Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.71, 2018

Juridical Studies on The Communal Rights of Land According To Agrarian Law In Indonesia

Tri Susilaningsih
Lecturer at The Faculty of Law, Merdeka University, Malang
Email of the corresponding author : trisusilaningsih25@gmail.com

Abstract

With the enactment of Regulation of MALPA / HNLA No. 9 / 2015 and Regulation of MALPA / HNLA No.10 / 2016, the Regulation of MALPA / HNLA No. 5/1999 on the Guidance on the Completion of Ulayat (Environmental) Rights Issues is declared as no longer valid. The term Ulayat Right is not known anymore. While the two rules govern the so-called Communal Rights, namely the right of common ownership of land given to people who lived in forest or plantation areas.

The Regulation of MALPA / HNLA No. 10/2016 attempts to facilitate indigenous and tribal peoples, by the way that communal rights can be registered, as is the case with customary law communities in West Papua. Whereas according to Article 9 of Government Regulation no. 24/1997 on Land Registration, Communal Right is not the object of land registration, so it should not be registered and the Certificate of Communal Rights cannot be issued.

This study aims to examine the legal ratio on the applicability of MALPA / HNLA Regulation No. 10 year 2016 and review the provision of Communal Rights under the National Land Law. This study uses the normative juridical research method because this study tries to review the applicable laws and regulations related to Communal Rights.

Keywords: Communal Rights, Ulayat Rights, Land Registration

INTRODUCTION

In indigenous and tribal societies, land has important significance, because by its very nature, land is the only thing of wealth which, though under any circumstances, remains in its present state, and sometimes becomes more profitable. Between the community and the land occupied by them, there is a very close relationship, which originates from a religious-magical perspective. Therefore, the legal community gained the right to control the land, use the land, collect the resources, and so forth. The legal rights of this land are called Ulayat (Environmental) right or customary rights, and in the literature, this right is mentioned by Van Vollenhoven as beschikkingsrecht.[1]

Recognition and regulation of Ulayat Rights, one of which is regulated in Article 3 of Law Number 5 Year 1960 on the Basic Regulation of Agrarian Principles (hereinafter referred to as UUPA or BRAP), that the exercise of Ulayat Rights and other similar rights from indigenous and tribal peoples, as long as it is proven to be still exist, shall be such in the way that it is in accordance with the interests of the Nation and the State, based on the unity of the nation and shall not be conflicting to the higher laws and regulations.

Further regulation on Ulayat Rights shall be regulated in the Regulation of the Minister of Agrarian and Land Planning Affairs (MALPA)/ Head of the National Land Agency (HNLA) Number 5 Year 1999 concerning the Guidelines on the Settlement of Dispute on Ulayat Rights in Customary Law Communities (hereinafter referred to as the Regulation of MALPA / HNLA No. 5/1999). The regulation provides the definition of Ulayat Right as an authority which, according to the customary law, belongs to a certain customary law community over a certain area which is the environment of its community to benefit from the natural resources, including land, within the territory, for survival and life, arising from the continuous and uninterrupted connection, both in material and spiritual, between the customary law community and the concerned territory.

PMNA / HNLA No. 5/1999 is no longer valid after the enactment of Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 9 Year 2015 on the Procedures for Determination of Communal Rights on Indigenous People's Land and Communities in Specified Area (hereinafter referred to as MALPA / HNLA No. 9/2015) which has also been revoked by the Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 10 Year 2016 on the Procedures for the Establishment of Communal Rights on Indigenous People and Community's Land in a

[1] Bushar Muhammad, Pokok-pokok Hukum Adat, Balai Pustaka, Jakarta, 2013, p.103.

Specified Area (hereinafter referred to as " Regulation of MALPA / HNLA No. 10/2016).

In accordance with the Regulation of MALPA / HNLA No. 9/2015, Communal Rights consisted of two groups of subjects, namely the right of common property on land, where the subject is the indigenous and tribal peoples, and the right of common property rights to land, where the subject is non-community society.[1]

In contrast to PMNA / HNLA No. 5/1999, in the Regulation of MALPA / HNLA No. 9/2015 and Regulation of MALPA / HNLA No. 10/2016, there is no longer known the term of Ulayat Right. The rights regulated in these regulations are communal rights to land, hereinafter referred to as communal rights, namely the right of common property to the land of a customary law community or the right of common property to the land which is given to a community residing in a forest or plantation (Article 1 No. 1 of the Regulation of MALPA / HNLA No. 9/2015).

If seen from the source of Regulation MALPA / HNLA No. 9/2015 and Regulation of MALPA / HNLA No. 10/2016, that is PMNA / HNLA No. 5/1999, the former of these regulations equates Ulayat rights with communal rights. It is apparent in the preamble to the letter b that the Indonesian national land law recognizes the existence of communal rights and the like from indigenous and tribal peoples, insofar as they still exist, as referred to in Article 3 of Law Number 5 year 1960 on Basic Regulations of agrarian principles. Whereas as it is known that Article 3 of UUPA does not speak about communal rights but Ulayat Rights.

Ulayat right with communal right has different character. Ulayat rights have wider scope compared to communal rights. Ulayat right is both public and private. Its public dimension appears from the authority of indigenous and tribal peoples to regulate:

1) Land / area as its living space related to its utilization including its maintenance;
2) The legal relationship between indigenous and tribal peoples; and
3) Legal acts related to the land possessed by customary law community.

While the civil dimension of ulayat rights appears on the manifestation of ulayat right as a common belonging together.[2] Ulayat right is not a land right as meant in UUPA, on the contrary communal right is understood to have meaning as the right of the land.

In UUPA structure, the rights of indigenous and tribal peoples are regulated in Article 3 of UUPA. The article mentions two objects, namely customary rights and other similar rights from indigenous and tribal peoples. The term communal rights are not known in UUPA. The provisions concerning land rights are provided for in Article 16 jo. Article 53 of UUPA which also does not regulate communal rights.

Regulation of MALPA / HNLA No. 10/2016 tries to make it easier for customary law communities, by setting communal rights as able to be registered. According to Article 18 of the Regulation of MALPA / HNLA No. 10/2016, after the establishment of indigenous and tribal peoples, the communal right shall be conveyed to the Head of the Land Office or Head of the Regional Office of the NLA to establish and register the communal right to their land at the local Land Office.

The government through the Ministry of Agrarian and Land Planning (ALPA) / National Land Agency (NLA) issued a certificate of communal rights as a form of recognition and respect for indigenous and tribal peoples in West Papua. Besides being a form of recognition, the certificate of communal right becomes one of the efforts to protect the existence of customary land. Furthermore, the Minister of ALPA/HNLA stated that investors can still invest in communal land rights. Investors can develop their business based on the Right to Build and Use Right to Build. So ownership remains in the hands of indigenous and tribal peoples, and investors only obtain Business Use Rights or Building Use Rights.[3]

Based on the above matters, it is still necessary to discuss the existence of communal rights in the land law. To get an idea about it, the authors chose the title of study "JURIDICAL STUDIES ON THE COMMUNAL RIGHTS OF LAND ACCORDING TO AGRARIAN LAW IN INDONESIA".

RESEARCH QUESTIONS

Based on the explained issues above, the research problems are as follow:

1. *Ratio Legis* on the implementation of Regulation of Minister of Agrarian and Land Planning Affairs Number 10 Year 2016
2. The issuance of Communal Right Certificate according to Agrarian Law in Indonesia

Research Objectives

The objectives of this research are as follow:

1. To study the legal ratio on the implementation of RMALPA/HNLA No. 10/2016.

[1] Maria SW Sumardjono, Ihwal Hak Komunal Atas Tanah, Kompas, 6 July 2015, p. VI.
[2] Maria SW Sumardjono, Ihwal Hak Komunal atas Tanah, Digest Epistema, Volume 6 Year 2016, p. 5.
[3] Interview with Public Relations Division of Legal and Public Relations Bureau of the Ministry of Agrarian and Land Planning Affairs / National Land Agency, October 28, 2016.

2. To study the issuance of Communal Rights Certificate according to Agrarian Law in Indonesia.

Significance of the Study

1. Theoretical Significance
   The benefits from the results of this study is to contribute ideas for the development in the field of agrarian law science, especially on the enactment of Regulation of MALPA / HNLA No. 10/2016, so that in the future the recognition and registration of communal rights refers to the provisions and principles that apply in Agrarian law in Indonesia.
2. Practical Significance
   The practical benefit is to contribute to legislators in order to be more synchronized in enacting legislation to be in harmony with the content's material.
   For the community, to open a better insight into the granting and registration of communal rights.

RESEARCH METHOD

This legal research used normative legal research method. This method is one way of examining the legal norms in a legislation that applies in relation to the legal issues to be studied.

This research combines three approaches, these are Statute Approach, Conceptual Approach and Case Approach. The Statute Approach in this research is to study the granting of communal rights certificate according to RMALPA / HNLA No. 10/2016 which is associated with land law in Indonesia, it has been done by collecting and then analyzing and concluding its contextualization with the subject. The Conceptual Approach means researchers need to refer to legal principles.[1] These principles can be found in the view of scholars or legal doctrines. Although not explicitly, the concept of law can also be found in the teachings. The Conceptual Approach has been done by collecting the opinions of the jurists to answer the legal issues being discussed, in particular the Public Relations Division of the Legal and Public Relations Bureau of the Ministry of Agrarian and Land Planning Affairs / NLA in Jakarta.

Furthermore, in terms of Case Approach, the researcher will observe and examine the Certificate of Communal Rights issued by the Minister in West Papua. In this case only to know that the fact of giving certificate on communal rights in West Papua from the results of interviews with the Public Relations Division of the Bureau of Law and Public Relations in the Ministry of Agrarian and Land Planning Affairs / NLA, October 28, 2016. By using Case Approach, the one needs to be understood by researchers the legal reasons underlying the issuance of Communal Rights Certificate.

DISCUSSION

Legal Ratio of Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 10 Year 2016

The notion of "control" and "rule" of land rights can be used in a physical sense, as well as in a juridical sense, and also in civil and public aspect.[2] The land in question is the surface of the earth which in its use includes also some of the earth body that is beneath it and part of the space above it. Judicial control is based on rights, which is protected by law and generally authorizes the right-holders to physically occupy the cultivated land, but there is also juridical control, although it gives the authority to control the land which is physically abused, in fact its physical control is done by another party.[3] This means that the tenure of land rights contains a series of powers, as well as the obligation and / or prohibition of the right holder to do something with the land in custody.

The hierarchy of land rights in UUPA and the national land law are:[4]

1) The right of the Indonesian nation;
2) Right to control for the State;
3) Ulayat right of indigenous and tribal peoples, insofar as they still exist;
4) Individual rights:
   a. Land rights
      i. Primary
      ii. Secondary
   b. Waqf
   c. Land title

From the hierarchy it can be seen that the customary rights of indigenous people are recognized in the UUPA.

[1] Id. P. 178
[2] Boedi Harsono, Op. Cit., p. 23.
[3] Id. P. 23
[4] Id. P. 264

Before discussing further about customary rights, it is necessary to discuss briefly about customary law in UUPA.

Customary law is used as the basis of the Basic Agrarian Law, as defined in Article 5 of the Basic Regulations on Agrarian Law, which applies to the earth, water and space in customary law, as long as it does not conflict with national and state interests, based on national unity, with the rules set forth in this Law and with other laws and regulations, all with due regard to the elements of relying upon religious law. The provisions of Article 5 of UUPA as the legal basis for the enactment of UUPA stipulate the requirements of customary law which is the basis of Agrarian Law, namely:

1) Not conflicting with the national and the state interests based on the unity of the nation;
2) Not in conformity with the rules stated in UUPA;
3) Not contrary to other laws and regulations.

Referring to the provisions of Article 5 of UUPA, it places customary law in land law at an important position in the national agrarian law, but in reality various problems arise mainly in determining the customary law on which the law is based. Customary law in the UUPA is also found in Article 16 of the UUPA along with its explanation, that article 16 of UUPA is the implementation of the provisions of Article 4 of the UUPA. In accordance with the principle laid down in article 5 of the UUPA, that the national land law is based on customary law, the determination of land and water rights in this article is also based on the systematic nature of customary law.

Also stipulated in article 56 of the UUPA, that as long as the Law on property rights has not been established, the prevailing provisions shall be the provisions of local customary law and other authorizing regulations on land rights, or similar to those referred to in Article 20, provided that it is not inconsistent with the spirit and provisions of this Act. It is also found in article 58 of the UUPA that, as long as the rules for enforcement of this Law have not yet been established, the written and unwritten regulations concerning earth and water and the natural resources contained therein and the rights to land, which exists at the entry into force of this Law, shall continue to apply, to the extent that it is not contrary to the spirit of the provisions of this Law and shall be accorded interpretation accordingly.

Basic consideration on the issuance of regulation are the philosophical, juridical and sociological basis, obviously also work on the issuance of Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 10 year 2016 on the Procedures for Determination of Communal Rights on Indigenous Land of Customary Law and Society in Certain Regions (Agrarian and Land Planning no. 10 Year 2016). In the issuance of Agrarian and Spatial Plans No. 10 Year 2016, it has been determined philosophical, sociological and juridical foundation on the formulation of the legislation.

The philosophical foundation for the preparation of Agrarian and Land Planning no. 10 year 2016 is set forth in the legal considerations of letter a, which determines: To guarantee the rights of indigenous and tribal peoples within a certain area, which holds land for a considerable period of time, protection shall be required in order to realize the maximum possible land prosperity of the people. This means that the philosophical basis of the publication of Agrarian and Spatial Plans no. 10 year 2016 is: 1) to guarantee the rights of customary law community and the right of the people to be within a certain area, 2) to control the land for a considerable period of time, 3) to be given protection in order to realize the greatest possible prosperity of the people.

The sociological foundation of Agrarian and Spatial Plans No. 10 year 2016 is set forth in the legal considerations of sub-paragraph b, which determines to guarantee the rights of indigenous and tribal peoples within a certain area, which holds land for a considerable period of time to be protected in order to realize the maximum possible land for the people. The sociological foundation of Agrarian and Spatial Plans No. 10 year 2016 is to guarantee indigenous and tribal peoples to exploit communal rights to land within a certain area, which holds land for a considerable period of time.

The juridical basis of the issuance of Agrarian and Land Planning No. 10 year 2016 is included in the legal considerations in letter c, which determines with the widespread application of communal rights occurring in the community and to avoid the occurrence of different understandings. It is necessary to replace the Ministerial Regulation No. 9 year of 2015 on the Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency on the Procedures for the Establishment of Communal Rights on Indigenous People's Land and Communities within the Specified Area.

Based on the considerations as mentioned above, it is necessary to stipulate Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency on the Procedures for the Establishment of Communal Rights on Indigenous People and Communities' Land which are in Specified Area. The stipulation of Agrarian and Spatial Plans No. 10 year 2016 is in order to ensure legal protection against indigenous peoples in terms of exercising the field of communal land rights.

Based on the above description relating to the legal ratio of the enactment of Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 10 of 2016 on the Procedures for Determination of Communal Rights on Indigenous People and Communities' Land in Specified Regions can

be explained that indigenous peoples have communal rights over land that has been steady for more than 10 (ten) years and take advantage of natural resources, including land, in the area, for survival and life, need to get assurance of protection in order to realize the greatest possible prosperity of the people. This means that communal rights to land given to indigenous peoples are limited to benefiting from land in forest areas or plantations in order to realize the greatest possible prosperity of the people.

Issuance of Certificate of Communal Right by Agrarian Law in Indonesia

Before discussing communal rights in advance of ulayat rights, the term "ulayat rights" consists of two words, namely "rights" and "ulayat". Etymologically the word 'Ulayat' is identical with the meaning of territory, region, clan and nagari.[1] The word "right" means a role for a person or a party to act on something to be the object of that right.[2] Meanwhile, according to Moh. Kosnoe, the word "ulayat" basically means an environment of land which is within the legitimate power of a partnership.

According to Iman Sudiyat,[3] it calls ulayat rights as the ancient rights. The meaning of ancient rights is the right which belongs to a tribe (clan / gens / stan), a union of villages (dorpenbond), or usually by a village alone to control all the land in its territory.

According to Boedi Harsono, ulayat rights constitute a series of powers and obligations of a territory of a customary law community, relating to land situated within its territory, which is a major supporter of the livelihood and life of the community concerned over time.[4] Customary rights are recognized in Article 3 of the UUPA, but there is no explanation of the definition of customary rights themselves. In the elucidation of Article 3 of UUPA, what is meant by "customary rights and of the similar rights" is what is in the library of customary law called "beschikkingsrecht".

In the literature of customary law, the term ulayat right called "beschikkingsrecht", is a name given by Van Vollenhoven, which means the right to control the land in the sense that the rule of law society does not reach the power to sell the land within its territory.[5] Ulayat right in this case shows the legal relationship between the legal community and the land.[6]

Recognition of the existence of customary rights of customary law community is insofar as it still exists. This means that if in reality there is no proof, then the Ulayat right will not be revived, and will not be created new customary rights. Ulayat right is left to be regulated by Indigenous People respectively. In addition to being regulated in UUPA, the Ulayat right is also regulated in PMNA / HNLA no. 5/1999. Article 2 PMNA / HNLA No. 5/1999 stipulates that the exercise of Ulayat rights insofar as the fact remains is still being undertaken by the indigenous peoples concerned in accordance with the provisions of local customary law. Customary rights of customary law community are considered to exist if fulfill several conditions, namely:

a. There is a group of people who are still bound by their customary legal order as a member with a certain legal partnership, which recognizes and applies the terms of the fellowship in their daily life;
b. There are certain ulayat lands which being the living environments of the legal community and where they take their daily necessities, and
c. There is a customary law arrangement concerning the handling, control and use of communal land that is observed and adhered to by the members of the legal community.

According to Article 4 paragraph (1) letter a RMALPA / HNLA No. 5/1999, where required by the rights holder, the land areas controlled by the customary law community concerned with the right of tenure under the applicable provisions of its customary law, may be listed as land rights in accordance with the provisions of UUPA.

Communal rights differ from customary rights. Communal rights to land have been unknown in the Indonesian land regulations. The UUPA only recognizes the rights of indigenous and tribal peoples, which are called ulayat rights, which are different from those of communal land rights. Ulayat rights have a wider scope compared to communal rights. Communal rights to land herein are defined as land rights. According to Urip Santoso,[7] that "the right to land is a right that the source of authority to which has the right to use or take advantage of the land in his possession."

The concept of communal rights was first recognized in the Regulation of MALPA / HNLA No. 9/2015 which was subsequently revoked by the Regulation of MALPA / HNLA No. 10/2016, that the communal right to land is a joint title to the land of a customary law community or a right of common property over the land granted to a community in a forest or plantation area.

[1] Djamarat Samosir, Op.cit., p. 103.
[2] Id.
[3] Iman Sudiyat, Hukum Adat Sketsa Asas, Liberty, Yogyakarta, 2007, p. 2.
[4] Boedi Harsono, Op.cit., p. 185-186.
[5] Djamarat Samosir, Op.cit., p. 106.
[6] Id.
[7] Urip Santoso, Perolehan Hak Atas Tanah, Kencana, Jakarta, 2010, p. 21.

In indigenous and tribal peoples, communal rights are manifested in their control of the customary territory. The territory in question covers all living spaces of the customary law community, including land and / or sea, other waters and all natural resources which are regulated by customary law.

Myrna A. Safitri in his article mentions that: In the system of land tenure by the community, there are known several kinds of rights typology. First is the individual right of the citizens to own or utilize the land and natural resources. The second is the collective rights by the family. And the third is communal right, namely the right of all citizens to their territory and to the lands for public interest that is shared by the concerned community.[1]

The lands with communal rights are the common property of a society that every member of society can take advantage, providing the reserve of resources and / or areas for social activities, non-transferable and controlling them to represent local community functionaries. These communal rights differ from collective rights. What distinguishes is that communal rights holders are the sole social unity of society.

According to the fact, the regulator of MALPA / HNLA No. 10/2016 equates the term ulayat rights with communal rights. In fact, Ulayat rights and communal rights have different characteristics. Ulayat rights have a wider scope compared to communal rights. The ulayat right is both public and private. The public dimension appears from the authority of indigenous and tribal peoples to regulate the land / territory as their living space, the legal relationship between indigenous and tribal peoples; and legal acts related to customary law community lands. While the civil dimension of Ulayat rights appear in the manifestation of customary rights as belonging to the community of customary law. Ulayat right is not a land right as meant in UUPA, on the contrary communal right is understood to mean land right. Means communal right to be registered.

As regulated in Regulation of MALPA / HNLA No. 10/2016, the subject of the Law of the Communal Rights is made up of two subject groups, namely the right of common property on land subject to indigenous and tribal peoples and the right to mutual property with the subject of non-indigenous people. The Ministerial Regulation shall be subject to the right of communal rights not only to indigenous and tribal peoples, but also to other societies, which in the Regulation of MALPA / HNLA no. 10/2016 termed it with the community in a certain area, the people who lived in forest or plantation. Indigenous and tribal peoples themselves are defined as communities that are bound by customary law, both geneologically (equality of lineage) and territorial (residential similarity).

In addition to equating communal rights with Ulayat rights, the Regulation of MALPA / HNLA No. 10/2016 is wrong in conceptualizing communal rights. According to the typology of rights in the control of land by the people, communal rights are the right of all peoples to their commonly held territory. While the Regulation of MALPA / HNLA No. 10/2016 gives a different definition of communal rights as land rights. Communal rights should be compared to the land of Ulayat right, not with the Ulayat rights which is an authority.

Pursuant to Article 18 of Regulation of MALPA / HNLA No. 10/2016, with the report, the Regent / Mayor and Governor determine the existence of indigenous and tribal law communities. Regents / Mayors stipulate the existence of indigenous and tribal peoples, in the case where the land lies in 1 (one) Regency / City. While the Governor determines the existence of indigenous and tribal peoples, in the case of land located on the cross Regency / City. Determination of indigenous and tribal peoples through the Decree of the Regent / Mayor or Governor shall be submitted to the Head of the Land Office or Head of Regional Office of NLA to establish and register the communal right to his land at the local Agrarian Office.

Furthermore, according to Article 19 of Regulation of MALPA / HNLA No. 10/2016, registration of communal land rights to indigenous and tribal peoples communities, or other communal rights carried out in accordance with the provisions of laws and regulations in the field of land registration. According to Article 9 of GR. 24/1997, the communal right is not an object of land registration but may be registered under Article 18 of the Regulation of MALPA / HNLA No. 10/2016. In the case of land registration, it is necessary to review the legislation that regulates it.

The object of registration of land according to Article 9 of GR. 24/1997, including:

a. areas of land which are owned by ownership rights, Business utilities rights, Building utilities rights and Right to use;
b. land Rights Management;
c. land of waqf;
d. Property of Housing Unit '
e. Mortgage right;
f. State land.

[1] Myrna A. Safitri, "*Legalisasi Hak-Hak Masyarakat atas Tanah dan Kekayaan Alam dalam Peraturan Perundang-undangan Nasional Indonesia: Model, Masalah dan Rekomendasi*", Masa Depan Hak-Hak Komunal Atas Tanah : Beberapa Gagasan Untuk Pengakuan Hukum, Second Edition, July 2011, p. 15.

Communal Land Rights According to Agrarian Law in Indonesia

In UUPA, communal land over land is not regulated and only Ulayat Rights (Article 3) is governed. Ulayat rights is further regulated in RMALPA / HNLA No. 5/1999 on the Guidance on the Completion of Indigenous Peoples' Rights Issues. Implementation of customary rights insofar as their reality is still there must be such that in accordance with the interests of the Nation and the State, based on the unity of the nation and should not conflict with other respective laws and regulations.

Article 4 paragraph (1) letter a of RMALPA / HNLA No. 5/1999 affirmed that by indigenous peoples concerned with the right of tenure under the applicable provisions of customary law, which, if desired by the holder of its rights, it is impossible to be listed as a right to land in accordance with the provisions of the UUPA.

Seen from these two rules (UUPA and RMALPA / HNLA No. 5/1999) there was a conflict of norms. In UUPA (Article 16 paragraph (1)) and Article 53 (ulayat rights) is not declared as a right to land so it cannot be registered. Similarly, according to GR. 24/1997 as a rule of land registration, customary rights are also not the object of land registration. This conflict of legal norm should not happen by considering the "lex superior derogat legi inferiori" principle, which means that higher laws will paralyze the lower laws.[1]

In connection with the establishment of Regulation of MALPA / HNLA No. 9/2015 on the Procedures for the Establishment of Communal Rights on Indigenous People's Land and Communities that are in Specified Regions, the RMALPA / HNLA No. 5/1999 is declared no longer valid. And in this new law is known the existence of Communal Rights. Regulation of MALPA / HNLA No. 9/2015 has also been revoked by Regulation of the Minister of ALPA / Head of NLA No. 10/2016 on Procedures for the Establishment of Communal Rights on Indigenous People and Communities' land under Specific Areas.

Although the communal right is not an object of land which must be registered in NLA, but according to Article 18 of the Regulation of MALPA / HNLA no. 10/2016 communal rights may be registered. It means that if the Communal Rights are registered, then there will be a conflict of legal norms. As well as communal land rights that can be registered there is a conflict between GR no. 24/1997 with RMALPA / HNLA No. 10/2016.

The communal right is the same as Ulayat Right, if it is registered, both are against the higher rules.

Based on the above explanation, it appears that there is a conflict of norms between Regulation MALPA / HNLA No. 10/2016 with Government Regulation no. 24/1997. Therefore, it applies the principle which reads "lex superior derogat legi inferiori", which means that higher legal rules will paralyze the lower laws.[2]

One of the objectives of land registration under Article 3 of Government regulation 24/1997 is to provide legal certainty and protection to the right holder of a plot of land, flats and other registered rights in order to easily prove himself / herself as the rightful holder. So as to provide legal certainty and protection, the right holder will be given a certificate as a proof of rights. Issuance of a certificate is the final product of a series of land registration.[3]

Similarly, the makers of Regulation of MALPA / HNLA No. 10/2016 want a regulation that fills a legal void on Communal Rights. So far the rights of indigenous and tribal peoples have been deemed to have been underestimated. It is a long process for indigenous and tribal peoples who struggle for legal protection. So that the granting of the Communal Rights certificate is deemed sufficient to provide legal protection for indigenous and tribal peoples and can reduce conflicts in a particular region.

Communal Rights Certificate issued to indigenous and tribal peoples in West Papua was a form of recognition of the rights of indigenous and tribal peoples. The certificate is on behalf of a particular tribe and not on behalf of one person. In the certificate there is also a clause, "This land cannot be sold to people other than the customary law community itself".[4] The clause "This land cannot be sold to a community other than the customary law community itself" contained in the Communal Rights Certificate is one of its own disadvantages. If Communal Rights cannot be transferred, then the registration of communal rights to the land appears to be too forced. It cannot be ascertained whether Communal Rights can be used as collateral for debts burdened with Mortgage Rights such as other land rights or not. Moreover, the certificate on behalf of the customary law community groups concerned, and not on behalf of individuals.

CONCLUSION

a. Legal Ratio of Regulation of the Minister of Agrarian and Land Planning Affairs / Head of National Land Agency Number 10 year 2016 on the Procedures for the Establishment of Communal Rights on

[1] Sudikno Mertokusumo, Penemuan Hukum, Liberty, Yogyakarta, 2007, p. 8.
[2] Id.
[3] Urip Santoso, Pendaftaran dan Peralihan Hak Atas Tanah, First Edition, Kencana Prenada Media Group, Jakarta, 2010, p. 259.
[4] Interview with Public Relation Manager Staff of National Land Agency of the Republic of Indonesia, February 21, 2017.

Indigenous People and Communities' land in Specified Regions, that indigenous peoples have communal rights over land that has been established for more than 10 (ten) years and take advantage of natural resources, including land, within the territory, for its survival and life, need to be guaranteed protection in order to realize the greatest possible prosperity of the people. This means that communal rights to land given to indigenous peoples are limited to benefiting from land in forest areas or plantations in order to realize the greatest possible prosperity of the people.

b. The granting of a Certificate of Communal Rights is an inappropriate act. Because the communal right is not an object of land registration according to Government Regulation No. 24/1997 on Land Registration.

SUGGESTION

a. Each regulation that regulates matters relating to land, based on the UUPA, where in the UUPA does not regulate communal rights to land, in order to avoid a confusion.
b. The granting of communal rights is sufficiently regulated by the Local Regulation of local customary law community without the registration of communal land rights. Because it is contrary to the higher laws and regulations.

REFERENCE

Harsono, Boedi, Hukum Agraria Indonesia, Jakarta: Djambatan, 2005, cetakan kesepuluh.
Muhammad, Bushar, Pokok-pokok Hukum Adat, Jakarta: Balai Pustaka, 2013, p. 103
Safitri, Myrna A., Legalisasi Hak-Hak Masyarakat atas Tanah dan Kekayaan Alam dalam Peraturan Perundang-undangan Nasional Indonesia: Model, Masalah dan Rekomendasi, Masa Depan Hak-Hak Komunal Atas Tanah : Beberapa Gagasan Untuk Pengakuan Hukum, Second Edition, July 2011, p. 15.
Samosir, Djamarat, Hukum Adat Indonesia, Bandung: Nuansa Aulia, 2013, p. 1
Santoso, Urip, Pendaftaran dan Peralihan Hak Atas Tanah, Jakarta: Kencana Prenada Media Group, 2010, p. 259.
_____, Perolehan Hak Atas Tanah, Jakarta: Kencana, 2010, p. 21.
Sudikno Mertokusumo, Penemuan Hukum Sebuah Pengantar, Yogyakarta: Liberty, 2007, p. 8.
Sudiyat, Iman, Hukum Adat Sketsa Asas, Yogyakarta: Liberty, 2007, p. 2.
Sumardjono, Maria SW, Ihwal Hak Komunal Atas Tanah, Kompas, 6 July 2015, p. VI.
_____, Ihwal Hak Komunal atas Tanah, Digest Epistema, Volume 6 Year 2016.