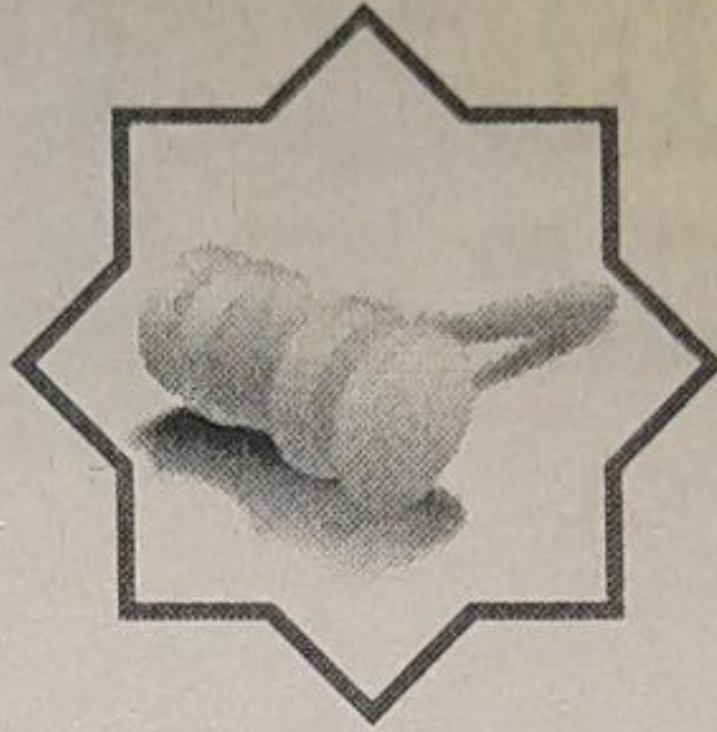




# LAW AND ISLAMIZATION: The Case of Indonesia

Edited By:  
Euis Nurlaelawati & Ratno Lukito





**LAW AND ISLAMIZATION:  
THE CASE OF INDONESIA**

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# **LAW AND ISLAMIZATION: THE CASE OF INDONESIA**

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**Euis Nurlaelawati & Ratno Lukito**

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## PREFACE

This book is a collection of articles presented at an International conference held at International Islamic University Malaysia in September 2014 under the cooperation between the Faculty of Sharia and Law, State Islamic University (UIN), SunanKalijaga, Yogyakarta, and Harun M. Hashim Law Center, IIUM Gombak Malaysia. The articles discuss various issues of law and Islamization in Indonesia.

The publication of this book is realized thanks to the financial support of the Faculty of Sharia and Law, UIN Yogyakarta, and to the hard effort of the staffs and the members or lecturers of the Department of legal studies of the faculty. The Dean of the faculty deserves special thanks and appreciation for his full support to the projects of this book publication and of the joint conference in Malaysia. Special thanks also go to all the staffs of the faculty for having facilitated and made the arrangement of the travel of the members of the Department of legal studies to Malaysia and for having extended their helpful hands to bring the two activities of holding conference and of publishing the presented articles to a success. Sincere thanks are also awarded to the director of Harun M. Hashim Law Center, IIUM, Prof. Dr. Ainul Jaria Maidin, and her secretary, Dr. Farid Suhaib, for having agreed to hold the joint-conference and made it well accomplished. The audience of the

International conference in which the papers were presented deserves also our gratitude.

This book is not a perfect piece of work and still needs considerable review and improvement. However, we do hope that this book will contribute to the development of Islamic legal discourse in Indonesia and give good understanding for readers of how Islam has become since its adoption by Indonesians an inspiration, source, and base for the development of law in Indonesia.

Editor, 2014

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# **Judicial Perspective of Land Registration in Indonesia Review of Law Number 41 of 2004 on the Endowment (waqf) and the Government Regulation Number 24 of 1997 on Registration of Land<sup>1</sup>**

*By Iswantoro*

## **A. Introduction**

Problems of land in Indonesia are structural, meaning that the problem of land emerges as a hegemonic process through a long political process. Besides, it can also be through a series of government policy-making process, in addition to land problems also emerges as a lack of public awareness and education law. So, it triggers the problems caused by the dominance of land ownership in Indonesia is a political process; land policy which has been conducted over a long time based on the history of Indonesia.

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<sup>1</sup>Paper presented at the Seminar in Law and Society 4 (SLAS 4) Development of Law and Islamization: "The Malaysian and Indonesian Perspective" held in Cooperation between the Faculty of Shariah and Law Universitas Islam Negeri Sunan Kalijaga, Harun M. Hashim Law Centre and Majlis Profesor Negara on 9th September 2014 in International Islamic University Malaysia, Gombak, Malaysia.

The history and condition of land in Indonesia is built through a diversity of custom systems, culture and political system built by the government. These conditions gave rise to the dispute principally in the area of land whose solution requires integration of all parties or stakeholders. Each custom and regions, social unity, the unity of the legal community have colorful characteristics. Configuration of politics and law in Indonesia kept up coloring the faces in Indonesian agrarian law. We have not been able to consolidate political, social problem and land law. The politics and law of land in Indonesia have not evolved significantly and never obeyed the principle, as law enforcement.

Milestone in the emerging agrarian law, after the date of 24 September 1960, with the promulgation of the Basic Agrarian Law (UUPA) or the Basic Regulation of Agrarian aimed at unifying the field of land law. As a national agrarian law, the UUPA aims at laying the basis for the preparation of national agrarian law; the foundations for organized unity and simplicity in the law of land and the foundations to provide legal certainty regarding the rights over the land for the people.

The thing to remember is that the UUPA struggle as the principal regulations, to achieve that goal requires the actor of regulations becoming effective. The *UUPA* as a mechanism for land consolidation requires businesses to make it happen. "Partly because of the rules of operations have not been comprehensively developed and partly because of the dynamics of development and the presence of psychological and political barrier for some of us to consistently implement."<sup>2</sup>

In the background, it poses a complex affective participating in land dispute solution process. Variants of the dispute concerning

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<sup>2</sup> Rusmadi Murad, *Menyingkap Tabir Masalah Pertanian, Rangkaian Tulisan dan Materi Cceramah*, (Bandung: CV Mandar Maju, 2007), p. vi.

land use rights on the land *i.e.*, the 'vast' land, the subject of land rights, and community activities in the area, the provision of land by the State for the public interest and no optimal policy landreform. To reveal several problematic one in the field of landship requires manner or mechanism; the authority and the existence of a credible institution. Dispute defense is structural in manner and should be done to overcome the systemic roots of the question to be understood first. With this method, it appears that the problematic one really can be solved elegantly namely law certainty. The law enforcement and Justice are as the pillar to be considered.

From the above condition, it means that the question of land use due to structural problems affecting the enforcement principles and protection of law certainty to the community will be disturbed. This triggers many conflicts in sporadic about landship in various districts as a result disharmony on the regulations one another as well as non-completion rules, along with the history and characteristics of various districts; this adds complexity in land becoming problematic. Against this background, the author try to analyze the Dilemmatic Dispute of Lands and Settlement in the Perspective of law certainty will be positive. The alternative solutions can be through formal and non-formal institution with the juridical foundation based on the Principle Law of Agrarian (*UUPA*) and organic regulations.

The problems arising as a result of "the retardation" of the land registration program and cannot small problems in the implementation of land registration and that as a result of implemented one. Different parties can contact consequences. Two questions stand out in implementing the land registry are about the rule arising the problems and the problem of implementing officials, because they specifically have highlighted the extent to which the regulations are implemented and the implementing apparatus can

perform. In Article 33 Paragraph (3) of the Constitution of 1945 (UUD45) has been clear of what meant by the concept of land right from the State. By this concept, the *UUPA* is just the principles and issues in the guide lines; therefore it is just referred to the Principle Law of Agrarian, where the purpose of the principle is: putting the policies for restructuring the national agrarian law, which is as a tool to bring the prosperity, happiness and justice for the Nation and People, especially the peasants, either in the fair and prosperous society;

1. putting the policies to provide unity in land use law;
2. Putting the policies to provide legal certainty regarding the rights of the people in the land.

Referring to the Law Number 5 of 1960, so the activities of the Land Registry has the philosophy, and as the main purpose of law certainty addressed to the holders of the rights to the land. Based on the trust of the Article 18 paragraph (1) of Law Number 5 of 1960, it was issued its further reaction the Government Regulation (PP) No. 10 of 1961 and beginning from October 8, 1997 was replaced by the PP No. 24 Year 1997 about Registration of Land. The reason of why replacing the PP No. 10 of 1961 is because more than 35 years is not enough to give a satisfactory result. "From around 55 million parcels of land rights there are eligible to be registered with approximately 16.3 million parcels of land rights eligible to be registered. In the meantime, through inheritance, separation and grants of new rights, the number of parcels of land eligible to be registered during the second long-term development was expected to increase about 75 million cases."<sup>3</sup>

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<sup>3</sup> See General Explanation of the Indonesian Government Regulation No. 24 Year 1997 on Land pendaftaran the 3rd paragraph and so on.

Land registration in accordance with Article 1 of Government Regulation No. 24 In 1997, the Registration of land is a series of activities carried out by the government on a continuous, sustainable and orderly manner, including the collection, processing, bookkeeping, and catering, as well as the preservation of the physical and juridical data, in the form of maps and lists, on the areas of land and units of flats, including the grant of letters visible evidence of rights to land parcels having no rights of ownership of the units and flats as well as certain rights conveying.

The words "*chain of events*" shows the range of activities in the maintenance of the land registry. The words "*continue*" points to the implementation of activities once started there will be no end. The word "*regular*" shows all activities should be based on the legislation of the rights.

The Land Registry is performed in the assurance of law certainty in the framework of land rights. To actualize the law certainty, it can be done by:

1. Preparing the device of written law; complete and clear one
2. Coordinating the land registration allowing for the rights to the land to prove ownership over land controlled and by the government is to implement land use policies.<sup>4</sup>

While the Land Registry for the Endowments (*Waqf*) is arranged by the following:

1. Law No. 5 of 1960 on the Principle Regulation of Agrarian Policy.
2. Law Number 41 of 2004 on Endowments (*Waqf*).
3. Government Regulation Number 24 of 1997 on Land Registration.

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<sup>4</sup> Urip Santoso, *Pendaftaran dan Peralihan Hak Atas Tanah*, (Jakarta: Kencana, 2010), p.2.

4. Government Regulation Number 42 Year 2006 concerning the implementation of Law Number 41 of 2004 on Endowments.
5. Government Regulation Number 13 of 2010 on the type and rate on type of Non-Tax Receipts Happens at the National Land Agency.
6. Regulation of the Minister of Agrarian Affairs/Head of National Land Agency Number 3 Year 1997 regarding Implementation Conditions of *PP* No. 24 Year 1997 on Land Registration.
7. Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 9 Year 1999 on Procedures for Grant and Cancellation Rights and Rights of National Land Management.

While the meaning of endowment (*Waqf*) according to Law No. 41 Year 2004 about the Endowments (*Waqf*) is stipulated in Article 1, paragraph (1) that the waqf is the acts of law by the giver (*waqif*) to separate and/or give part of the ownership to other to use forever or during the given time period in accordance with the use of worship and/or public prosperity according to Shari'ah, the things or properties can only be endowed as waqf when owned and controlled by the waqif appointed formally. The *Waqf* property can be either stationary objects or moving objects. So, the endowment (*waqf*) is a dedicated legal act by the giver (*waqif*) to separate and / or give some of the property to be used permanently or for a period of time according to their importance. The endowments (*waqf*) seeks to create interest or general welfare of worship according to the Islamic law (*shari'ah*) and the *waqf* land certification is required by the order of administration and certainty rights when disputes or legal problems occur.

Based on Law No. 41 Year 2004 about the Endowments (*waqf*) then right to the land that is endowed:

- a. The ownership of land either those already listed or unlisted ones.
- b. The rights of building use (*Hak Guna Bangunan*), the rights of business use (*Hak Guna Usaha*) or the rights of use over the State's lands.
- c. The Rights Use of Building (*Hak Guna Bangunan*) or rights Use of management or ownership rights must get a written permission by the holder of managing rights or ownership rights.
- d. The ownership of the units of flats.

According to HM. Daud Ali and Habibah Daud the Endowments (*waqf*) should be clear with some purposes, including:

- a. For the public interest, such as building a mosque, school, home hospital and other social charities
- b. To help the poor and those displaced by building orphanages
- c. To meet the needs of their own family even if the family consists of the have
- d. Not against the religious values.<sup>5</sup>

While the scope of the activities of the Land Registry includes over land rights set forth in the *UUPA* and further elaboration in Article 9 *PP* No. 24 of 1997, the land registry objects are as follows:

- Property Rights (Article 20 paragraph 1 *UUPA*)
- Business Interest Rights (*Hak Guna Usaha*) (Article 28 paragraph 1 *UUPA*)
- Building Interest Rights (*Hak Guna Bangunan*) (Article 35 paragraph 1 and paragraph 2 *UUPA*)

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<sup>5</sup>HM. Daud Ali and Habibah Daud, *Lembaga-lembaga Islam di Indonesia*, (Jakarta: Rajawali Press, 2005), p.270.



## PART FOUR:

### Islamic Law and Property in Indonesia: Land Registration and Tax Management

- Benefit (Use) Rights (Article 41 paragraph 1 UUPA)
- Managing Rights Land
- Endowment Land
- Ownership Rights on Units of Flats
- Rights of Obligations (Law No. 4 of 1996)
- National Land

#### **B. Judicial Perspective on Land Registration In Indonesian Legal Security**

The UUPA introduces one article in particular about arranging *UUPA* Land's consecration, namely Article 49 which reads as follows:<sup>6</sup>

- (1) The ownership of land objects used during the religious and social benefits to efforts in the field of religious needs and socially recognized and protected;
- (2) The bodies are guaranteed to acquire enough land for the building and their efforts in the field of religious and social benefits. To the needs and requirements of other holy liturgy as referred to in Article 14 may be granted land directly controlled by the state with the right to use;
- (3) The consecration of land is protected and regulated by Government Regulation. Referring to the provisions contained in Article 49 UUPA above, and then this is an acknowledgment of the existence of formal juridical consecration of land owned by the state as aligned with the rights contained in other UUPA, *egg*, the Title, Right to Use, Use of Building and the rights of Use. However, the order of paragraph (3) of Article 49 is unanswered after the UUPA of more or less 17 years, when in

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<sup>6</sup>[Http://khoersilaturrehmi.blogspot.com/2010/02/penyelsaian-sengketa-wakaf.html](http://khoersilaturrehmi.blogspot.com/2010/02/penyelsaian-sengketa-wakaf.html), accessed on 9 August 2014 at 0900 Indonesian Western Time.

1977, after the government issued Government Regulation No. 28 Year 1977 on Land consecration. The *Waqf* land use is as a function of endowment (*waqf*) in general, that is to the benefits of the people, but specifically of Law Number 41 Year 2004 concerning Endowments arrange that the *waqf* land allocation is dependent on the endowment (*waqf*) pledges made. The Endowment (*waqf*) pledge is sacred utterances spoken sincerely to surrender his property to be used in the cause of Allah. Therefore, the parties will take advantage of the land should be completed with the letters associated with the land. It is stipulated in Article 9 paragraph (5) of Government Regulation No. 28 Year 1977, which is as follows: "In carrying out the pledge as referred to in paragraph (1), the parties are required to take and endowed land and submit to the office the following letters: (a) a certificate of title or other evidence of land ownership, (b) a declaration from the fortified village heads by the local district head made plain land ownership and not caught anything, (c) the certificate of registration of land, (d) permission from the regent/mayor as the district head of local agrarian sub-directorate head".

First registration of land is land registration activities for objects that are not registered land based on the Government Regulation Number 10 of 1961 on Land Registration ("PP 10/1961") or PP 24/1997. Registration of land for the first time implemented through systematic land registration and sporadic land registration. The land registry means systematic land registration activities for the first time simultaneously covering all the land registry objects that have not been registered in the province or the territory of a village/sub village (Article 1, item 10 PP 24/1997). While the sporadic land registration is land registration activities for the first time on a few objects of land registration in the territory

or the territory of a village/sub-village individually or in bulk (Article 1, item 11 PP 24/1997).<sup>7</sup>

So, concerning with the legal certainty, then the question arises, 'why can the Government consider assuring the legal certainty of land rights associated with land registration activities? This is because of the linkage with the grant of rights over the land, which shall be entitled, the object location, as well as vast areas of land boundaries and the boundaries of the land and nature. Some available data with ground truth and the public can easily be known by announcement.<sup>8</sup> This Announcement Board, commonly known as the Land Registry. With the board's announcement/registration of land will guarantee the law certainty about the rights to the land, both related to the subject or the object of his rights.

With the strengthening of the rights to the land in the announcement board a government agency, then each occurrence of the rights to the Estate can be followed in order, and so law certainty will be to the right on the ground acknowledged well. That's why the land registry maintained in order to ensure certainty of purpose of law certainty to be the right on the ground. Certainty of their owners, park boundaries, area and type of right on the lands.<sup>9</sup>

1. Nonetheless according to Budi Harsono, there are some problems that until today is still in the minds of the completion rules and settings:
2. Completion of the existing landreform rules in Article 7 and 17 UUPA, with the implementation of Law No. 56 Year 1960 concerning Stipulation PRP Land Agriculture;
3. Arrangement of land consolidation;

<sup>7</sup><http://www.hukumproperti.com/2012/02/27/kegiatan-pendaf-taran-tanah/> accessed on Sunday 10 – 08 – 2014 at 10.17 Indonesian Western Time.

<sup>8</sup> National Land Agency, *Himpunan Karya Tulis Pendaftara Tanah*, (Jakarta: 1999), p. 27

4. Arrangements on the land settlements as setting more certainty in Law Number 24 Year 1992 on Structuring space;
5. Provision of information in land use;
6. Education and the provision of human resources implementing HTN, clean, loyal and professional.<sup>10</sup>

Therefore there should be harmonization of legislation related, so that it can better guarantee the security of land and law certainty. This is related to the system or the related *stelsel* with the land registry that is what the land registry be the *stelsel* positive or negative *stelsel* registration. From their land registration *stelsel* provides the advantages and drawbacks. In the Government Regulation No. 20 of 1961 and renewed by Government Regulation Number 24 in 1997 embraced *Stelsel* as negative ear. Related to this fact is well functioning land registry to protect the owner, also serves to check the status of a piece of land, one owner, any right, how wide, for as used one and so on. Rights and obligations for the enrollment of the alliance as a liability Rights guarantees the right to be raised for the preferred creditor rights and fundamental guarantees of publicity that protect the existence of the third party claim arising.<sup>11</sup>

The provision on the legal basis of land rights set out in Article 4 paragraph (1) UUPA, *i.e.*, “bag the controlling right of the State over land as referred to in Article 2 determined the existence of a variety of rights to the Earth’s surface, called ground, which can be given to and owned by the people, either alone or together with persons and legal entities “. Land rights derived from the rights

<sup>9</sup> *Ibid*, p 27.

<sup>10</sup> Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Nasional dalam Hubungannya dengan Tap MPR RI IX/MPR/2001*, (Jakarta: Unniversitas Trisakti, the First Publication, March 2002), p. 75.

<sup>11</sup> Chadidjah Dalimunte, *Pelaksanaan Land Reform Di Indonesia dan Permasalahannya*, (Medan: FH USU Press, 2000), p.132.

of the State control over land can be given to either individual of Indonesian citizens or foreign nationals, a group of people together, both legal and private legal entity of established public law.<sup>12</sup>

The rights over the land in order to achieve security assurance it goes to the law be then required land registration activities that will produce visible evidence of the Estate mentioned on the right certificate, a realization, one of UUPA (the Principle Law of Agrarian). The obligation to do the registration, in principle, be charged to the government and the implementation is done in stages, district by district based on consideration of the availability of the registration policy map. In Indonesia from the surrounding areas there are 44 million, around 30 percent of new certificates.<sup>13</sup>

With already having issued the certificates of land, it will be legal certainty was reached over the rights to the land; because the data juridical and physical data are listed in the land certificate is accepted as the correct data. The receipt of the correct data is good in deed of law actualization everyday and the litigants in court. It is appropriate and in accordance with Article 3 of Government Regulation No. 24 of 1997 explained that the purpose of land registration is as follows:

- a. In order to provide legal certainty and legal protection to the holders of land rights which plot, apartment units and other rights that can easily be registered in order to prove himself as the holder of the right in question.
- b. To provide information to interested parties including the government can easily obtain necessary data in providing legal

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<sup>12</sup> Urip Santoso, *Hukum Agraria dan Hak-hak Atas Tanah*, (Jakarta: Kencana, 2011), p. 87.

<sup>13</sup> Maria S.W. Sumardjono, *Land Policy: Between Regulation and Implementation*, (Jakarta: Kompas, 2001), p. 181-182

actions concerning land parcels and flats units are already registered.

c. For the orderly implementation of land administration.

In the context of legal certainty, it is the legal standing of proof and bookkeeping as done with the land registry for registration of rights consisting of;

- a. New land rights and can be evidenced by:
  1. Determination of granting the right of the competent authorities concerned entitles
  2. Original Deed of the Land Deed (Official (PPAT) which includes the provision of such rights
  3. Regarding the Management Rights evidenced by the establishment granting of management rights by the competent authority
  4. Land endowment pledge evidenced by deed of *waqf*
  5. The ownership of apartment units evidenced by a deed of separation
  6. Granting rights to dependents evidenced by deed of granting security rights.

### **C. The Perspective of Land Publicating Registration Systems and Opportunities Opening of The Claim on Land Certificate**

In Article 19 of the *UUPA* it is mentioned that for administrative ensure the certainty of holding the government land registration throughout the territory of the Republic of Indonesia is regulated by the government. The *UUPA* explain the land registration include as follows:

#### PART FOUR:

#### Islamic Law and Property in Indonesia: Land Registration and Tax Management

- a. Measurement, mapping and soil bookkeeping;
- b. Registration of rights to land and the transfer of these rights
- c. Granting letters of proof applicable rights as a powerful proofing tool.

The juridical implications of the success of the above 3 activities are manifested in the land certificate as proof of the land rights to provide certainty of subject, object and ground related data. In the Government Regulation No. 60 of 1961 on Land Registration and now revised by the Government Regulation No. 24 of 1997 is to know the system of publication in the land registry.

Definition of publications in the land registration system that is, in the organization of the publication system of land registration making the problem in extent to which people may believe the truth data provided by the State as a result of land registration activities undertaken. And what are the legal consequences of the legal acts of the land that has been registered with the use of the data, but then it turns out that the data prove to be incorrect?<sup>14</sup>

Land registration system that is applied in a State based on the principle of legal certainty can be adopted by the State in removing the right to the land. There are two basic kinds of laws that is the basis of good faith and fundamental *Nemo plus jurist*.<sup>15</sup> Good faith basis means the person who acquires a right in good faith will be the rights holders pursuant the certainty will be legitimate. While basic *Nemo plus jurist* means people cannot move right more than the rights available to it. The publishing system is

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<sup>14</sup> Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah*, p. 84.

<sup>15</sup> Adrian Sutedi, *Peralihan Hak Atas Tanah dan Pendaftarannya*, (Jakarta: Sinar Grafika, 2010), p. 117

used for basic good faith as a positive publishing system, whereas the basic system *Nemo plus jurist* using positive publishing system.<sup>16</sup>

In outline, there are two systems, namely the publication of positive publicity system and the system of negative publicity. Positive publishing system always uses rights registration system, then there must be a book of land as a form of data storage and presentation of juridical, but it is also the certificate of rights as proof of rights letter. Negative publicity is not the registration system as concerned, but the validity of a legal act performed that determines the transfer of rights to the buyer, where registration is not to make people who acquire land from those who are not entitled to be a new right holder.

Publishing system used in PP 24/1997 is negative publicity system containing positive elements. It can be seen from the provisions of Regulation 24/1997 Article 32 paragraph (1) and explanation. In Article 32 paragraph (1) is mentioned on the certificate as proof that powerful tool which means a system of positive publicity as seen on the right as proof of registration.

When viewed based on the aspect of guarantees given by the granting Letters Evidence of Land Rights (Certificate of Land Rights) as a means of proof, the Land Registry is familiar with two kinds of systems, namely;<sup>17</sup>

#### a. Negative System

The official/Land Registry board is not active in doing the Land Registry, but only receive data in land use proposed by the landowner until the government does not guarantee legal certainty on land owned by the community. This never happened

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<sup>16</sup>*Ibid*, p. 118.

<sup>17</sup><http://hasyimsoska.blogspot.com/2011/07/pendaftaran-tanah.html>, accessed on 16 - 8- 2014 at 12.00. Indonesian Wester Time.



in Indonesia during the Dutch colonial era. Examples of countries that impose a system are the Netherlands, France, Philippine.

#### b. Positive Systems

This system gives stronger guarantees to acquire the rights over the land. Those were recorded in the General Register/Book Land as the owner of certain land/absolute. This system occurs in the developed countries where the data is complete, and the government guarantees the accuracy be proactive and absolute proof tool. Examples of countries that impose a system are Germany, Switzerland, Austria, and Australia. Indonesia has a tendency of using the Positive Negative system. With this system, there are signs that, when it turns out to be false, then it can be changed and corrected. Proof of ownership of the land is strong, but not absolute. The system adopted by Indonesia since the law of land administration is still based on customary law which is negative but the resulting data is accurate (positive).

The Land Registration System in Indonesia also called Quasi-Positive (Positive that trick). The Features of Positive Quasi is as follows:

- a. The name listed in the Register Book Land is a true land owner and protected by law. Mark certificate is the strongest evidence of rights, absolutely opens it.
- b. Each process of transfer, through a careful review and scrutiny procedures and meet the requirements of openness.
- c. Each *Persil* limit is measured and drawn by Land Registry map with a scale of 1: 1000, a measure which allows to be seen again *Persil* limit, when there is a dispute on limits later.
- d. Landowners listed in the certificate and the book can be pulled through the Land Court decision or canceled by the Head of

- National Land Agency, when there is a legally flawed.
- e. The government does not provide funds for the payment of damages to the society due to administrative error Land Registry, unless the societies who feel wrongly begin with the judicial process to obtain the right.<sup>18</sup>

While the explanation of Article 32 mentioned in the certificate as proof of the strong in the sense that if there is evidence to prove otherwise, so that the rights of the certificate will be not absolute; if it can be proven that the certificate is obtained by performing a legal act as not valid in a period of 5 years. Here is the element of the existing system of negative publicity. This can be done along the acquisition and issuance of certificates of land rights acquired in accordance with the procedural rules and laws that apply in good faith and there is no land forgery intended subject and object. In principle, the same function of land registration as provided in Regulation No. 10 of 1961, but there is little difference in the settings on the provisions of Article 32 paragraph (2) of Government Regulation No. 24 of 1997 on Land Registration in essence stated emphatically. "In the case of an area of land being lawfully issued a certificate on behalf of the person or entity law acquiring the land in good faith and actually master it, then the other party has the right feel to the land can no longer demand the implementation of these rights when the 5 (five) years from the issuance of the certificate does not file a written objection to the certificate holder and Head of the Land Office concerned, or not filed with the Court regarding the acquisition of land or the issuance of the certificate".<sup>19</sup>

If referring to the Government Regulation No. 10 of 1961 on Land Registration, and now has been replaced by the Government

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<sup>18</sup>*Ibid.*

<sup>19</sup>See Further Implementation of Rule-article-32Peraturan-Government-number-24-year-1997-of-registration-land.

Regulation No. 24 Year 1997 on Land Registration, then the publication of the registration system is a system used negative publicity, meaning not guarantying the correctness of data bias as assembled with the registration filing submitted. This condition implies that despite registration of land and last output has issued certificates of land rights, it is still an opportunity opening of a lawsuit or other parties objected to the issuance of certificates of land rights as concerned. In the realm of the court becomes final conditions for chuckling the pillar and prosecute against any appeal against the certificate of land rights is concerned. The question is what if the plaintiff wins the lawsuit against the land of title certificates. Referring to the use of the negative publicity system, then the certificate is the object of bias lawsuit was canceled by order of the court ruling.

The proof system we adopt a positive tendency of negative publicity is done by a land inspection Land Inspecting Committee A (for Proprietary Rights, Building Rights and Use Rights) and Committee B for (the Business Use Rights) against any application for registration of land, meaning that the Land Office will not be hasty just received the application for registration of land, but it must be through an examination by a Committee or Committee B.<sup>20</sup>

When connected to the Article 19 of the Principle Law of Agrarian (UUPA), seeks to ensure the law certainty and certainty over land rights. Standing on the reality on land rights certificates will bias sued. The law certainty become the guarantee, but when there is against the law certainty happening on the land ownership rights, because of the trust UUPA contradictory to Article 19 of Government Regulation No. 10 of 1961 and Government Regulation No. 24 Year 1997 About the Land Registry.

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<sup>20</sup> Mariam Darus Badrul Zanman, *Mencari Sistem Hukum Benda Nasional*, (Bandung: Alumni), 1997, p. 59

In Article 23, 32 and 38 is also stated that "registration is strong proof."<sup>21</sup> The contents of Article 32 of Government Regulation Number 24 of 1997 on Land Registration, "The certificate is a sign the letter as proof that there is a strong proof tool on physical data and juridical data that contains in it, the physical data and juridical data according to the data available in the survey letter and book land rights are concerned.'Certificate is a strong visible evidence, in the sense that it cannot be proven otherwise for physical data and juridical data listed in, it should be accepted as a valid entry. Of course, the physical and juridical data listed in the certificate must match the data listed in the book and letter surveying land as concerned, because the data is taken from the book of the soil and the depth letter."<sup>22</sup>

Furthermore, if the reference to Article 38 paragraph (1) of Government Regulation No. 24 of 1997 on Land Registration, stated, "The Making of the deed referred to in Article 37 paragraph (1) attended by the parties to a legal act in question and witnessed

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<sup>21</sup> The Third Part of the Proof on the rights and the introduction to the paragraph I, the Proof of New Rights on the Article 23, for the need of rights registration: a. the rights for the new lands is proved by: (1) The provision of the rights giving from the authorized officials Giving the rights to the concerned people in accordance with the provision valid if the rights giving comes from the State lands or the land with the management rights; (2) The original deed by the ppAT consisting of the rights giving by the holders of ownership rights to the receivers when concerning with the rights of building use and right use for the ownership rights use; b. the management rights is proved by the provision of rights giving of the management by the authorized officials;c. the endowment land proved by the endowment deed. Explanation: What means by the Deed of Endowment is the deed of endowment as mentioned partly in the Government Regulation Number 28 Year 1997 about the Ownership Land Endowment. The provision concerning with the endowment proof based on the object of booking is the registration for the first time, though a piece of land concerned has been registered before as the ownership rights.

<sup>22</sup> See Article 32 Regulation of the Government No. 24 of 1997 concerning the Registration Lands and explanation.

by at least 2 (two) witnesses who are qualified to act as a witness in the legal action. Statements of Articles 23, 32 and 38 of Government Regulation No. 24 of 1997 on Land Registration give a sign that the publication system used Land registration system is not the publications of that of purely negative one.

The efforts to tackle land disputes can use the institutions where the settlement is based on authority as referred to in Regulation No. Know 24, 1997, PMNA/ Ka BPN No. 9 In 1999 and PMNA/Ka BPN No. 1 In 1999, the Institute for Mediation, Institute for Negotiation and Alternative Dispute Resolution agencies (ADR). In handling the dispute, it is likely to be coordination between the stakeholders and consultations with relevant agencies.<sup>23</sup> In addition, if the non-litigation mediation as a settlement has no completion point, the bias will be in using the litigation pathway of State Administrative Court (Administrative Court) and the District Court (PN).

Referring to the rules there are some issues that can be taken to file a lawsuit against land registration both systemically and sporadically. It is the competent Court and the District Court of the State Administrative Tribunal (Administrative Court). Authority of the Administrative Court because a sphere Publishing Certificate authority land is the State administration officials authorized to issue state administrative decisions. State in this case is the National Land Agency Board as entitled to issue title certificates of land, and then the position has always been the defendant. This is possible because there are losers as a result of the issuance of the decision of the State administration of land titles. According to article 1 paragraph 3 of Law No. 5/1986, which meant the state Administrative decision is a written determination issued by the Board or Administrative Officer (TUN) which contains the laws of the State

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<sup>23</sup> Rusmadi Murad, *Menyingkap Tabir Permasalahan Tanah*, p. 69.

Administrative actions are based on the laws and regulations in force, which is concrete, individualized, and final, the legal consequences for a person or body of civil law.

In Article 107 of the Regulation of Agrarian Ministry 9/1999 mentions that the administrative law Defects as referred to in Article 106 (1) is:

- a. error procedure
- b. faulty implementation of legislation
- c. error subject rights
- d. rights object error
- e. error type of rights
- f. extensive calculation errors
- g. there are overlapping land rights
- h. the data juridical or physical data is not correct, or
- i. other errors that are administrative ones

Problems of filing a lawsuit against the administrative court of land registration due to a relatively short time; this has implications for proof and evidence of incomplete owned by plaintiff. In Article 55 of Law No. 5/1986, there it says: "An action may be filed within the period of ninety days from the receipt or publication of the decision of the Board or Administrative Officer". Calculation of the grace period for the addressee of a decision by the *TUN* is 90 days since she receives the decision *TUN*, whereas for Third Parties who feel their interests would be harmed can be interpreted from the 90 days are known, both as informed or as announced. In the legal provisions relating to the registration of land, either in article 19 of Law No. 5/1960, PP 24/1997, Regulation of the Minister of Agrarian/Head of BPN 3/1997, it set up the release announcement obligation decree land registration,

such as the issuance of a certificate of land registration process first.<sup>24</sup>

Meanwhile, if the lawsuit is intended to be towards the District Court civil and criminal cases with a material or substance in accordance with the presented one by the parties or the plaintiff. The lawsuit can be filed to the District Court if related to the alleged forgery in accordance with the provisions of the Criminal Code article 263 of the Criminal Code Article 263 Forgery.

Criminal fraud is set forth in the Criminal Code (the Code of Criminal Law) CHAPTER XII in the forgery category. Article 263 reads:

1. Whoever makes a false or forged letter which can rise to a right, commitment or debt relief, or is intended as a proof of the thing with intent to use or get someone else to wear the letter as if it is true and not faked, threatened if such use may result in losses, due to forgery, with a maximum imprisonment of 6 years.
2. Threatened with the same criminal whoever knowingly uses a false or forged letter as if true, if the use of the letter can result in losses?

One of the drawbacks to the efforts of the registration of the land claim is the discovery of the three areas of authority in the court to examine and adjudicate land disputes. At the moment there are three judicial institutions that can deal with a conflict over land that Civil Justice, Criminal Justice and the State Administrative Court. In certain forms of conflict, one of the winning sides in a civil not necessarily wins the criminal (in the case of a conflict with a criminal offense).<sup>25</sup>

<sup>24</sup><http://pakpahankardi89.blogspot.com/2012/08/tenggang-waktu-pengajuan-gugatan-ke.html>, accessed on 16-8-2014, at 13.13 Indonesian Western Time

<sup>25</sup><http://raiudampo.blogspot.com/2014/03/pemberian-ganti-rugi-terhadap.html>, accessed on 18-8-2014, at 10.30 Indonesian Western Time

#### D. The Efforts to Actualize The Legal Certainty and Warranty to The Land Ownership Rights

In the opinion of the author, that the guarantee of land titles are as strong evidence of bias materialize and that the purpose of the publication of the registration system using positive system is, when the land certificate has been at least 5 (five) years there was no objection or other party, the lawsuit automatically right certificate above-ground closed to a lawsuit that accumulates if won the court ruling that the certificate has been canceled published by the National Land Agency does not happen. Even if no lawsuit is allowed throughout the State ensures the accuracy of data submitted land registration applicants. This means that if the plaintiff wins the case of lawsuit and it is no longer the cancellation of certificates of land rights that have been published. The countries in this case should provide compensation in a reasonable amount of money and adapted to land prices in the current year when the lawsuit is filed in court.

The juridical perspective in the activities of the Land Registration in fact rises the problematic legal erring injuring the rights and the purpose of law. The publication of the Land Registration System in Government Regulation No. 24 of 1997 on Land Registration affects the legal certainty itself. The publication of the negative system, in which the State does not guarantee the correctness of data in the land registry, indicates a contradiction with the purpose of Land Registry. The solution is the Positive Publication System, then it is more linear with certainty the rights over the land.

The implementation and responsibility for these damages is the National Land Agency. This should be done by legislation and the use of strict oversight mechanisms that change the magnitude and bias detriment satisfy the justice, legal certainty, the recognition



of human rights and usefulness in society manifest bias. This is so accordance with the provisions of Article 19 of the UUPA that: In order to ensure legal certainty by government held land registration in the entire territory of Indonesia according to the regulations stipulated by the Government Regulation (PP), the goal is to land registration in canoes ensure legal certainty in the area of land (or legal *rechtkadaster cadaster*).

By having a certificate, the legal certainty will respect to the type of land rights, the subject of rights, and the right to be real objects. Registration of land rights will result in:

1. The certainty of land rights ownership
2. The certainty of subject rights
3. The certainty of object rights
4. The certainty of statute

## REFERENCES

### A. Literature

- Ali, HM. Daud and Habibah Daud, *Lembaga-lembaga Islam di Indonesia*, Jakarta: Rajawali Press, 2005.
- Badrul Zanman, Mariam Darus, *Mencari Sistem Hukum Benda Nasional*, Bandung: Alumni.
- Dalimunte, Chadidjah, *Pelaksanaan Land Reform Di Indonesia dan Permasalahannya*, Medan: FH USU Press, 2000.
- Harsono, Boedi, *Menuju Penyempurnaan Hukum Tanah Nasional dalam Hubungannya degan Tap MPR RI IX/MPR/2001*, Jakarta: Unniversitas Trisakti, the First Publication, March 2002.
- Murad, Rusmadi, *Menyingkap Tabir Masalah Pertanian, Rangkaian Tulisan dan Materi Cceramah*, Bandung: CV Mandar Maju, 2007.

National Land Agency, *Himpunan Karya Tulis Pendaftara Tanah*, Jakarta: 1999.

Santoso, Urip, *Hukum Agraria dan Hak-hak Atas Tanah*, Jakarta: Kencana, 2011.

Santoso, Urip, *Pendaftaran dan Peralihan Hak Atas Tanah*, Jakarta: Kencana, 2010.

Sumardjono, Maria S.W., *Land Policy: Between Regulation and Implementation*, Jakarta: Kompas, 2001.

Sutedi, Adrian, *Peralihan Hak Atas Tanah dan Pendaftarannya*, Jakarta: Sinar Grafika, 2010.

## **B. Regulations**

Regulation of the Government No. 24 of 1997 Concerning the Registration Lands and explanation.