been redeemed by the land owner or anyone acting on his or her behalf [2]. Djaren Saragih

(1982), on the other hand, argues that land pawning is a transaction in which a landowner hands over their land to another person as security for a loan provided that the land is returned to the landowner after the loan has fully been paid off [3]. Article 33 section 3 of the 1945 Constitution of the Republic of Indonesia says that the earth, space, water, and natural resources shall be controlled by the state for the greatest prosperity of the Indonesian people. To achieve this goal, the national government passed Law No. 5/1960 on the Basic Principles of Agrarian Law (commonly referred to as the Basic Agrarian Law or *Undang-Undang Pokoh Agraria* (UUPA)) to deal with land issues throughout the Indonesian archipelago. Article 5 of Basic Agrarian Law prescribes that issues related to land, water, forest, and space shall be dealt with through *Adat Law* insofar as it does not conflict with interests of the state such as national unity, Indonesian socialism, or Islamic Law. However, land, forest, water, and space issues remain under the control of national law [4]. In other words, despite the national government's effort to recognize and respect traditional communities' *Adat* laws, agrarian issues remain under the influence of the national law. This is not significantly different from the Dutch colonial administration. It is important to note that not only do some provisions of the Basic Agrarian Law are also at odds with article 7 of the West Sumatra Local Regulation No. 16/2008 on Communal Land Tenure, which states that communal land in West Sumatra shall be regulated by *Adat* law.

Law No. 56 Prp of 1960 on the Determination of Agricultural Land Area is a good example of how national law directly contradicts *Adat* Law. Law No. 56 says that after seven years of the pledge, the agricultural land must be returned to the owner by the pawnbroker without additional costs [5]. The Supreme Court supported this national law in Supreme Court Decision No. 903 K/Sip/1972 decided on October 10, 1974. The *Minangkabau Adat* Law, however, says the very opposite of the provision of this law. In fact, according to the *Minangkabau* culture, a pawnbroker may require additional cost from the property owner if he or she fails to pay off the debt within the specified timeline. Related to this, Djaren Saragih (1984) argues that, "in principle, the mortgage must fully be returned at once at the end of the contract and all remaining debt must be paid off by the debtor by the last mortgage payment" [3]. This contradiction between the national law and *Adat* Law gives the impression that there is a dichotomy in the legal system regarding agricultural land pawning in Indonesia.

The situation is further complicated in West Sumatra, where West Sumatrans believe that *Adat* Law complies with Islamic Law. As evidence, a *Minangkabau* proverb says: "*Adat basandi Syarak, Syarak basandi Kitabullah, Syarak mangato, Adat mamakai*", which means that custom is to comply with the values of Islam, which in turn is rooted in Al-Quran [6]. While the provisions of the national legislation and *Adat* law contradict one another, Islamic Law remains silent on the validity of agricultural land pawning. As a result of this grey area in legal systems, not only is the community confused as to which legal system to follow, but district court judges also struggle to decide which legal system should prevail on land matters in general. District court judges often reach ambiguous decisions on land issues, especially in West Sumatra where a vast majority of land remains under the control of the community. These blocks of communal lands in West Sumatra are referred to as *tanah ulayat*, and they are managed by the traditional local government, *pemerintah nigari* [1].

This paper seeks to provide an understanding of the differences in land pawning policies and regulations under national, *Adat*, and Islamic law. In so doing, the paper intends to point out where discrepancies lie between these three legal systems in order to strengthen legal certainty, a concept precious to any legal system in the world. This is crucial to prevent civil judges from reaching contradicting decisions over agricultural land pawning issues in Indonesia, which is especially important under the *Minangkabau* community's Islamic law perspective. Land reform and land-related issues in Indonesia have been the subjects of much discussion and research by both Indonesian and foreign scholars. Some of the most cited scholars in this field are Franz and Keebet von Benda-Beckman (2013), Jacqueline Vel, Kurnia Warman, Iskandar Kemal, Afrizal, Yando Zakaria, Yance Arizona, Adriaan Bedner, Paul Gellert, Andiko, Martua Sirait, Sandra Moniaga, Andrew Rosser, and Kristina Grossman. The studies of most of these scholars focus on legal pluralism, the empowerment of *Adat* law and *Adat* communities, land tenure and land conflicts in Indonesia and specifically West

Sumatra. A discussion on the socio-legal implications of agricultural land pawning in West Sumatra is hardly found in the work of these scholars. The difference between the present study and the existing literature on agrarian issues in Indonesia is that it focuses on agricultural land pawning in West Sumatra, while most of the leading studies are mainly concerned with land issues from a broader perspective. As argued at the outset of this paper, this study does not seek to promote one legal system over others, but instead, it intends to promote legal certainty in agricultural land pawning in West Sumatra. To show how the lack of legal certainty can lead to confusion and conflicts, this study relies on the contradicting verdicts of an agrarian conflict between lower courts and the Supreme Court. To address the main issue, the paper begins with a discussion on the management of agricultural land pawning under the *Minangkabau Adat* law, National law, and Islamic law. The paper then ends with an analysis of the interaction of *Adat*, national, and Islamic laws in the management of agricultural land pawning in the province of West Sumatra.

2. Materials and Methods

This is a socio-legal research that investigates the management of agricultural land pawning in the *Minangkabau* matrilineal society in West Sumatra Province, Indonesia. The socio-legal approach suggests that the analysis of law is directly associated with the analysis of the social condition to which the law applies, and should be put into the perspective of that situation by examining the role that the law plays in the creation, maintenance, and/or change of the condition [7]. Socio-legal methodology generally involves a contextual analysis of the law and asks, how does law operate in society and what are the implications of that law? A socio-legal approach goes beyond legal texts and supplements legal analysis. It is either multidisciplinary or interdisciplinary. To address the research questions, this study uses both descriptive and evaluative approaches. The Primary data involved in the present study consist of Focus Group Discussions (FGDs), in-house-surveys, and interviews with 35 landowners, 28 traditional community leaders, and 22 pawnbrokers (sometimes referred to as investors as they use the land for economic activities). Focus group discussions were conducted with small groups of farmers, traditional community leaders such as *penghulu*, *ninik mamak*, and *dato*, and landowners in Payakumbuh city and its surrounding areas, and in *Nagari Batuhampar* (please refer to Figure 1). These individuals were asked to voice their concerns and provide suggestions for the legal question at issue. Face-to-face interviews were held with all parties involved who agreed to either have their voice recorded or the interviews videotaped. In-house-surveys consisting of multiple-choice questions were also used to gather information from respondents who were unable to participate in both face-to-face interviews and focus group discussions. The secondary data for this paper is mainly derived from legal materials, which include regional and national laws, regional and national regulations, and land case rulings. The respondents involved in this study were determined by purposive sampling based on the research objectives. Both primary and secondary data were examined and processed according to each research problem formulation, then presented descriptively. The final objective of data analysis is to draw conclusions in accordance with the appropriate legal options for the realization of a just and fair pattern of agricultural land pawning to improve the well-being of both farmers and pawnbrokers in West Sumatra.



Figure 1. Map of the Research Areas.

3. Results

3.1. Understanding of Land Pledge and Mortgage

There are two types of land transactions within the matrilineal *Adat* Law, namely land transactions and land-related transactions [8]. A land transaction only includes the land, while a land-related transaction's object is anything related to land but not the land itself. Agricultural land pawning is considered a land transaction. This is different from mortgage rights, a legal agreement by which a bank lends money at interest in exchange for taking the title of the debtor's property. A mortgage right would include the condition that the conveyance of title becomes void upon the payment of the debt; as long as the debt has not been paid off, the land will remain under the control of the mortgage holder (Government Regulation In lieu of Law No. 56/1960). A mortgage, a type of secured loan, is a security interest in a piece of real property in exchange for the extension of a loan. When a borrower seeks financing from a lender in a mortgage arrangement, the borrower transfers his interest

in the property to the lender for the length of the loan. Once the borrower pays back the loan in full, the lender then transfers the interest in the property back to the borrower (the landowner). In the event that the borrower fails to repay the loan in full, the loan defaults and the lender takes complete ownership of the property. A mortgage is not a loan, but rather an interest the lender receives in the house for the duration of the loan repayment. This is different from a land pledge, which is used to secure funds. Land pawning is when a landowner temporarily relinquishes his/her cultivation rights to a pawnbroker in exchange for money. This transaction takes place on the condition that the land will be returned to the owner when the landowner pays off the money borrowed. Conversely, a mortgage is a security interest secured against the property, which is the pledge. It is important to note that both the national law and *Adat* law agree that what is transferred in agricultural land pawning is not land ownership right, but cultivation rights. Thus, the pawner keeps ownership rights over a pawned land. This is what differentiates agricultural land pawning from other object pawns whereby the pawnee enjoys ownership rights should the pawner fail to redeem the pawned object. The pawnee only enjoys cultivation rights. To further clarify, Soeroyo Wignyosoebroto argues that the subjects of land transactions include land pawning, while land-related transactions concern land rent, land security and the right to build on the land [8].

3.2. Agricultural Land Pawning Management in Matrilineal Adat Law

According to the *Minangkabau Adat* law, the duration of a land pawn depends only on whether or not the landowner has fully paid off the loan plus interest. The *Minangkabau Adat* Law also specifies that although the pawnbroker may not force the landowner to pay the interest rate, they are entitled to sublet the land to a third party regardless of the value of the original pawn. In West Sumatra, most immovable objects, such as land, are pawned based on *Adat* Law. *Pusako* assets and livelihood assets are the two types of asset are the objects of a pawn. *Pusako* assets are assets or properties inherited by a family/clan from their ancestors. A *pusako* property or asset is owned collectively by members of a family/clan and it is in the form of rice fields, farms, fish ponds, diamonds, silver, gold, and other valuable possessions. Livelihood assets are assets acquired by members of a clan/family through their enterprise based on Islamic Inheritance Law (*faraidhi*). Nearly every block of land in West Sumatra is a *pusako* property, which is owned and handed down collectively from generation to generation through the mother line (*padusi*), while a livelihood asset is owned and handed down individually [9]. A *pusako* property cannot be sold (*Tajua indak dimakan bali*, meaning no buyer for land on sale), it can only be pawned after a consensual meeting of clan leaders. No single family member can claim ownership over *pusako* property, as it is owned collectively. Family members only have the rights to use *pusako* property after receiving permission from the clan leaders, or the *ninik mamak*. These use rights include the right to cultivate the land, the right to harvest and sell crops, the right to build houses and the right to fish and hunt. However, should a disaster or misfortune hit a family, a *pusako* asset such as land may be pawned for money or gold to solve the situation. In addition, a *pusako* property can also be pawned for four reasons: (1) to support an aged widow or a spinster or to pay for the wedding of an aging woman if she or her parents cannot afford it (referred to in *Minangkabau* as "*gadiah gadang indak balaki*"); (2) to organize funerals (*mayik tabujua di ateh rumah*); (3) to build a mosque or to renovate a traditional house, or *rumah gadang*; (4) to organize the ceremony of clan leader appointments. The land pawned in West Sumatra is mostly used for small-scale plantations or cultivations. In West Sumatra, only small farmers seeking to secure funds to take care of themselves or their loved ones generally practice land pawning. The *Minangkabau* people in West Sumatra have always relied on *Adat* law to pawn agricultural land when needed. This does not just apply to West Sumatra but also throughout Indonesia. In fact, it is specified in the Indonesia legal system that for agrarian issues, *Adat* law is to apply (Basic Agrarian Law No. 5/1960). It is important to note that, *Adat* Law makes it very clear that a pawned land can only be returned to the landowner only after they have paid off the debt and any interest to the pawnbroker. This *Adat* regulation is known as "*salang kumbali*, the pawn of *batauri*" [9]. According to *Adat* Law, until the landowner pays off the debt, the land will remain in the

possession of the pawnbroker. No matter how long it takes, the pawn must be redeemed at a price equal to the pawn when the deal was reached. Should a landowner die, his heirs would bear the burden. As the *Minangkabau* saying goes: “*gadai batabusan salang bapulangan*” meaning a pawned land must be redeemed no matter how long it takes. However, this long-standing *Minangkabau* tradition is challenged by Law No. 56 Prp/1960 on the Determination of Agricultural Land Areas.

3.3. Agricultural Land Pawning Management in National Law

The government of the Republic of Indonesia made agrarian reforms one of its priorities after gaining independence from both the Dutch and the Japanese in 1945. This followed logically, as Indonesia was a post-colonial developing nation with a vast coverage of arable land, these reforms included the enactment of laws dealing with land pawning such, as the Basic Agrarian Law No. 5/1960. This law was intended to provide legal certainty and unification, and also change the societal structure from feudalism and colonialism to a just and prosperous society [10]. Because the Basic Agrarian Law only contains basic regulations, as the name implies, the national government needed to supplement the law with a set of regulations and subsequent legislation. Hence the enactment of Law No. 56/1960 on the Determination of Agricultural Land Area, which, in turn, was supplemented with the Government Regulation No. 224/1961 on Land Reform objects, and the Government Regulation No. 10/1961 on Complete Village Measurements. Similarly, Presidential Decree No. 131/1961 formed a national Land Reform Committee, which was subsequently refined through the Presidential Decree No. 263/1964. The Land Reform Committee was established at the Provincial and District levels in the framework of regional autonomy. Regulations dealing with land pawning also include Article 1150 of the Indonesian Penal Code and the Decree of the Ministry of Agriculture and Agrarian Affairs No. 20/1963 on the Guidelines for the Settlement of Pawn Issues. The Basic Agrarian Law clearly states that agrarian law that applies to the earth, water, space above, and wealth contained therein is to be the *Adat* Law that existed before the arrival of colonizers. Article 7 of Law No. 56 Prp/1960 on the Determination of Agricultural Land Area, which supplements the Basic Agrarian Law holds that whoever possessed a pawned agricultural land for seven years or more after the issuance of the law is obliged to return the land to the owner within a month after the existing crops have been harvested with no right to demand payment of ransom. The article also says that the owner of any pawned land that has not yet lasted seven years by the time this law entered into effect may ask the broker to return the land after harvest following the payment of the debt based on the following formula:

$$(7 + 1/2) - \text{length of Pawn} \\ \times \text{among of money}$$

Legislation concerning land tenure in general and agricultural land pawning, in particular, is outlined the following Table 1.

Table 1. Land Legislation.

No	Legal Instruments	Year of Enactment
1	Article 33 section 3 of the 1945 Constitution of the Republic of Indonesia	1945
2	Law No. 5/1960 on the Basic Principles of Agrarian Law	1960
3	Law No. 56 Prp of 1960 on the Determination of Agricultural Land Area	1960
4	West Sumatra Local Regulation No. 16/2008 on Communal Land Tenure	2008
5	Government Regulation No. 224/1961 on Land Reform Objects	1961
6	Government Regulation No. 10/1961 on Complete Village Measurements.	1961
7	Presidential Decree No. 263/1964 on National Land Reform	1964

3.4. Agricultural Land Pawning Management in Islamic Law

In *Fiqh* literature, pawning is interpreted as the use of goods or properties as collaterals for debt, or as substitutes, if the debt cannot be reimbursed (Al Khotib ash Syarbini, *Mughni al Multaj*, Beirut Dar

Al Kutub al Ilmiyah, juz: 3, p: 38). The majority of scholars believe that pawns are permissible either verbally or otherwise, as the Prophet Muhammad pawned his armor to Jews in Medina. However, Islamic Law only refers to movable objects in the context of pawning. The Al-Quran, the source of Islamic Law, does not regulate land pawning. Much of the information regarding this phenomenon consists of interpretations of Islamic Law scholars. According to Abdurahman Al Maliki, Muslims can obtain land through six methods: buying and selling, inheritance, grants, *ihya al mawat* (reviving dead land), *tahjir* (making boundaries or fences on dead land), and from the state to the community (*iqtha*). Once the land is owned, the land can be managed and utilized properly. Land pawning is known in Islamic Law as *rahn tasjily*, and it is defined as a land ownership right that entitles the owner to exploit the land for business purposes. For Islamic jurists, land pawning is a debt agreement with guaranteed land. They argue that mortgage is included in the category of land-related transactions and is an asset agreement in the form of debt. Islamic Law has always remained rather silent on the issue of land pawning [11]. However, Islamic scholar Sulaiman Rasyid argues that despite the lack of clear regulations on land pawning under Islamic law, it is religiously wrong for someone who has temporary control or possession of a pawned land to entirely profit from the crop and other products contained therein. Rasyid does not just label this condition as illegitimate and *haram*, he also believes that this is a type of usury [12]. Islamic law does recognize two types of agricultural land transactions, *al-muzara'ah* and *al mukhabarah*. Under *al-muzara'ah*, the landowner gives his or her land to a farmer, referred to as *muzara'ah*, who cultivates the land to receive a part of the yield while the cost of work and seeds is borne by the landowner. This yield is usually one-half, one third, or one quarter. The same principle applies to *al mukhabarah* except that the cost of work and seeds is borne by the worker (*mukhabarah*). It is noteworthy that despite its silence on land pawning issues, Islamic Law land policy, in general, is in line with that of the *Minangkabau Adat Law*.

4. Discussion

4.1. Legal Certainty in Agricultural Land Pawning

Legal certainty requires that all laws be sufficiently precise to allow citizens to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [13]. This requires legislation to be worded so that it is understandable to those who are subject to the law. In the civil law tradition, legal certainty is defined in terms of maximum predictability of officials' behavior. In the common law tradition, legal certainty is often explained in terms of citizens' ability to organize their affairs in such a way that does not break the law. In both legal traditions, legal certainty is regarded as a grounding value for the legality of legislative and administrative measures taken by public authorities [14]. The legal philosopher Gustav Radbruch sees legal certainty, justice, and purposiveness as the three fundamental pillars of the law [15]. The principle of legal certainty further requires that laws and decisions are public, definite and clear, the decisions of courts are binding, the retroactivity of laws and decisions are limited, and legitimate interests and expectations are protected. Legal certainty is the principle that guarantees that the law will not be used arbitrarily and it is a key element to the rule of law. The absence of legal certainty is characteristic of a legal system that has become a tool of a political elite [16] or that has simply fallen into decay to the point that there is a wide difference in decisions from one district court to another, as shall be discussed later on. As agricultural land pawning affects a vast majority of the population, it is crucial to ensure legal certainty in agrarian law not only to create a safe business environment but more importantly to strengthen the rule of law and democracy in Indonesia. The following discussion on the contradiction between *Adat* law and national law, especially Law No. 56/1960 on the Determination of Agricultural Land Area, displays the lack legal certainty in agricultural land pawning, a business activity on which many Indonesians depend.

4.2. The Contradiction Between National Law and Adat Law in Agricultural Land Pawning

When discussing agrarian law in Indonesia, it is important to note that land issues have always been under the influence of *Adat* law (Article 5 of the Basic Agrarian Law Law N. 5/1960). However, from the Dutch colonial administration to the present, *Adat* law has been ignored when dealing with agrarian issues involving serious economic interests [17]. It is important to note, as previously discussed, that this Basic Agrarian Law has contributed to the marginalization of the *Adat* law communities by imposing several restrictions. This law recognizes the land rights of *Adat* communities under the term *hak ulayat* with the following conditions: (1) as long as such communities still exist, (2) it may not conflict with the national interest and the State's interest, and (3) shall not contradict the laws and regulations of higher levels. This conditional recognition with strictly set requirements eventually led to the disappearance of the indigenous peoples' land rights [18]. The above discussion on how agricultural land pawning is dealt with by the three strands of law displays not only the government's disrespect of *Adat* law, especially *Minangkabau Adat* law, but also the existence of contradictions between the three legal systems. The *Minangkabau Adat* law clearly states that a pawned land can only be returned to the landowner only after he or she has paid off the debt and any interest to the pawnbroker. No matter how long it takes, the land will not be returned to the owner until the money borrowed along with the interest is completely paid back. In direct contradiction, National Law through Law No. 56 Prp/1960, the same law which says that *Adat* law prevails over agrarian issues, prescribes that whoever has possessed a pawned agricultural land for seven years or more must return the land to the owner within a month after the existing crops have been harvested, with no right to demand payment of ransom. According to this national law, the land must be returned to its rightful owner with no interest whatsoever because it assumes that the pawnbroker has profited from cultivating the land. Law No. 56 Prp/1960 goes even further to say that a landowner may demand the return of his land even if the pawn has lasted for less than 7 years provided that he redeems the pawn. This is in contradiction with *Adat* law. The 1960 Basic Agrarian law views the issue of land pawning as a form of borrowing or lending whereby a property represents the security for the creditor and a commitment for the debtor.

Law No. 56 Prp/1960, which regulates land pawning in Indonesia, is detrimental to pawnbrokers. In fact, pawnbrokers hardly get all their money back after cultivating the land for 7 years. Whether or not a pawnbroker gets all their money back depends on many factors including the size of the land, operating expenses, and the amount of money lent. The wider the size of the land, the more crop it is likely to yield. However, revenues may shrink once the operating expenses are deducted. As a consequence, many pawnbrokers end up lending more money than they actually get back. In most villages of West Sumatra, including *Nagari Batuhampar*, in 50 Kota Regency, the average price of land pawning is around Rp. 50 million (about \$3600) for earning around Rp 4 million (about \$286) per harvest. If harvested two times a year, the land would yield about Rp. 56 million (about \$4000) within seven years with only Rp. 6 million (about \$430) as the pawnbroker's net revenue. But if operational costs are deducted from this sum, then not only will the price of the mortgage not be covered, but the pawnbroker will make no profit whatsoever. This has discouraged many pawnbrokers from lending money to farmers throughout Indonesia, including West Sumatra. As argued at the outset of this paper, for a vast majority of the *Minangkabau* people land is a valuable asset that they can use to secure loans. One of the reasons why farmers in West Sumatra are reluctant to comply with Law No. 56 Prp/1960 is that it discourages pawnbrokers to lend them money. Farmers have few alternatives and the law makes it harder for them to pawn their land to the banks. In fact, according to the article 1150 of the Indonesian Criminal Code, only movable objects can be pawned. This means that farmers cannot use their land to secure loans from the banks. It is no wonder why they are reluctant to obey a law that is meant to protect them. We suggest that one way to deal with this legal uncertainty in agricultural land pawning is to implement a more just and stronger decentralization whereby local issues are dealt with by local legislations.

4.3. Cooperation Between Adat Law and Islamic Law

Discussing land pawning in West Sumatra, one must keep in mind that the *Minangkabau* Adat law provisions regarding land issues do not and may not contradict those of Islamic Law regarding the same issue. This is because the *Minangkabau* people believe that both are intertwined (*Adat basandi syarak, syarak basandi Kitabullah*). The *Minangkabau* cultural philosophy in the old saying *Adat basandi syarak, Syarak Basandi Kitabullah* is one of the philosophies of life held in the *Minangkabau* community, which makes Islam the main foundation of social life. *Adat Basandi Sarak, Sarak Basandi Kitabullah* represents the identity, and lifestyle of the *Minangkabau* people. It is both a cultural and religious value highly followed and applied by religious and community leaders such as *penghulu, dato*, and *ninik mamak* when dealing with religious and social issues including land pawning. The method usually referred to in dealing with issues throughout Indonesia is deliberation through consensus or *Musyawarah mufakat*. This is one example of how interconnected *Adat* and Islam are in Indonesia. The sense of gratefulness is another reason why *Minangkabau* farmers side with Islamic Law and neglect Law No. 56 Prp/1960. In fact, the tradition of the *Minangkabau* people holds that a good deed must always be paid back. Farmers see the pawnbroker not necessarily as a businessperson but as a “brother” or “savior”. For them, a good deed must always be returned to the benefactor no matter what [19]. Therefore, land pawning is seen not just as a business but as mutual assistance within the community. This perception is believed to go hand in hand with Islamic principles regarding mortgage (*Adat basandi syarak, syarak basandi Kitabullah, syarak mangato*, and *Adat mamakai*, which means that custom is rooted in Islam, which, in turn, is rooted in Al-Quran). This traditional way of dealing with land issues, especially land pawning, has been the legal culture of the *Minangkabau* people for a very long time. It was not questioned then and should not be a problem now. The fact that Islamic law remains silent on the issue of agricultural land pawning proves that *Adat* law prevails over agrarian issues in Indonesia, especially in West Sumatra [20]. In a democratic rule of law country such as Indonesia, the government has the authority to make the law, but it must do so in respect and consideration for *Adat* law, the living law. Failing to do so would result in not only yielding ineffective law but also creating confusion and uncertainty in the community as it opens the door for conflicting and overlapping laws and court decisions. Evidence of this is the court ruling in the land pawning that took place in Solok, a town in West Sumatra. In 1926, land as wide as 10,775 m² was pawned in Pasir, a village located in Solok Regency at an estimated price of 100 grams of gold (estimated to Rp. 62 million or about \$4435). The transaction occurred between Mr. Kea as the plaintiff and landowner and Mr. Bugih as the defendant and pawnbroker. The plaintiff sued the defendant demanding that his land be returned with no interests attached. As the pawnbroker refused to comply, the matter was taken to Solok District Court for litigation. In its decision No. 05/Pdt.G/2003, the court ruled in favor of the land owner’s demand, citing Law No. 56 Prp/1960 and arguing that because the pawn has lasted 77 years, which is beyond the time limit set by the law, the land must be returned to its owner without additional fees. Unsatisfied with the ruling, and perhaps knowing that this was inconsistent with *Adat* law, the defendant appealed the ruling at the High Court in Padang, which, in turn, took his side in its ruling No. 108/PDT/2004/PT.PDG. However, the matter did not end here as the plaintiff appealed to the Supreme Court, which through the verdict MA No. 1540 K/PDT/2005, upheld the ruling of Solok District Court and nullified the verdict of Padang High Court. But shortly after the decision was carried out, the Supreme Court, after a judicial review requested by the defendant, dismissed its first verdict and upheld the ruling of Padang High Court through the verdict No. 394 PK/PDT/2011. This case shows inconsistency in dealing with a case not only between a lower court and a higher court but also within the same high court. Inconsistency may exist between the verdict of two courts over the same mater, but for the Supreme Court to dismiss its own verdict over the same case is a manifestation of legal uncertainty at the highest level.

5. Conclusions

This study notes that even though agricultural land pawning has been practiced within the *Minangkabau* matrilineal community in West Sumatra for a long time, overlapping regulations from *Adat*, national, and Islamic laws prevent it from continuing adequately. The pawning concerns mainly land and land-related assets such as crops. The land pawned in West Sumatra is mostly used for small-scale plantations and cultivations. In West Sumatra, Land pawning is only practiced by small farmers who generally pawn their land to secure funds to take care of themselves or their loved ones. Generally, livelihood property and *pusako* land are the objects of a pawn. A *pusako* asset consists of land which is handed down from generation to generation through the mother line and which is commonly owned by the community as a whole. While livelihood assets are assets acquired by members of a clan/family through their own enterprise in accordance with the Islamic Inheritance Law. Nearly every block of land in West Sumatra is a *pusako* property which is regulated in accordance with *Adat* Law. However, despite the fact that *Adat* Law is identified by the National law (the 1960 Basic Agrarian Law) as the primary law to deal with agrarian issues throughout Indonesia, many of the *Adat* Law provisions remain challenged by the government over some agrarian issues, especially agricultural land pawning in West Sumatra. Firstly, *Adat* Law prescribes that immovable objects such as land may be pawned, while Article 1150 of the Indonesia Criminal Code says otherwise. Secondly, while *Adat* Law requires that the pawned land to be returned only after it has fully been redeemed by the original owner, Article 7 of Law No. 56 Prp of 1960 on the Determination of Agricultural Land Area says that any law that has been pawned for a period of seven years must be returned to the owner without any interest whatsoever. This state of legal uncertainty leads to not only confusion and inconsistency in court rulings over land pawning issues but also land-related conflicts and chaos within the community as to which legal system one must turn to in dealing with agrarian problems. This also leads to a situation whereby the weak and poor and taken advantage of, as pointed out by Leawood [15]. As agricultural land pawning affects a vast majority of the population in West Sumatra, it important to guarantee legal certainty not only for creating a sound and safe business environment but also and more importantly for strengthening the rule of law and democracy in Indonesia. One way to deal with this legal uncertainty in agricultural land pawning not only in West Sumatra but throughout Indonesia, as the country faces the question of legal unification, is to implement a more just and stronger decentralization whereby local issues are best dealt with by local legislations.

Author Contributions: Analysis, Z.N. and H.T.; investigation, resources and data curation, Z.N.; writing—original draft preparation, Z.N.; writing—review and editing, H.T.

Funding: This research received no external funding.

Acknowledgments: The Authors are indebted not only to the Faculty of Law Andalas University Padang but also to everyone who made this research possible.

Conflicts of Interest: The authors declare no conflict of interest.

Laws and Regulations

- The 1945 Constitution of the Republic of Indonesia.
- The Indonesian Penal Code.
- Law No. 56/1960 on the Determination of Agricultural Land Areas.
- Law. No. 5/1960 on the Basic Principles of Agrarian Law.
- Government Regulation No. 224/1961 on Land Reform Objects.
- Government Regulation No. 10/1961 on Complete Village Measurements.
- Presidential Decree No. 131/1961, and the Presidential Decree No. 263/1964 on National Land Reform.
- West Sumatra Local Regulation No. 16/2008 on Communal Land Tenure

Court Verdicts

Solok District Court Verdict No. 05/Pdt.G/2003.
 Padang High Court Verdict No. 108/PDT/2004/PT. PDG.
 Supreme Court Verdict No. 1540 K/PDT/2005.
 Supreme Court Verdict No. 394 PK/PDT/2011.
 Supreme Court Verdict No. 903 K/Sip/1972 dated 10-10-1974.

References

1. Tegnan, H. Legal pluralism and land administration in West Sumatra: the implementation of the regulations of both local and nagari governments on communal land tenure. *J. Leg. Plur. Unoff. Law* **2015**, *47*, 112–123. [[CrossRef](#)]
2. Nagarajan, G.; Quisumbing, A.; Otsuka, K. Land pawning in the Philippines: An exploration into the consequences of land reform regulations. *Dev. Econ.* **1991**, *29*, 125–144. [[CrossRef](#)]
3. Saragih, D. *Pengantar Hukum Adat Indonesia*; Tarsito: Bandung, Indonesia, 1984; p. 102.
4. Harsono, B. *Undang Undang Pokok Agraria, Sejarah Penyusunan, Isi dan Pelaksanaannya*; Djambatan: Jakarta, Indonesia, 1970.
5. Saragih, D. *Pengantar Hukum Adat Indonesia*; Tarsito: Bandung, Indonesia, 1982; p. 104.
6. Yaswirman. *Hukum Keluarga, Karakteristik dan Prospek Doktrin Islam dan Adat Dalam Masyarakat Matrilineal Minangkabau*; Rajawali Pers: Jakarta, Indonesia, 2011; p. 115.
7. Schiff, D.N. Socio-legal Theory: Social Structure and Law. *Mod. Law Rev.* **1975**, *39*, 287–310. [[CrossRef](#)]
8. Wignydipuro, S. *Pengantar dan Asas-Asas Hukum Adat*; Gunung Agung: Jakarta, Indonesia, 1983; pp. 206–212.
9. Yakub, N. *Minangkabau Tanah Pusaka, Buku Ketiga*; Pustaka Indonesia: Bukittinggi, Indonesia, 1991; p. 23.
10. Wiradi, G. Sejarah UUPA-1960 dan Tantangan Pelaksanaannya Selama 44 Tahun. In Proceedings of the FSPI Seminar, Jakarta, Indonesia, 3 September 2004.
11. Anshori, A.G. *Pokok-Pokok Hukum Perjanjian Islam di Indonesia*; Citra Media: Yogyakarta, Indonesia, 2006; p. 77.
12. Rasyid, S. *Fiqh Islam*; cet. Ke 55; Sinar baru Algensindo: Bandung, Indonesia, 2012; p. 312.
13. Maxeiner, J.R. Some realism about legal certainty in the globalization of the rule of law. *Houst. J. Int. Law* **2008**, *31*, 27–46.
14. Claes, E.; Devroe, W.; Keirsbilck, B. *Facing the Limits of the Law*; Springer: Berlin/Heidelberg, Germany, 2009; pp. 92–93.
15. Leawood, H. Gustav Radbruch: An Extraordinary Legal Philosopher. *Wash. Univ. J. Law Policy* **2000**, *2*, 489.
16. Weiss, U. The Regressive Effect of Legal Uncertainty. *J. Disput. Resolut.* **2019**, *2019*, 149–185.
17. Von Benda-Beckmann, F.; Von Benda-Beckmann, K. *Political and Legal Transformations of an Indonesian Polity the Nagari from Colonisation to Decentralisation*, 1st ed.; Cambridge University Press: Cambridge, UK, 2013; p. 113.
18. Arizona, Y.; Cahyadi, E. *The Revival of Indigenous Peoples: Contestations over a Special Legislation on Masyarakat Adat*; Göttingen Studies in Cultural Property; Göttingen University Press: Göttingen, Germany, 2013; Volume 7.
19. Putri, D.L. Pelaksanaan Gadai Tanah Pusaka di Sumatera Barat (Studi Kasus di Kanagarian Koto Berapak Kecamatan Bayang Kabupaten Pesisir Selatan). *JOM Fak. Huk.* **2015**, *2*, 11.
20. Warman, K. *Hukum Agraria pada Masyarakat Majemuk*; Huma: Jakarta, Indonesia, 2010; p. 52.



© 2019 by the authors. Licensee MDPI, Basel, Switzerland. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>).

ORIGINALITY REPORT

0%	%	%	%
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

Exclude quotes	On	Exclude matches	< 3%
Exclude bibliography	On		