http://dx.doi.org/10.18623/rvd.v23.n4.4630

CERTAINTY OF REGISTRATION OF LAND RIGHTS OF CUSTOMARY LAW COMMUNITIES

CERTEZA DO REGISTRO DOS DIREITOS FUNDIAIS DAS COMUNIDADES DE DIREITO CONSUTULAR

Article received on: 10/9/2025
Article accepted on: 1/9/2026

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The authors declare that there is no conflict of interest

Abstract
Legal certainty through customary land registration raises the issue of the existence of customary law communities in national land law politics as well as preventive legal protection through registration of customary land. Recognition of customary law communities with customary rights according to customary law needs to be interpreted as recognition of the customary law system in the land sector. This research method is normative legal juridical research, which is a type of research used to look at legal aspects in social interactions in society. This type of research is normative juridical research, namely legal research whose object of study includes legislative provisions or also called library legal research. Library legal research is research conducted by examining library materials or secondary data only. The problem approach used in this research, namely: statute approach, and conceptual approach.

Resumo
A segurança jurídica através do registro consuetudinário de terras levanta a questão da existência de comunidades de direito consuetudinário na política nacional de direito fundiário, bem como a proteção jurídica preventiva através do registro consuetudinário de terras. O reconhecimento das comunidades de direito consuetudinário com direitos consuetudinários de acordo com o direito consuetudinário deve ser interpretado como o reconhecimento do sistema de direito consuetudinário no setor fundiário. O método de pesquisa utilizado é a pesquisa jurídica normativa, que é um tipo de pesquisa utilizada para analisar os aspectos jurídicos nas interações sociais na sociedade. Este tipo de pesquisa é uma pesquisa jurídica normativa, ou seja, uma pesquisa jurídica cujo objeto de estudo inclui disposições legislativas, também chamada de pesquisa jurídica bibliográfica. A

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Based on the results of this writing, it is found that the urgency of registering land rights is the legal protection and guarantee of legal certainty for holders of land rights, thus creating a sense of security over the land they control. The registration of customary land into management rights does not guarantee legal certainty and protection of the customary rights of Masyarakat Hukum Adat.

Keywords: Legal Certainty. Customary Land Registration. Customary Rights.

pesquisa jurídica bibliográfica é uma pesquisa realizada através da análise de materiais bibliográficos ou dados secundários. A abordagem do problema utilizada nesta pesquisa é a abordagem estatutária e a abordagem conceitual. Com base nos resultados deste trabalho, verifica-se que a urgência do registro dos direitos fundiários é a proteção jurídica e a garantia da segurança jurídica para os titulares dos direitos fundiários, criando assim uma sensação de segurança sobre as terras que controlam. O registro das terras consuetudinárias em direitos de gestão não garante a segurança jurídica e a proteção dos direitos consuetudinários da Masyarakat Hukum Adat.

Palavras-chave: *Segurança Jurídica. Registro de Terras Consuetudinárias. Direitos Consuetudinários.*

1 INTRODUCTION

The State of Indonesia is a Unitary State and there is recognition for customary law communities as mandated in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Article 18B Paragraph (2) of the 1945 Constitution states that: The State recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in the provisions of laws and regulations. Furthermore, Article 33 paragraph (3) of the 1945 Constitution states: [1] The land and water and the natural resources contained therein shall be controlled by the state and utilized for the greatest prosperity of the people.

According to Ter Haar, the definition of customary law communities is a group of people who are organized, settled in a certain area or region, and have their own power, and have their own visible and invisible wealth, where indigenous peoples and members

1 Dimas Ghifari Ajie, Yeni Yunithawati R, Efa Kaela F, Liability Of Temporary Land Deed Officials For Negligence In Reading Deeds During Sale And Purchase Transactions, Journal Indonesia Private Law Review Vol. 5 No. 1 (2024). https://jurnal.fh.unila.ac.id/index.php/iplr/article/view/3409.

experience social life. Customary law communities have been recognized by the state and the constitution, including laws and regulations.[2]

Based on Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA) Article 3 of UUPA states that: "By remembering the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as according to reality they still exist, must be in such a way that it is in accordance with national and State interests, which are based on national unity and must not conflict with laws and other higher regulations."

The existence of land in life in the world as one of the natural resources is a gift from God Almighty. Land is the most basic need of human life as a source of livelihood and livelihood. In fact, land and humans are inseparable from the time humans are born until humans die. Humans live and carry out activities on the land, so every human being is related to the land. The importance of land for humans causes land to have value and benefits for long-term development, the role of land for the fulfillment of various needs will increase. So urgent is land in relation to human life that Ter Haar explains that land is a place to live, land provides life and livelihood, land where humans are buried and the relationship is magical-religious.[3]

Djaren Saragih, Land is a place from which humans live their lives and obtain sources to continue their lives. Therefore, until the current level of development, humans have a need for land.[4] In national development, the role of land for the fulfillment of various needs will increase, either as a place to live or for business activities. In connection with this, the need for support in the form of legal certainty in the land sector will also increase. Therefore, land is needed by every member of society so that disputes often occur among each other, especially those concerning land. For this reason, rules are needed that regulate the relationship between humans and land.[5] The relationship between humans and land within the territory of the Unitary Republic of Indonesia includes the land of customary law communities.

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[2] H. Umar Maaruf, The State's Right to Control Land and the Principles of Land Law, Semarang: Unissula Press, (2014), p. 7

[3] In Sri Susyanti. Land Bank: Alternative Solutions to the Problem of Land Provision for Sustainable Urban Land Development, Makassar: As Publishing, 2010 p.1

[4] DDjaren Saragih. Introduction to Indonesian Customary Law, Bandung: Tarisito, (1996) p. 74

[5] KKenny Wijaya. Perspective of Agrarian Law in Indonesian Society. Unsrat Journal Vol. I/No. 5/ October-December, (2013) https://repo.unsrat.ac.id/367/

Land and land are vital elements in the life of the nation and state, because they are the sources of justice and prosperity of society. The relationship between the Indonesian people and the land is characterized by an eternal relationship.[6] Providing legal security in the land sector first requires the availability of written, complete and clear legal instruments. Land and buildings are objects that play an important role in human life. Land and buildings are one of the basic human needs (shelter needs) that affect the existence of each individual because every human being needs a place to live. Land rights have a very important role in this human life, the more advanced the society, the more densely populated, will increase the importance of the position of land rights.[7]

The need for land today is increasing in line with the increase in population, the number of business entities, and the increase in other needs related to land. Land is not only a place to live, a place to farm, but can also be used as collateral to obtain bank loans, for the purposes of buying and selling and leasing. The importance of land for people or legal entities demands legal certainty over the land. To obtain a guarantee of legal certainty over land, requires a legal instrument that is written, complete, clear and consistently implemented in accordance with the spirit and content of the applicable provisions.[8]

State control over land can be granted to individuals, both Indonesian and foreign citizens, groups of people together, and private and public legal entities.[9] This is achieved through land registration as part of the process of protecting land rights by obtaining a certificate as a means of proving land rights. Land documents as a result of the land registration process are written documents containing physical data and juridical data of the land concerned. Land registration is a series of activities carried out by the Government continuously, continuously and regularly, including collecting, processing, bookkeeping, and presenting and maintaining physical data and juridical data, in the form of maps and lists, regarding land parcels and units of flats, including the provision of proof of rights for land parcels that already have rights and ownership rights to units of

[6] B National Land Agency, Government Agency Performance Report Fiscal Year 2012. Jakarta: BPN RI, (2013) p 1. National Land Agency, Government Agency Performance Report Fiscal Year 2012. Jakarta: BPN RI, (2013) p 1.
[7] Achmad Rubaie. Law of Land Acquisition for Public Interest, Malang: Bayumedia, (2007), p. 1
[8] Florianus SP Sangsung. Procedures for Processing Land Certificates. Jakarta: Visimedia, (2007), p. 2.
[9] UUrip Santoso. Agrarian Law and Land Rights. Jakarta: Kencana, (2010), p. 87.

flats and certain rights that encumber them. Including also with the type of rights, among others, property rights, business use rights, building use rights and so on. That is why land certificates are very important in order to obtain a legal certainty for holders of land rights and other parties with an interest in land. It is not surprising to hear that conflicts often occur because people dispute existing land. These conflicts can be due to struggles over ownership rights, seizure, destruction, and fraud in the sale and purchase process. The emergence of these conflicts is triggered, among others, by ownership rights that have no legal basis, do not have valid proof of ownership and control lands based on customary law.[10]

In order to be given a guarantee of legal certainty and legitimacy from the state, every control and utilization of land, including in handling land issues, must be based on law and resolved legally and based on the constitutional basis as stipulated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, hereinafter referred to as (1945 Constitution) as follows: "The land and water and the wealth contained therein shall be controlled by the state and utilized for the greatest prosperity of the people".

Customary rights are closely related to customary law communities[11] because customary rights are the authority and obligations that exist in a customary law community. Customary law communities arise spontaneously in a certain area whose establishment is not determined or ordered by a higher authority and use wealth resources for the benefit of fellow customary law communities. This is different from a legal community, which is a community that establishes, is bound by, and is subject to its own legal system. This ulayat right covers all land within the territory of the legal community concerned, whether it is already owned by someone or not.

Article 1 of the Regulation of the Minister of Agrarian Affairs No. 5/1999 further explains that customary rights are the authority according to customary law owned by a certain customary law community which is the environment of its citizens to take

[10] Damianus krismantoro, recognition of indigenous peoples' rights to customary land: an analysis of the relationship between national law and customary law, acceleration of national scientific journal, vol. 4 no, 2 (2022). https://www.researchgate.net/publication/361914608_PENGAKUAN_HAK_MASYARAKAT_ADAT_ATAS_TANAH_ULAYAT_ANALISIS_HUBUNGAN_ANTARA_HUKUM_NASIONAL_DAN_HUKUM_ADAT.

[11] Mutia Zahra, Ery Agus Priyono Legal Certainty of Customary Land Status After the Enactment of the Basic Agrarian Law, Journal Legal Standing Journal of Legal Science, Vol. 9 No. 1 (2025) file:///C:/Users/Dell/Downloads/10973-35652-1-PB%20(1).pdf

advantage of natural resources, including land, in the area, for their survival and life.[12] Meanwhile, customary law communities are considered to still exist if there is a group of people who still feel bound by their customary legal order as joint citizens of a particular legal community, there is certain customary land which is the living environment of the citizens of the customary community, and there is a customary legal order regarding the management, control and use of customary land, and is obeyed by the citizens of the customary community.

In the definition adapted by Philipus M. Hadjon above, there is no detailed explanation of the meaning of legal protection itself, but it can be understood that the purpose of protection is of course the protection of the government or ruler from arbitrary actions. The relationship between legal protection of indigenous peoples' customary rights and the protection proposed by Hadjon is very closely related. Because, talking about protection issues will certainly relate between the people as subjects who need protection and the government as their protector.

Between the Government as the personification of all the people who have power over the land, has the authority to regulate all the movements of the community including in the utilization of rights to their customary land. The authority of the government that chews the right to control the land as if between the government and the people has been idolized the position of the superior government against the imperior community. This is as stated by I Nyoman Nurjaya; " ... because from the beginning, a subordinate pattern of relationship has been instilled between the government and the community in the life of the nation and state; the government occupies a position as superior or super ordinance and the community is positioned as an inferior or sub-ordinate component of the state.[13]

In such a position, of course, the community will become the object of sufferers, who will always be victims, even though the government and customary law communities as voters of customary rights are partners in a government. As stated by Philipus M.

12 Putu Dina Sukmawati, Agrarian Law in the Settlement of Land Disputes in Indonesia, Journal, Sui Generis Legal Science Vol. 2 No. 2 (2022).
https://ejournal2.undiksha.ac.id/index.php/JIH/article/view/1015.

13 I Nyoman Nurjaya, Natural Resources Management, in the Perspective of Legal Anthropology, Jakarta: Perstasi Pustaka Publiser (2008), p. 41.

Hadjon that; such a view is contrary to the philosophy of life of our country, which views the people and the government as partners in an effort to realize the ideals of state life.[14]

The perspective of legal protection for customary law communities' customary rights is implicitly guaranteed in the constitution as an embodiment of Article 33 paragraph (3) which is further emphasized in Article 18 B paragraph (2) stated; The state recognizes and respects the unity of customary law communities along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.

This research method is normative juridical research, which is a type of research used to look at legal aspects in social interactions in society[15].This type of research is normative juridical research, namely legal research whose object of study includes provisions of legislation or also called library legal research. Library legal research is research conducted by examining library materials or secondary data only. [16]

The problem approach used in this research, namely: statutory approach, and conceptual approach.[17] statutory approach, conducted by reviewing all laws and regulations related to the legal issue being studied. The conceptual approach (statute approach) departs from legislation and doctrines that develop in legal science. By studying the views and doctrines in legal science, researchers will find ideas that give birth to legal notions of legal concepts, and legal principles of law that are relevant to the issues discussed.

Related to the novelty of this research, previously there have been researchers who raised the same theme, namely about, first Research conducted by Syahrudin Nawi with the title: "State Land Management Rights" Analysis of its Arrangements and Special Implementation in the Province of South Sulawesi Level. This research tries to reveal the management rights of state land, both in terms of normative analysis of the provisions of the governing legal provisions and in terms of empirical analysis of the dominant factors that influence its implementation. The second research conducted by Yulianus Pabassing,

[14] Philius M. Hadjon, Op Cit, p. 1-2.
[15]Peter Mmud Marzuki, *Legal Research*, Cet 2, Jakarta: Kencana, (2008), p. 29
[16] SSeorjono Soekamto and Sri mamuji, Introduction to Law research, Jakarta: UI Prees, (1986), p. 13.
[17] Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana Prenadia Media Grup, (2008), p. 93.

with the title: “Legal Certainty of Compensation for the Rights of Indigenous Peoples to Land in Land Acquisition for Development”, this research focuses on respect and recognition of customary land in Papua and legal certainty of compensation for customary land used for public purposes. Third research by Anje M. Ma,moen, with the title: “Land Registration as the Implementation of the Basic Agrarian Law to achieve legal certainty of land rights in the city of Bandung”. The research focused on the smooth and orderly implementation of land registration and its factors, and the need for actions that are deemed necessary so that the implementation of land registration can run smoothly. And the fourth research is Rahardian Ayu Saputri with the title: Reconstruction of the Position of PPAT in Land Registration Based on the Value of Justice “. The research focused on Land Registration of Land Rights according to the UUPA. The novelty of the author's research compared to the four studies above, this research suggests the urgency of Land Registration as a Guarantee of Legal Certainty over Customary Land Tenure. Based on the background that has been described, the problem formulation that will be examined in this writing is: How is the urgency of land registration as a guarantee of legal certainty over customary land tenure?

2 DISCUSSION

2.1 The urgency of land registration as a guarantee of legal certainty over customary land tenure

2.1.1 Land registration in the perspective of legal certain

Indonesia is one of the countries that pays great attention to land issues as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Achieving legal certainty requires land registration. Land registration is an effort to provide legal certainty and protection to holders of rights to a parcel of land and other registered rights, so that the party who proves is the true owner of the land parcel.

The provisions of Article 19 Paragraph (2) of the UUPA emphasize that the provision of a certificate of proof of rights (certificate) which applies as a strong evidentiary tool, this is also in accordance with the explanation of the UUPA Chapter IV

paragraph 2 which states that land registration is rechtkadaster in nature which means it aims to ensure legal certainty. The legal certainty of the certificate should be understood as a certificate that is a product of a government agency is something as evidence of ownership of land rights that cannot be contested again. However, as explained in Article 32 Paragraph (1) PP No. 24 of 1997, the certificate is a strong proof as long as it cannot be proven otherwise, the physical data and juridical data contained therein are accepted as correct data. [18] It can be concluded that the certificate as a product of a government agency may be incorrect (regardless of the reasons), thereby reducing the meaning of legal certainty of the certificate itself.

Legal certainty according to the opinion of Jan Michiel Otto in his book Adrian Sutendi, that to create legal certainty must meet the following conditions: (1) There is a clear and consistent rule of law; (2) Government agencies apply the rule of law consistently, subject and obedient to it; (3) The community adjusts their behavior to the rule of law; (4) Judges who are independent, impartial and must apply the rule of law consistently and observant when resolving legal disputes; (5) Court decisions are concretely implemented.[19]

Legal certainty according to Van Apeldoorn is: (a) means things that can be determined from the law, in concrete matters. Parties seeking justice want to know what the law is in a particular situation or matter, before he starts with the case. (b) also means legal security, which means protecting the parties against the arbitrariness of the judge.[20]

The provisions of Article 32 Paragraph (1) of Government Regulation No. 24 of 1997 are prone to disputes because the certificate as evidence of land rights cannot guarantee its veracity. Article 32 Paragraph (2) of Government Regulation No. 24 of 1997 states: In the event that a certificate has been issued legally on a parcel of land in the name of a person or legal entity who obtained the land in good faith and actually controls it, then another party who feels that they have a right to the land can no longer demand the exercise of that right if within 5 (five) years of the issuance of the certificate they have not lodged a written objection to the certificate holder and the head of the relevant land

18 Fernando Tobing, Land Disputes Between Batak Indigenous Peoples and PT Toba PULP Lestari and Violations of Forestry Inflicting Acts in North Sumatra, Sui Generis Journal of Legal Science Vol. 2 No. 2 (2022). https://ejournal2.undiksha.ac.id/index.php/JIH/issue/view/80.
19 Adrian Sutedi, Land Rights Certificate, Jakarta: Sinar Grafika, (2011), p. 27.
20 Irawan Soerodjo, Legal Certainty of Land Rights in Indonesia, Surabaya: Arkola, (2003), p. 178.

office or have not filed a lawsuit with the Court regarding the control of the land or the issuance of the certificate. In the explanation to Article 32 Paragraph (2) of Government Regulation No. 24 of 1997 it is stated that in a negative publication system the state does not guarantee the correctness of the data presented. However, it is not intended to use a purely negative publication system. This is evident from the statement in Article 19 Paragraph (2) letter c of the UUPA, that the certificate of proof of right issued serves as strong evidence and in Articles 23, 32 and 38 of the UUPA that the registration of various legal events is a strong means of proof.

In addition, from the provisions concerning the procedures for collecting, processing, storing and presenting physical and juridical data and issuing certificates in this Government Regulation, it is clear that the effort is to obtain and present correct data as far as possible, because land registration is to ensure legal certainty. In connection with this, the provision in paragraph (2) is made. This provision aims, on the one hand, to adhere to the negative publication system and on the other hand to equally provide legal certainty to parties who in good faith control a piece of land and are registered as rights holders in the land book, with a certificate as proof, which according to the UUPA applies as a strong means of proof.

In relation to the evidentiary nature of the certificate as evidence of rights as stipulated in Article 32 Paragraph (2) of Government Regulation No. 24 of 1997, Maria SW Sumarjono states that if for 5 (five) years the holder of the original land right fails to use his land in accordance with the nature and purpose of his right, and allows his land right to be controlled and registered by another party of good faith and he does not file a lawsuit with the court, it means that the person concerned abandoned his land and lost his right to sue. This conception is based on the institution of rechtverwerking known in customary law.

The concept of rechtverwerking in Article 32 Paragraph (2) of Government Regulation No.24 of 1997 aims to provide legal certainty to 2 (two) parties, namely: (a) For the owner of the certificate, if 5 (five) years have passed since the certificate was issued by the District/Codya Land Office and no one has filed a lawsuit, then he is free from interference from other parties who feel they are the owner of the land. (b) For the actual land, he is obliged to control the land in real terms and register the land to the local

District / City Land Office in order to avoid the possibility of land registered on behalf of others.

According to Sudirman Saad in his book Urip Santoso, [21] legal protection for holders of land rights in land registration can be realized if 3 (three) cumulative conditions are met, namely: (1) The issuance of the land certificate has been 5 years old or more (2) The process of issuing the certificate is based on good faith (3) The land is physically controlled by the right holder or his power. The provisions of Article 32 Paragraph (2) of Government Regulation No.24 of 1997 which regulates absolute legal protection to the owner of the certificate of land rights and also regulates the loss of one's rights to land rights certified by others has juridical problems among others: (a) Article 32 Paragraph (2) of Government Regulation No. 24 of 1997 which regulates the loss of a person's right to land is not sufficiently regulated in the form of a government regulation, it should be regulated in the form of a government regulation.

(b) the land title certificate issued by the District/Municipal Land Office fulfills the elements of a State Administrative Decision (KTUN) as stipulated in Law No. 5 of 1986 on State Administrative Justice. Article 1 point 3 of Law No. 5 of 1986 provides an understanding of a State Administrative Decree, namely a written decision issued by a State Administrative Agency / or Official that contains State Administrative legal actions based on applicable laws and regulations, which are concrete, individual, and final, which have legal consequences for a person or civil legal entity.

In the event that a land title certificate issued by the District/City Land Office is 5 (five) years old, it does not mean that the right to sue is lost for the person who feels aggrieved by the issuance of the land title certificate. If the elements in Article 32 Paragraph (2) of Government Regulation No.24 of 1997 are cumulatively fulfilled, the right to sue for people who feel aggrieved over the issuance of the certificate is not lost. Although the elements in Article 32 Paragraph (2) of Government Regulation No. 24 of 1997 are fulfilled, then the person who feels aggrieved over the issuance of the certificate and to resolve disputes related to the issuance of land rights by the District / City Land Office, then the party who feels aggrieved can file a lawsuit to the State Administrative Court (PTUN). The lawsuit can be filed within 90 days from the receipt or announcement

[21] Urip Santoso, Registration and Transfer of Land Rights, (Jakarta: Kencana, 2010), p. 280. 280..

of the decision of the State Administrative Agency / or Official, as stipulated in Article 55 of Law No. 5 of 1986.

The reasons that can be used as the basis for a lawsuit to cancel or declare invalid a land title certificate issued by the District/City Land Office include: (a) The challenged State Administrative Decision is contrary to the prevailing laws and regulations. (b) The challenged State Administrative Decision is contrary to the general principles of good governance. Therefore, in this paper will be discussed about the forms of legal uncertainty of certificates of land rights owned, and legal protection for holders of certificates of land rights owned.

Land registration according to government regulation number 24 of 1997 uses a negative publication system. In this system the state only passively accepts what is stated by the party requesting registration. Therefore, at any time it can be used by people who feel more entitled to the land. The party who acquired the land in good faith. This means that in a negative publication system, the information contained therein has legal force and must be accepted as true as long as there is no evidence to prove otherwise. The advantages of the negative system are: (a) protection of the actual right holder; (b) investigation of the land history before the certificate is issued. Under the negative registration system, land registration officials are not required to check on whose behalf the rights are registered. The land registry official registers rights in the public registers in the name of the applicant, so that the work of registering transfers of rights in the negative system can be carried out quickly and smoothly, as a result of the absence of checks by the land registry official.

There are weaknesses in the public registers provided in the context of land registration. A person who wants to buy a land right from a person who is registered in the public registers as the right holder has to ward off the risk that the registered person will turn out not to be the actual right holder. Thus, the main feature of the negative system is that registration does not guarantee that the name registered in the land book cannot be challenged even in good faith. The right cannot be challenged if the registered name is the rightful owner (de eigenlijke eigenaar). The rights of the registered name are determined by the rights and purchasers of previous rights, the acquisition of which is a chain.[22]

[22] Adrian Sutedi, Land Rights Certificates, Loc Cit.

indigenous law communities do not always have written evidence of customary land tenure. In an effort to overcome these problems, it is necessary to provide legal recognition and protection to customary law communities and their customary rights, one of which is by granting management rights on customary land as stipulated in government regulation number 18 of 2021 and regulation of the minister of agrarian and spatial planning / head of the national land agency number 18 of 2021. Other efforts can also be made by identifying and inventorying existing customary lands as has been done by the Ministry of Agrarian Affairs and Spatial Planning/Head of the National Land Agency to be validated and recorded at the Land Office. The confirmation and recognition of local governments through local regulations is also needed to strengthen the existence of customary law communities and customary land.

2.2 Juridical Basis for registration of customary land rights

Before discussing further about Customary Land Registration, it is important to first know the concept of Land Registration in general and its juridical basis after the UUPA was enacted. Land registration actually aims to provide a guarantee of legal certainty for a land right owned by a particular party. Legal certainty is a guarantee that the law is carried out and that laws and regulations are obeyed. Legal certainty also means that there are clear and logical rules that do not cause doubts.

Legislation according to Hans Kelsen with the Theory of Hierarchy of Legal Norms (Stufentheorie) states that the legal norms are tiered and layered in a hierarchical order so that there is a structure where lower norms apply, are sourced and based on higher norms, as well as higher norms apply, are sourced and based on higher norms again then so on until a norm that cannot be traced again which is hypothetical and fictitious, namely the basic norm (grundnorm).23

Apparently, the essence of this theory is also contained in the law regarding the Order of Legislation in Indonesia based on the provisions in the Law of the Republic of Indonesia Number 12 of 2011 concerning the Formation of Legislation.

23 Maria Farida Indrati S, Science of Legislation Types, Functions and Content, Yogyakarta: Kanisius, (2017), p. 41

The form of the law is referred to as the juridical basis as stipulated in the provisions of Article 7 paragraph (1) that: Types and hierarchy of Legislation consist of:

The 1945 Constitution of the Republic of Indonesia;

Decree of the People's Consultative Assembly;

Law / Government Regulation in Lieu of Law;

Government Regulation;

Presidential Regulation;

Provincial Regional Regulations; and

Regency/City Regional Regulations.

The issue of land registration in general has actually been regulated in the UUPA. UUPA as the legal basis that regulates the main provisions of agrarian affairs is sourced from higher provisions, namely the 1945 Constitution, specifically Article 33 paragraph (3), namely "the earth and water and the natural resources contained therein shall be controlled by the State and used for the greatest prosperity of the people".

The provisions of Article 19 paragraph (1) of the UUPA are the juridical basis for land registration in Indonesia. The provision implicitly states that provisions regarding land registration are regulated by Government Regulation. Therefore, Government Regulation of the Republic of Indonesia Number 10 of 1961 concerning Land Registration was promulgated. Then as a replacement for the Government Regulation on Land Registration of 1961, Government Regulation of the Republic of Indonesia Number 24 of 1997 on Land Registration was promulgated, because the previous Government Regulation was no longer considered capable of providing an optimal legal basis to support national development. The provisions of Article 1 point 1 of the Government Regulation on Land Registration, we can find out what exactly is meant by land registration. Land registration is a series of activities carried out by the Government in a continuous, sustainable and orderly manner, including the collection, processing, bookkeeping, and presentation and maintenance of physical and juridical data, in the form of maps and lists, regarding land parcels and units of flats, including the provision of evidence of rights for land parcels that already have rights and ownership rights to units of flats and certain rights that encumber them.

It can be observed that land registration activities consist of various activities, which lead to the granting of proof of rights, namely land rights certificates. The process

of land registration can be divided into sporadic land registration carried out individually (at one's own request) or in bulk and systematic land registration carried out in bulk. Harris Yonatan Parmahan Sibuea believes that with land registration, land rights holders will obtain certificates as proof of rights that serve to ensure the existence of their rights.24 E The existence of a right is a manifestation of the guarantee of land rights by the State. The guarantee is then called legal certainty.

Indra Yudha Koswara gave his view that, with the implementation of land registration activities, the guarantee of legal certainty aimed at is certainty of the status of the registered rights, also covering the certainty of the subject and object of rights by obtaining a certificate as proof of rights.25

According to Maria Farida, the enforceability (geltung) of a norm will exist if the norm is formed by a higher norm in a sequence of laws and regulations or formed by an institution that has the authority to form the norm.26

The UUPA does not mention customary land as a land right and the Government Regulation on Land Registration does not regulate customary land as an object of land registration. Legal certainty on the status of land rights that are the object of land registration must come from the consistency of the norms that regulate it. Such consistency must be built starting from the highest legal norms to the implementing legal norms based on the order of the applicable laws and regulations in Indonesia.

Zainal Arifin Hoesein believes that to realize legal certainty, the regulation must meet the requirements, one of which is consistency in formulation. The consistency is classified into internal consistency, namely in the linkage of legislation governing the same thing must be maintained the relationship of its rules, then external consistency, namely, there is a harmonious relationship regarding the rules between the various provisions of the legislation.27

24 Harris Yonatan Parmahan Sibuea, "The Importance of Land Registration for the First Time", Journal of the Rule of Law: Building Law for Justice and Prosperity, Volume 2 No. 2 (2011). https://jurnal.dpr.go.id/index.php/hukum/article/view/218

25 Indra Yudha Koswara, "Land Registration as a Form of Legal Certainty in Facing the ASEAN Economic Community (AEC)", Positum Law Journal, Volume 1 No. 1 (2016). https://journalseeker.researchbib.com/view/issn/1693-0061#google_vignette.

26 Maria Farida Indrati S, Op.Cit. p. 39.

27Zainal Arifin Hoesein, "Law Formation in the Perspective of Law Reform", Journal of Rechtsvinding National Law Development Media, Volume 1 No. 3 (2012). https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/87.

Therefore, in terms of the formation of customary land registration norms, a regulatory device is needed that regulates it in accordance with the order of laws and regulations. In accordance with the theory of the hierarchy of norms, the regulation of norms regarding customary land as a right to land which is also the object of land registration should ideally be formulated in a law. Then it is further regulated regarding its implementation in lower-level regulations, even to the level of local regulations that contain explanations or follow-up to the regulations above.

The opportunity to regulate customary land as a land right in a law is actually clear. For example, at the constitutional level, the provisions of Article 18 B paragraph (2) of the 1945 Constitution, namely: "The State recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law". One of the traditional rights in question is the right to control the lands that they traditionally occupy.

Article 14 paragraph (1) of the Convention on Indigenous Peoples in Independent Countries states that: The rights of possession and control of the indigenous peoples concerned over the lands which they have traditionally occupied shall be recognized. In addition, in appropriate circumstances measures shall be taken to safeguard and protect the right of the indigenous peoples concerned to use lands which they do not exclusively occupy, but which they have traditionally entered for subsistence and to carry on traditional activities. In this regard, special attention should be paid to the situation faced by nomadic indigenous peoples and shifting cultivators.28

In relation to state recognition of the lands of indigenous peoples, Article 26 paragraph (3) of the United Nations Declaration on the Rights of Indigenous People also states: "states shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned"[OBJ].

When referring to the provisions of Article 18 b paragraph (2) of the 1945 Constitution, it is clear that there is a mandate given by the Constitution to state officials

28United Nations Declaration On The Rights Of Indigenous Peoples, https://referensi.elsam.or.id/wp-content/uploads/2014/10/Deklarasi-PBB-Tentang-Hak-hak-Masyarakat-Adat.pdf, accessed August 14 (2022) p. 1

to provide recognition of traditional rights including customary land in the law.29 K In reality, the ius constitutum regarding the recognition and protection of indigenous peoples is scattered across various laws and regulations.

The substance of these various regulations has the potential to overlap, which can lead to land conflicts. One example is the overlap between the LoGA and Law No. 41/1999 on Forestry. At the level of the law, the opportunity to formulate customary lands as a land right is actually also implied in the provisions of Article 16 paragraph (1) letter h of the UUPA. Therefore, if customary land as a land right becomes a norm regulated in the law, the Land Registration Regulation also needs to be adjusted. The GR on Land Registration is the implementation of the UUPA, especially Article 19. Regarding land rights that are "recognized" as the object of land registration and that get legal certainty and protection, only land rights regulated in Article 16 paragraph (1) of the UUPA (based on the provisions of Article 1 point 5 of the GR on Land Registration).

This is evidenced by the provisions in Article 4 paragraph (1) of the Government Regulation on Land Registration, which states "To provide legal certainty and protection as referred to in Article 3 letter a, the holder of the relevant land right is given a land right certificate". The intended land rights are land rights according to the provisions of Article 16 paragraph (1) of the UUP.

The strong desire to register customary land from customary law communities seems contradictory to the opinion of Boedi Harsono in his book. He argues that

"customary rights will not be regulated and the UUPA also does not order them to be regulated, because the regulation of these rights will result in perpetuating their existence, therefore the existing arrangements are allowed to continue according to local customary law".30

In reality, in today's development, customary law communities continue to show their existence. So that it demands to get juridical recognition, including its traditional rights. This can be proven by the number of local regulations enacted to recognize the existence of customary law communities in their regions. These conditions actually cause

29Muazzin, Indigenous Peoples' Rights to Natural Resources: An International Law Perspective, Padjajaran Journal of Legal Sciences, Volume 1 No. 2 (2014). https://doaj.org/article/8a5a42d5b250470b8d2f92c14dca0609.

30 Boedi Harsono, Indonesian Agrarian Law, History of the Formation of the Basic Agrarian Law, Its Content and Implementation, Jakarta: DJambatan, (2005), p. 282.

what is the ideal of law in the life of the nation and state in Indonesia not to be realized. Therefore, overlapping regulatory substance between one local regulation and another may occur. The existence of a customary law community is indicated by fulfilling several criteria, namely:

The existence of the subject of ulayat rights, namely customary law communities that fulfill certain characteristics.

The existence of land/territory with boundaries as lebensraum which is also the object of customary rights.

The authority of the customary law community as the subject of ulayat rights to take various actions against the object of ulayat rights.31

In its development, the regulation on customary rights has further developed with the Minister of Agrarian Affairs/Head of the National Land Agency Regulation Number 18 of 2019 concerning Procedures for Administration of Customary Land. This regulation does not distinguish between customary rights and communal rights and after the issuance of this regulation, there are no Decrees related to customary rights or communal rights issued by the Ministry of Agrarian Affairs and Spatial Planning / National Land Agency.

Furthermore, Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration and Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 18 of 2021 on Procedures for Determining Management Rights and Land Rights were issued. Article 4 of the Government Regulation states that the determination of customary rights into management rights is a form of recognition to customary law communities. The granting of management rights to customary law communities has indirectly recognized and made customary land one of the objects of land registration.

In 2024, the Minister of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) issued Regulation of the Minister of ATR/BPN No.14 of 2024 concerning the Implementation of Land Administration and Registration of Customary Land of Customary Law Communities.

31 M Maria S.W. Sumardjono, Land Policy Between Regulation & Implementation, Jakarta: Kompas (2005), p. 55.

3 CONCLUSION

Based on the results of this writing, it is found that the urgency of registering land rights is the legal protection and guarantee of legal certainty for holders of land rights, so as to create a sense of security over the land they control. Registration of customary land into management rights does not guarantee legal certainty and protection of the customary rights of Indigenous Peoples.

3.1 Suggestion

To ensure legal certainty over customary land rights, it is necessary to make a Law on the Association of Customary Law Communities which also regulates the Registration of Customary Lands as a form of follow-up to Article 18 B paragraph (2) of the Constitution of the Republic of Indonesia 1945.

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Authors' Contribution

All authors contributed equally to the development of this article.

Data availability

All datasets relevant to this study's findings are fully available within the article.

How to cite this article (APA)

Labobar, F. M., Tjoanda, M., Akyuwen, R. J., & Latupono, B. CERTAINTY OF REGISTRATION OF LAND RIGHTS OF CUSTOMARY LAW COMMUNITIES. Veredas Do Direito, e234630. https://doi.org/10.18623/rvd.v23.n4.4630