

## Granting Cultivation Rights on Communal Land According to Indonesian Land Law

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**ABSTRACT:** Land law in Indonesia regulates the customary rights of customary law communities. Communal rights were only recognised by the Minister of Agrarian Affairs and Spatial Planning Regulation No. 10/2016 on Procedures for Determining Communal Rights to Land of Customary Law Communities and Communities Located in Certain Areas. The regulation, which is expected to be a guideline in resolving conflicts between indigenous peoples, actually creates a conflict of norms. Through the National Land Agency, the government issued communal rights certificates as recognition and respect for customary law communities in West Papua. This shows that communal rights can be registered according to the laws and regulations in the field of land registration. In addition, the land can be cooperated with third parties or investors by granting Cultivation Rights or Building Rights. With this, it is necessary to study further the granting of communal rights certificates according to land law in Indonesia and the Right to Cultivate on communal land according to land law in Indonesia.

**KEYWORDS:** Communal Rights, Cultivation Rights, Land Law.

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### INTRODUCTION

There is a very close relationship between the community and the land it occupies, which stems from a *religio-magical* view. Therefore, the legal community obtains the right to control the land, utilise the land, collect products and so on. The right of the law community over the land is called hak pertuanan or hak ulayat, and in the literature this right is called *beschikkingsrecht* by Van Vollenhoven.<sup>1</sup>

For indigenous peoples, land has an essential meaning because, by its nature, it is the only wealth object that, despite all the circumstances, is still in a stable state, sometimes even more favourable. In fact, the land is where the community lives, provides the community with a livelihood, is the place where the community members who die are buried and is also the place of residence for the community's guardians and the spirits of the community's ancestors.<sup>2</sup>

The recognition and regulation of customary rights are regulated in Article 3 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (hereinafter referred to as UUPA), that the implementation of customary rights and similar rights of customary law communities, as long as according to the reality they still exist, must be in such a way that it is in accordance with the interests of the National and the State, which is based on national unity and must not conflict with other higher laws and regulations.

In addition to the UUPA, customary rights are also regulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 5/1999 on Guidelines for the Settlement of Customary Law Communities' Customary Rights (hereinafter referred to as PMNA/KBPN No. 5/1999). The regulation provides a definition of Ulayat Rights as the authority according to customary law owned by specific customary law communities over certain areas that are the environment of their citizens to take advantage of natural resources, including land, in the area, for their survival and life, arising from outward and inward relationships that are hereditary and uninterrupted between the customary law community and the area concerned.

In accordance with the considerations in the preamble, PMNA/KBPN No. 5/1999 is expected to be able to provide guidelines that can be used as a guide in dealing with and resolving existing problems and carrying out land affairs in general in relation to the customary rights of indigenous peoples in the future.<sup>3</sup> However, the provisions in PMNA/KBPN No. 5/1999 regarding the registration of customary rights are contrary to the conditions in the UUPA. Ulayat rights are not land rights as stipulated in Article 16 of the UUPA.

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<sup>1</sup> Bushar Muhammad, *Pokok-pokok Hukum Adat*, Balai Pustaka, Jakarta, 2013, P. 103

<sup>2</sup> Soerojo Wignjodipuro, *Asas-asas Hukum Adat*, Sumur Bandung, Jakarta, 1983, P. 197

<sup>3</sup> Bhim Prakoso, *Pendaftaran Tanah Sistematis Lengkap Sebagai Dasar Perubahan Sistem Publikasi Pendaftaran Tanah*, Journal of Private and Economic Law, Vol. 1, No. 1, 2021, P. 66.

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PMNA/KBPN No. 5/1999 is no longer applicable after the promulgation of Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency No. 9/2015 on Procedures for Determining Communal Rights to Land of Indigenous Peoples and Communities Located in Certain Areas (hereinafter referred to as Regulation MATR/KBPN No. 9/2015), which has also been revoked by Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency No. 10/2016 on Procedures for Determining Communal Rights to Land of Indigenous Peoples and Communities Located in Certain Areas (hereinafter referred to as MATR/KBPN Regulation No. 10/2016).

In contrast to PMNA/KBPN No. 5/1999, MATR/KBPN Regulation No. 9/2015 and MATR/KBPN Regulation No. 10/2016 no longer recognise the term *hak ulayat*. The rights regulated in these regulations are communal rights, which are joint property rights over the land of a customary law community or joint property rights over land granted to communities located in forest or plantation areas.

If we look at the parent of MATR/KBPN Regulation No. 9/2015 and MATR/KBPN Regulation No. 10/2016, namely PMNA/KBPN No. 5/1999, the formulators of the two regulations equate customary rights with communal rights. This can be seen in the consideration letter b, namely that Indonesian land law recognises the existence of Communal Rights and similar ones from customary law communities, as long as, in reality, they still exist, as referred to in Article 3 of Law Number 5 of 1960 concerning Basic Agrarian Principles. As is known, Article 3 of the UUPA does not talk about communal rights but customary rights.

Customary rights and communal rights have different characters. *Ulayat* rights have a broader scope than communal rights. *Ulayat* rights have both public and private dimensions. Its public dimension can be seen from the authority of customary law communities to regulate:

- 1) Land/territory as a living space related to its utilisation including its maintenance;
- 2) The legal relationship between customary law communities and their lands; and
- 3) Legal actions related to the land of indigenous peoples.

Meanwhile, the civil dimension of *ulayat* rights appears in the manifestation of *ulayat* rights as communal ownership.<sup>4</sup> *Ulayat* rights are not land rights as intended in the UUPA. Instead, communal rights are understood as land rights.

Within the UUPA structure, the rights of customary law communities are regulated in Article 3 of the UUPA. The article mentions two objects, namely *hak ulayat* and other similar rights of customary law communities. The term communal rights is not recognised in the UUPA. The provisions on land rights regulated in Article 16 jo. Article 53 of the UUPA also does not regulate communal rights.

Until now, there has been no precise regulation of the concept of communal rights in the UUPA or the laws and regulations related to land registration and others. Communal rights are only minimally regulated in a ministerial regulation, but their existence has a significant impact. This has led to a conflict of norms between the LoGA and the laws and regulations under it.

In contrast to MATR/KBPN Regulation No. 9/2015, MATR/KBPN Regulation No. 10/2016 tries to provide convenience for customary law communities, namely that communal rights can be registered. According to Article 18 of MATR/KBPN Regulation No. 10/2016, after the determination of the customary law community, the communal right is submitted to the Head of the Land Office or the Head of the BPN Regional Office to determine and register the communal right on the land at the local Land Office.

All matters related to land registration are regulated separately in Government Regulation No. 24/1997 on Land Registration (hereinafter referred to as GR No. 24/1997), including the objects of land registration. According to Article 9 paragraph (1) of GR No. 24/1997, the objects of land registration include, among others: a) parcels of land held under ownership rights, business use rights, building use rights and use rights; b) land under management rights; c) *waqf* land; d) ownership rights over apartment units; e) mortgage rights; and f) State land. Based on this, communal rights are not an object of land registration.

The government through the Ministry of Agrarian Affairs and Spatial Planning (ATR)/National Land Agency (BPN), issued communal rights certificates as a form of recognition and respect for customary law communities in West Papua. In addition to being a form of recognition, the communal rights certificate is an effort to protect the existence of customary land. Furthermore, the Minister mentioned that investors can still invest in communal land. Investors can develop their businesses based on Cultivation Rights and Building Rights. So ownership remains in the hands of indigenous peoples, and investors only obtain Cultivation Rights or Building Rights.

It has also been stipulated in Article 20 of MATR/KBPN Regulation No. 10/2016 that communal rights granted to Masyarakat Hukum Adat have been registered as referred to in the provisions of laws and regulations in the field of land registration. This shows that there is a possibility of Cultivation Rights Title on communal land. Whereas according to Article 4 of Government Regulation No. 40/1996 on Cultivation Rights, Building Rights, and Land Use Rights (hereinafter referred to as PP No. 40/1996), Cultivation Rights can only be granted on State land.

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<sup>4</sup> Maria SW Sumardjono, "*Ihwal Hak Komunal atas Tanah*", Digest Epistema, Volume 6 Tahun 2016, P. 5.

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## RESEARCH METHODS

This research uses normative juridical research methods because this research tries to examine legal norms contained in applicable laws and regulations related to Land Law and related to communal rights, namely the Regulation of the Minister of Agrarian Affairs and Spatial Planning Number 10 of 2016 concerning Procedures for Determining Communal Rights to Land of Customary Law Communities and Communities Located in Certain Areas.

## DISCUSSION

### A. Characteristics of Cultivation Rights according To the Uupa and It's Implementing Regulations

There are several kinds of land rights that have been classified into three major groups, namely land rights that are permanent, temporary and those that will be determined by law. Each land right has different functions and characteristics. Hence Cultivation Rights have different purposes of use and characteristics from other land rights.

Cultivation Rights are regulated in Articles 28 to 34 of the UUPA. According to Article 28 paragraph (1) of the UUPA, Cultivation rights are the right to cultivate land directly controlled by the state within the period as referred to in Article 29 for agricultural, fishery or livestock enterprises. In other words, Cultivation rights are the right to cultivate land directly controlled by the state within a certain period of time, with the purpose of limited land use, namely in agriculture, fisheries and livestock businesses. In this case, PP No. 40/1996 adds the designation, namely for plantation business. However, this does not rule out the possibility of land that is not directly controlled by the state, provided that there are special conditions, namely that the legal subject is able to change the status of the land from land that is not directly controlled by the state to land that is directly controlled by the state, for example by land acquisition.<sup>5</sup>

The legal subjects of Cultivation Rights or those who can obtain Cultivation Rights according to Article 30 of the UUPA in conjunction with Article 2 of Government Regulation No. 40/1996 are:

1. Indonesian citizen;
2. Legal entities established under Indonesian law and domiciled in Indonesia

Based on the above provisions, there is no requirement that the legal subject must be a single Indonesian citizen, so it is possible for those with dual citizenship to have cultivation rights. It is further explained in Article 30 paragraph (2) of the UUPA in conjunction with Article 3 of Government Regulation No. 40/1996, that holders of Cultivation Rights of Way who do not meet the requirements as subjects of Cultivation Rights of Way, within 1 (one) year must relinquish or transfer their Cultivation Rights of Way to other parties who meet the requirements. If this is not done, the Cultivation Rights Title will be nullified by law and the land becomes state land.

One of the characteristics of Cultivation rights is the land area that has been determined by law. Article 28 paragraph (2) of the UUPA stipulates that Cultivation rights are granted on land with an area of at least 5 hectares, provided that if the area is 25 hectares or more, it must use proper capital investment and good corporate techniques in accordance with the times. From this provision, we know that Cultivation rights are not only reserved for large companies. Entrepreneurs with modest capital are also given the opportunity to do business in agriculture, plantations, fisheries and animal husbandry by using state land.<sup>6</sup>

The establishment of Cultivation Rights Title through an application for the granting of Cultivation Rights Title by the applicant to the Head of the National Land Agency through the head of the district/city land office.<sup>7</sup> Based on the application, a Decree on Granting Rights (SKPH) will be issued by the Head of the National Land Agency of the Republic of Indonesia, which is given the delegation of authority to grant Cultivation Rights. Provisions regarding the procedures and requirements for granting business use rights are further regulated by Presidential Decree.

However, in its implementation, the provisions regarding the granting of land rights are regulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency of the Republic of Indonesia No. 9/1999 on Procedures for Granting and Cancelling State Land Rights and Management Rights (hereinafter referred to as PMNA/KBPN No. 9/1999) *jo.* Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 2 of 2013 on the Delegation of Authority to Grant Land Rights and Land Registration Activities (hereinafter referred to as KBPN RI Regulation No. 2/2013).

The Decree Granting Cultivation Rights must be registered in the land book at the Regency/City Land Office. Cultivation Rights Title occurs since the Decree Granting Cultivation Rights Title is registered at the Regency/City Land Office. The registration is intended to be issued a certificate as proof of rights.

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<sup>5</sup> Sri Hajati, Buku Ajar Hukum Politik Hukum Pertanahan, Program Studi Magister Kenotariatan Fakultas Hukum Universitas Airlangga, 2017, P. 69.

<sup>6</sup> Effendi Perangin, *Hukum Agraria Di Indonesia Suatu Telaah Dari Sudut Pandang Praktisi Hukum*, Raja Grafindo Persada, Jakarta, 1994, P. 262

<sup>7</sup> Rahadiyan Veda Mahardika, et.al., *Kedudukan Subyek Hukum Ditinjau Dari Hak Keperdataan (Refleksi: Terjadinya Tumpang Tindih Lahan Hak Guna Usaha)*, (Jember: UM Jember Press, 2022), P. 56.

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The official authorised to grant Cultivation Rights Title is the Head of the Regional Office of the National Land Agency according to KBPN RI Regulation No. 2/2013. Article 8 states that the Head of the Regional Office of the BPN gives a decision regarding the granting of Cultivation Rights Title on land with an area not exceeding 2,000,000 M<sup>2</sup> (two million square metres).

Furthermore, Article 29 of the UUPA stipulates that cultivation rights can be granted for a maximum of twenty-five years. For companies that require a more extended period of time, such as oil palm plantations, cultivation rights can be granted for a maximum of thirty-five years. At the request of the right holder and taking into account the circumstances of the enterprise, the term may be extended by a maximum of twenty-five years. The possibility of extending the term by another twenty-five years is considered to be long enough for entrepreneurs of long-lived crops, such as rubber, coffee, oil palm and others.

The extension of the term of the right does not terminate the validity of the right in question, but rather the right continues to run concurrently with the term of the original right. This is important for the interests of other parties' rights that encumber the cultivation rights, such as mortgage rights, which will be abolished automatically if the cultivation rights are abolished.<sup>8</sup> After the term of the cultivation rights and its extension expires, the right holder may be granted a renewal of the cultivation rights on the same land. The extension or renewal of cultivation rights must be recorded in the land book and land office.

The holder of cultivation rights has the right to control and use the land granted with cultivation rights to carry out business in the fields of agriculture, plantation, fishery, and/or animal husbandry. The control and use of water sources and other natural resources on land granted with cultivation rights by the holder of the cultivation rights can only be done to support the aforementioned businesses by taking into account the provisions of applicable laws and regulations and the interests of the surrounding community. The holder of cultivation rights has the right to use these natural resources to the extent necessary for the purposes of the business being carried out.

In terms of guaranteeing the repayment of debts, cultivation rights can be used as collateral encumbered by a mortgage. The mortgage is extinguished when the cultivation rights are extinguished. As with mortgages under the BW system, the principle of *asseoir* (additional or accompanying) is now emphasised.

As is well known, usufruct rights can be transferred and assigned to other parties. The transfer of cultivation rights occurs due to sale and purchase, exchange, grant, inheritance, and so on. The transfer of cultivation rights must be registered at the Land Office. The transfer of cultivation rights due to sale and purchase, exchange, and grant is done by a deed made by a Land Deed Official. Meanwhile, sales and purchases through an auction are proven by the Berita Acara Lelang.

The abolition of cultivation rights, as mentioned above, results in the land reverting to the state. If a cultivation right is abolished and not extended or renewed, the former right holder is obliged to dismantle the buildings and objects on it and surrender the land and plants on the land of the former cultivation rights to the state within a time limit set by the Minister. However, if it turns out that the buildings, plants and objects are still needed to continue exploiting the land, the former right holder shall be compensated. The UUPA stipulates that Cultivation Rights can only be granted on state land. With the MATR/KBPN Regulation No. 10/2016, communal rights granted to customary law communities that have been registered, the use and utilisation of their land can be cooperated with third parties, in accordance with the agreement of the parties and the provisions in the laws and regulations, according to Article 20 of the MATR/KBPN Regulation No. 10/2016.

Investors can invest in communal land by being granted Cultivation Rights or Building Rights with the consideration that the local indigenous community is considered not to have the ability to manage the land. However, if there are investors who wish to cooperate, this is possible based on MATR/KBPN Regulation No. 10/2016.

The prevailing land law in Indonesia, especially the UUPA, which is the basis for realising unity and simplicity in land law, regulates that Cultivation Rights Title can only be granted on state land. This is in accordance with Article 28 paragraph (1) of the UUPA which reads:

*"Cultivation rights is the right to cultivate land directly controlled by the State, for a period of time as referred to in Article 29, for agricultural, fishery or livestock enterprises."*

The definition of "land controlled by the State" here shows the legal relationship between "land" as the subject and "State" as the object. Meanwhile, the legal relationship in question is controlled by the state. In the legal concept, mastering and owning are two different things. Mastering means that physically the land is controlled or cultivated, but juridically he does not own the land. Meanwhile, owning means that juridically, he is the owner of the land and does not necessarily use the land.<sup>9</sup>

Maria SW Sumardjono said that what is meant by state land is land that is not attached to a right, namely property rights, business use rights, building use rights, use rights on State land, management rights, as well as customary land and waqf land. Referring to this definition, a plot of land attached to customary land cannot be classified as state land. So it must also be studied whether communal rights can be classified as state land or not.

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<sup>8</sup> Sri Hajati and Agus Sekarmadji, *Buku Ajar Politik Hukum Pertanahan*, Airlangga University Press, Surabaya, 2011, P. 72.

<sup>9</sup> Khafid Setiawan, et.al., *Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 2, 2021, P. 47.

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Communal rights are granted to indigenous peoples and communities in certain areas when they have obtained a determination from the Regent/Mayor or Governor. The registered communal rights will later be issued a communal rights certificate in the name of the customary law community or certain tribes.

Based on this description, communal land is no longer controlled by the state but has become the property of certain indigenous peoples or communities in certain areas. This means that the land has been attached by rights, namely communal rights and is no longer controlled by the state. Therefore, communal land cannot be classified as state land. Thus, according to the UUPA, Cultivation Rights on Communal Rights land cannot be justified.

### **B. The Occurrence of Business Use Rights on Communal Land According To Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 10/2016**

Before discussing Cultivation Rights on communal land, it is necessary first to understand the rationale for the issuance of regulations, namely the philosophical, juridical and sociological foundations, as is the case with MATR/KBPN Regulation No. 10/2016. In the case of the issuance of MATR/KBPN Regulation No. 10/2016, the philosophical, sociological and juridical foundations for the formation of laws and regulations have been determined.

The philosophical foundation is a consideration or reason that illustrates that the regulations formed take into account the worldview, awareness and legal ideals, which include the spiritual atmosphere and philosophy of the Indonesian nation which originates from Pancasila and the 1945 Constitution of the Republic of Indonesia.<sup>10</sup> The philosophical foundation for the preparation of MATR/KBPN Regulation No. 10/2016 is stated in the legal considerations in letter a, which stipulates: To guarantee the rights of customary law communities and the rights of communities located in certain areas, who control land for an extended period of time, protection needs to be given in order to realise land for the greatest prosperity of the people. This means that the philosophical basis for the issuance of MATR/KBPN Regulation No. 10/2016 is: 1) to guarantee the rights of customary law communities and the rights of communities in certain areas, 2) to control land for an extended period of time, 3) to be given protection in order to realise land for the greatest prosperity of the people.

Sociological foundations are considerations or reasons that illustrate that regulations are formed to fulfil the needs of society in various aspects. The sociological foundation actually concerns empirical facts regarding the development of problems and needs of society and the state. The sociological foundation for the issuance of MATR Regulation No. 10/2016 is stated in the legal considerations in letter b, which determines that to guarantee the rights of customary law communities and the rights of communities in certain areas, who control land for an extended period of time, protection needs to be given in order to realise land for the greatest prosperity of the people. The sociological basis for the issuance of MATR Regulation No. 10/2016 is to guarantee customary law communities in utilising communal rights to land in certain areas which control land for an extended period of time.

The juridical foundation is a consideration or reason that illustrates that the regulation is formed to overcome legal problems or fill a legal vacuum by considering existing rules, which will be amended, or which will be revoked in order to ensure legal certainty and a sense of justice for the community. The juridical basis concerns legal issues related to the substance or material being regulated, so new laws and regulations need to be formed. The juridical foundation for the issuance of MATR Regulation No. 10/2016 is stated in the legal considerations in letter c, which stipulates: With the increasingly widespread application of Communal Rights occurring in the community and to avoid differences in understanding. Therefore, it is necessary to replace Ministerial Regulation No. 9/2015 on the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency on the Procedure for Determining Communal Rights on Land of Customary Law Communities and Communities in Certain Areas. In addition to this basis, the National Land Agency also added that the main reason for the establishment of this regulation is to fill the legal vacuum that regulates communal rights because so far the rights of indigenous peoples are less protected.

From these three explanations, it can be concluded that MATR Regulation No. 10/2016 was formed because of the need to fill the legal vacuum regarding Communal Rights in order to provide legal certainty of the rights of indigenous peoples in using Communal Rights land. With MATR Regulation No. 10/2016, it is hoped that it can reduce disputes that arise both between indigenous peoples and with third parties.

The same is true in the case of usufruct rights on communal land. It should be noted what is the basis for the existence of these provisions. Rusdianto stated that the provision was given because he saw that the human resources owned by a group of customary law communities were inadequate. So that if there are investors who are willing to invest in the land, why not give the opportunity for indigenous peoples and investors to work together. This is considered a *win-win solution* for the customary law community to get income and for investors to be able to utilise the land.

Article 6 of the UUPA is the basis for why Cultivation Rights Title can be granted on Communal Rights land. In contrast to this opinion, Sri Hajati argues that Article 6 of the UUPA, namely the social function of land rights, cannot be used as the basis that Cultivation Rights Title can be granted on Communal Rights land.

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<sup>10</sup> Salim HS and Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi*, Raja Grafindo Persada, Jakarta, 2013, P. 38.

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It should be understood that the social function of land rights here is related to the public interest or the community in terms of its use. The interests of the community and individual interests must balance each other so that the main objectives of prosperity, justice and happiness for the people as a whole can be achieved.<sup>11</sup> For example, in a plot of land, there are two houses that only have one entrance to cross. Then it must be adhered to that both the door and the road in the yard of the house have a social function. It does not mean that a parcel of land has a social function so that other land rights can be granted to it. Therefore, Article 6 of the UUPA cannot be used as the basis for the establishment of MATR Regulation No. 10/2016.

In terms of the determination of communal rights over the land of indigenous peoples and communities in certain areas, it is preceded by an application submitted to the Regent/Mayor or Governor according to Article 5 of MATR/KBPN Regulation No. 10/2016. The application is submitted by the customary head or a representative of the community in a specific area by completing several requirements, including the history of the customary law community and its land history for the applicant of the customary law community; a history of land tenure of at least 10 (ten) years or more consecutively for the applicant of the community in a certain area; a photocopy of identity card or deed of establishment of a cooperative, unit part of the village or other community group; and a certificate from the village head.

The Regent/Mayor or Governor then forms an IP4T Team involving many people such as the Head of the District/City Land Office, local sub-district heads, village heads, elements of customary law experts, elements of the department in the forestry sector, representatives of local customary law communities, and so on to determine the existence of customary law communities or communities in certain areas and their land.

In the IP4T Implementation Guidelines, it is stated that the Inventory of Land Tenure, Ownership, Use and Utilisation, hereinafter referred to as IP4T, is an activity of collecting data on land tenure, ownership, use and utilisation, which is processed with a graphic information system, so as to produce maps and information on land tenure by the applicant.

The IP4T team is tasked with receiving applications from indigenous peoples or communities within the specific area. It then begins to identify and verify the applicant, land history, type, tenure, utilisation and use of land; identify and inventory land boundaries; conduct field checks; analyse juridical data and physical data on land parcels; and submit a report on the results of the IP4T Team's work.

After conducting identification, verification and field examination as well as analysis of physical data and juridical data, where the results of the analysis can be: a) there are indigenous peoples and their lands; b) there are indigenous peoples located in forest areas; c) there are communities located in certain areas. In the event that the result of the analysis is that there are indigenous people and their land, the IP4T Team reports the results of the analysis to the Regent/Mayor or Governor.

In the event that the land is above the Cultivation Rights Title, IP4T notifies the right holder and related parties of the possession and requests the right holder to relinquish some of their land rights that have been controlled by the community within the Specified Area, and return the land to the state where the notification will be forwarded to the Minister as stipulated in Article 13 of MATR Regulation No. 10/2016.

The words "request" and "return" in the provision indicate that the Cultivation Rights Title holder is required to return the land to the state. This means that the Cultivation Rights Title is returned involuntarily by the right holder. Cultivation Rights of Way must be granted within a period of time. If the Cultivation Rights Title has not expired, it cannot be requested to be returned to the state. It is not a problem if the holder of the Cultivation Rights Title is willing to release or return the land rights to the state so that the procedures for releasing the rights are carried out in accordance with the provisions of laws and regulations. However, MATR Regulation No. 10/2016 seems to force right holders to want to release their land, as stated in Article 14 paragraph (2). If, within 30 (thirty) working days of the notification, the right holder objects to relinquishing or returning the land to the state, the Head of the Regional Office of the National Land Agency shall submit a proposal for cancellation of the rights to part of the land rights held by the community on the Cultivation Rights Title to the Minister.

The Minister will then decide whether or not to accept the proposal. If the Minister agrees with the cancellation proposal, a Decree on the Cancellation of Cultivation Rights is issued. Meanwhile, if the proposal is rejected, the Minister returns the cancellation proposal document along with recommendations for the right holder to utilise, use, and maintain the land so that it can be put to its best use and does not cause problems.

These provisions have been debated because of how can a Cultivation Rights Title be requested for cancellation because it intersects with the land that will be given the establishment of its customary law community.<sup>12</sup> Cultivation Rights have a period of time that has been determined at the beginning of the granting of rights. The National Land Agency of the Republic of Indonesia actually disagrees with the existence of this article because it is considered not in agreement with the settlement that is usually carried out.<sup>13</sup> The settlement in question is in the manner stipulated in Government Regulation No. 40/1996. In addition, actually before the

<sup>11</sup> Kartini Muljadi and Gunawan Widjaja, *Hak-hak Atas Tanah*, Kencana, Jakarta, 2004, P. 18..

<sup>12</sup> Rahadiyan Veda Mahardika, & Gatot Suyanto, *Kedudukan Hukum Badan Bank Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*, Jurnal Ilmu Kenotariatan, Vol. 3, No. 2, 2022, P. 62.

<sup>13</sup> Bayu Indra Permana, et.al., *Legal Certainty of Income Tax Exemption on the Transfer of Rights to Land in the Sharing of Collective Integration Rights*, *International Journal of Social Science and Education Research Studies*, Vol. 2. No. 11, 2022, h. 13.

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granting of the Cultivation Rights Title, there must be a long process, including the socialisation stage, location permits, land acquisition and others.

The National Land Agency of the Republic of Indonesia must have gone to the field to ascertain whether there was any conflict or not. And when the RI National Land Agency has granted the Cultivation Rights Title, it means that the situation is *clear and clean*. However, if there is a conflict, the solution is to be released by the customary law community. This release can be done by way of compensation or *recognition*. According to the General Elucidation of the UUPA, compensation or *recognise* is compensation given in the form of the construction of public facilities or other forms that benefit the local community. Therefore, *recognition* is not provided in the form of money.

Again, the provisions regarding cooperation by customary law communities with third parties must not conflict with existing laws and regulations. Cultivation Rights Title can only be granted on State land in accordance with Article 4 paragraph (1) of Government Regulation No. 40/1996.

Such norm conflicts are resolved by the principle of "*lex superior derogate legi inferiori*", which means that higher legal regulations will paralyse lower legal regulations.<sup>55</sup> Therefore, the provisions governing Cultivation Rights on Communal Rights land cannot be justified.

### CONCLUSIONS

The granting of Communal Rights Certificates is contrary to the laws and regulations in the land sector in Indonesia. According to the provisions in Article 9 of PP 24/1997 and its implementing regulations, Communal Rights are not an object of land registration. In addition, the fact that Communal Rights cannot be transferred to other parties means that the registration of Communal Rights itself is not maximised. This means that the registration of Communal Rights can only be done for the first time, i.e. to ensure the subject, object, area, boundaries and others. At the same time, the essence of land registration itself is to provide legal certainty by recording all forms of transfer of rights.

Cultivation Rights cannot be granted on Communal Rights land based on Indonesian laws and regulations. According to Article 4 of Government Regulation No. 40/1996, Cultivation Rights Title can only be granted on State land. Meanwhile, land that has been attached to Communal Rights and has been registered in the name of specific customary law communities cannot also be categorised as State Land. Therefore, the regulation stating that Cultivation Rights Title can be granted on Communal Rights land cannot be justified.

### REFERENCES

- 1) Hajati, Sri and Agus Sekarmadji, *Buku Ajar Politik Hukum Pertanahan*, Airlangga University Press, Surabaya, 2011
- 2) Hajati, Sri, *Buku Ajar Hukum Politik Hukum Pertanahan*, Program Studi Magister Kenotariatan Fakultas Hukum Universitas Airlangga, Surabaya, 2017.
- 3) HS, Salim and Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, Raja Grafindo Persada, Jakarta, 2013.
- 4) Mahardika, Rahadiyan Veda, Bhim Prakoso, & Iswi Hariyani. 2022. *Kedudukan Subyek Hukum Ditinjau Dari Hak Keperdataan (Refleksi: Terjadinya Tumpang Tindih Lahan Hak Guna Usaha)*. Jember: UM Jember Press
- 5) Mahardika, Rahadiyan Veda, & Gatot Suyanto. *Kedudukan Hukum Badan Bank Tanah Dalam Pengadaan Tanah Untuk Kepentingan Umum*. Jurnal Ilmu Kenotariatan. Vol. 3. No. 2. 2022.
- 6) Muhammad, Bushar, *Pokok-Pokok Hukum Adat*, Balai Pustaka, Jakarta, 2013.
- 7) Muljadi, Kartini and Gunawan Widjaja, *Hak-Hak Atas Tanah*, Kencana, Jakarta, 2004.
- 8) Perangin, Efendi, *Hukum Agraria Di Indonesia Suatu Telaah Dari Sudut Pandang Praktisi Hukum*, Raja Grafindo Persada, Jakarta, 1994.
- 9) Permana, Bayu Indra, Bhim Prakoso, & Iswi Hariyani. Legal Certainty of Income Tax Exemption on the Transfer of Rights to Land in the Sharing of Collective Integration Rights. *International Journal of Social Science and Education Research Studies*. Vol. 2, No. 11, 2022.
- 10) Prakoso, Bhim. *Pendaftaran Tanah Sistematis Lengkap Sebagai Dasar Perubahan Sistem Publikasi Pendaftaran Tanah*. *Journal of Private and Economic Law*. Vol. 1. No. 1, 2021.
- 11) Setiawan, Khafid, Bhim Prakoso, & Moh. Ali. *Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 2, 2021
- 12) Sumardjono, Maria SW, *Ihwal Hak Komunal atas Tanah*, Arsip Pusat Dokumentasi dan Jaringan Informasi Hukum Nasional Kementerian Hukum dan HAM Republik Indonesia yang bersumber dari harian Kompas tanggal 6 Juli 2015.
- 13) Wignjodipuro, Soerojo, *Asas-Asas Hukum Adat*, Sumur Bandung, Jakarta, 1983.