

# THE COMPARISON OF POSITIVE AND NEGATIVE PUBLICATION SYSTEM ON LAND REGISTRATION IN INDONESIA

**Farida Patittingi, Hasanuddin University**  
**Syahrul Yasin Limpo, Ministry of Agriculture Republic Indonesia**  
**Kahar Lahae, Hasanuddin University**  
**Andi Batari Anindhita, Hasanuddin University**  
**Chalis Al Rossi, Attorney General of the Republic of Indonesia**  
**Marwati Riza, Hasanuddin University**

## ABSTRACT

*This research focused on the comparison of 2 (two) existing system on land registration, which are positive and negative registration systems. The principles of land registration systems are simple, safe, affordable, up-to-date and open. The purposes of land registration are to provide legal certainty and rights certainty for holders of land rights (rechtskadester/legal cadaster), then land registration is held, and whereas in Indonesia itself is based on orders from Law Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles (UUPA) and further regulated by Government Regulation. The first Government Regulation governing Land Registration is Government Regulation Number 10 Year 1961 then replaced by Government Regulation Number 24 Year 1997. For land registration in Indonesia has been regulated and includes several sections of Article in UUPA. Therefore, conducting comparative study would show the advantages and disadvantages of these systems, especially in order to obtain a legal certainty.*

**Keywords:** Land Registration, Positive Publication System, Negative Publication System

## INTRODUCTION

Many developing states own less than 30% cadastral coverage, it means that more than 70% of land in most developing states are not recorded in formal land register (Salifu et al., 2019), including Indonesia as one of developing states. Indonesian legal system is still pluralistic which is configurations composed by national legislations after the Proclamation of Independence, legislations and jurisprudence of Dutch East Indies era (Western law particularly Dutch Law), customary law, Islamic law, international conventions and foreign laws. Indonesian legal system is arranged in a hierarchical manner with the main focus of Pancasila. Pancasila is operationalized into reality through the principles of national law in the process of creating positive law through legislation and jurisprudence. These national legal principles must be elaborated and refer to the Idea of Pancasila. (Sidharta, 2009).

According to the knowledge and insight regarding the flow of thought, theory, history of nations and deep understanding of socio-cultural and economic structure of Indonesia at that time, the formulation of social-economic and political perspective appears. This formulation set up in Article 33 of Indonesian Constitution 1945 paragraph (1), (2), and (3) as a whole unit. Paragraph (3) stated: "The earth, water and natural resources contained therein are controlled by the state and to be used to the maximum to the prosperity of the people and become the vision, mission and spirit of the rise of Law Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles. (Kusuma, 2004; Yamin, 1959).

Before the enactment of Law Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles (UUPA), the dualism of legal instrument regarding land in Indonesia was first applied. The first legal instrument is from customary law called customary land law and the second legal instrument is from western law. Thus, with the enactment of the national agrarian law (UUPA), the lands with western rights and customary rights must be matched in the UUPA. In order to be include in the UUPA system, it must be settled through a conversion institution.

The main objectives of the enactment of Law Number 5 Year 1960 regarding Basic Regulation on Agrarian Principles (UUPA) is as umbrella of law for land disputes in Indonesia (Silviana et.al., 2020) and also to realize legal certainty concerning land rights for all Indonesian citizen. Subsequently, to realize the legal certainty, there are 2 (two) efforts can be taken (Santoso, 2010):

- 1) Provide written, complete and clear legal instruments.
- 2) Conducting land registration that allows the holder of land rights to prove the rights to the land under his control and for the government to implement land policies.

The procedure of land registrations is pivotal since procedure as a supporting factor in the implementation of sustainable development and the development carried out is a conscious effort created by community to achieve better life. The current development process will always relate to the environment. In this case, the use of the land itself, which can lead to the complex problems, such as the procedure of land registration as a guarantee of legal certainty of land owned by people from state through National Land Institution (Koswara, 2016).

Regarding the land rights, the law also requires the right-holders to register their land. Land registration is important issue in UUPA since land registration is the beginning of the issuing process of ownership evidence to the land rights (Supriadi, 2008).

According to the Regulation No. 1 Number 1 Government Regulation Number 24 Year 1997 regarding Land Registration which has approved Government Regulation Number 10 Year 1961 which approves by “registering land in accordance with the activities carried out by the Government sponsored continuously and regularly, completing, processing, bookkeeping and presentation and maintenance of physical data and juridical data, in the form of maps and lists, regarding plots of lands and units of apartment, including letters of evidence of their rights to lands which already has its rights and ownership rights of the apartment units and certain rights that burden it.”

Regarding the importance of publication on land registration, it is contained in the provision of Article 3, also it is accommodated in the provision of Article 4 of Government Regulation Number 24 Year 1997. However, in reality problems related to legal certainty of land ownership is still far from expectation desired by the business sector since land conflicts is a chronic and classic problem that take places over an annual or even decade and it exists everywhere (Harsono, 2005; Hussain, Quddus, Pham, Rafiq & Pavelková, 2020).

Land disputes and conflicts are complex and multidimensional problems (Sumarto, 2012). For instance, the case in the judgment Number 96/PK/TUN/207. In this judgment, there was an overlapping case related to the certificate of land rights owned by Djonie Unjoto (plaintiff) by the certificate of land rights on behalf of Iwan Setiawan (Defendant). The Head of BPN in Bandung (Defendant) has also issued a certificate of land rights in the name of Iwan Setiawan not in accordance with the relevant laws and regulations (Nainggolan, 2013).

Another cases, related to overlapping ownership of certificates of land rights, for instance case number 14/G/2015/PTUN-PTK jo. Number 30/B/2016/PT.TUN.JKT jo. Number 373 K/Tun/2016 which has permanent legal force between Drg. Eko Priyono, S with

the Head of Land Institution in Pontianak (Sari & Hanim, 2017). According to cases that have been mentioned, it is interesting to study the legal issues on how ideal the land registration publication system can provide legal certainty in the community. Thus, the research question is what is the basis for differences in the implementation of positive and negative publication system in the context of ideal land registration for legal certainty?

## METHODOLOGY

This research is normative research with comparative approach. The author used regulation, cases and literature to obtain the data.

## DISCUSSION AND ANALYSIS

According to A.P. Parlindungan as quoted by Urip Santoso, land registration comes from the word of “Cadastre” which in Dutch called Kadaster. Cadastre is a technical term for a record that shows the extent, value and ownership (or other rights) of a land. The word Cadastre comes from Latin word Capistrum means a register or capita or unit made for the Roman land tax (Capitatio Terrens). Cadastre has explicit meaning which is a record (records of land, values of land, right holders and for tax purposes (Parlindungan, 1999).

Based on the provision of Article 2 Government Regulation Number 24 Year 1997, for land registration in Indonesia complies to 5 (five) principles, namely as follows:

- 1) Simple, meaning that the provisions and procedures for land registration must be easily understood by the concerned parties, particularly by holders of land rights.
- 2) Safe, meaning that land registration needs to be carried out carefully and accurately, thus the results are able to guarantee the legal certainty.
- 3) Affordable, meaning that the services provided in the context of land registration must be affordable to those who need it, especially by taking into account the needs and abilities of low-income economy groups.
- 4) Updated, meaning that adequate equipment is available in carrying out land registration and data maintenance. The available data must be up-to-date, so it must be registered and recorded regarding the changes that might occur in the future.
- 5) Open, meaning that at any time public can obtain information about the correct data.

Furthermore, according to Soedikno Mertokusumo, in land registration there are 2 (two) types of principles as follows (Santoso, 2010; Hussain & Hassan, 2020):

- 1) Specialiteit principle means the implementation of land registrations carried out on the basis of certain laws and regulation related to the problems of measurement, mapping and transition registration.
- 2) Openbaarheid principle (publicity principle) means every people have the right to know juridical data about subject of rights, name of the land rights, the transition of rights and the imposition of land rights in the Land Office, including raising objections before the issuance of certificates, replacement of certificates, lost certificate or damaged certificate.

From the legal provisions according to the Law and Government Regulation mentioned above, according to Dr. Endang Pandamdari, S.H., C.N., M.H., Republic of Indonesia used two models of land registration, namely land registration at the the initiative of Government of Indonesia and land registration at the initiative of landowner. First, land registration at the initiative of government, government bears the cost of land registration and select areas for land certification. BPN formed a committee to come to the village, collect and inform the villages about land certification plan in the area. Hereafter, they agree on the day

and date of registration. Lands that has been registered, will be given a certificate. Second, land registration at the initiative of landowner. The cost paid by the land owner. The mechanisms are the land owners come to the local BPN office. Then, the measurer comes to the location to measure the land. When measuring the land, parties whose land is directly adjacent to the land to be certified are invited to ascertain boundaries of land ownership. Furthermore, Dr. Endang Pandamdari, S.H., C.N., M.H. also stated that the negative publication system, the State guarantees the validity of land data and those who are entitled to the land are certificate holders. The positive publication system prioritizes legal certainty. The land owner is who has the certificate (Alwino, 2018).

Furthermore, according to the provisions of Article 19 paragraph (2) of UUPA stated that the end of land registration activity held by government is the granting of the evidence of rights, which acts as a strong evidence. UUPA does not mention the name of the evidence of land rights that are registered. Only in Article 13 Paragraph (3) of Government Regulation Number 10 Year 1961 states that the certificate of evidence of land rights registered is called certificate, which is a copy of the land book and measuring letter that has been put together with a cover sheet whose form is determined by Agrarian Minister.

In wider perspective, the publication system in land registration is known as 2 (two) systems, positive and negative publication systems. The fundamental difference between the two systems is the positive publication system always uses a rights registration system. Whereas the record of person's name in a land registration/land book makes the person as the holder of land rights (title by registration/the registration is everything). People whose names are registered as right holders in a registration, obtain indefeasible title (rights that cannot be contested). The truth of the data contained in the register is absolute.

In positive land registration system includes the provision that what has been registered is guaranteed the truth about the data registered by the state. This system guarantees that people who register as holders of land rights cannot be contested anymore. The state as the registrant guarantee that the registration that has been carried out is true. The state guarantees the truth of data presented. So, if the holder of land rights loses his rights, then he can reclaim his rights. If there is an error in registration due to the fault of registration official, he can only demand compensation in the form of money.

This system is adopted in Germany and Switzerland. According to the positive system, certificate is proof of absolute land rights and the only proof of land rights. The positive system guarantees the name registered in the land book, it cannot be denied, even though it is not the rightful owner. This system gives absolute trust to the land book. Land registration officials (title transfer) play an active role.

The characteristics of land registration using a positive publication system are:

- a) The registration system uses the registration of titles system
- b) Certificate issued as proof of absolute land rights, namely physical data and juridical data contained in the certificate cannot be contested and gives absolute trust in the land book.
- c) The state as the registrant guarantees that physical data and juridical data in land registration are correct.
- d) Third parties who acquire land in good faith get absolute legal protection
- e) Other parties who are disadvantaged by the issuance of land certificates receive compensation in another form.
- f) It takes a long time to carry out land registration, land registration officers carry out their duties carefully and the costs are relatively high.

There are opinions from Sudikno Mertokusumo and Arie S. Hutagalung regarding the advantages and disadvantages of positive publication systems as follows (Santoso, 2010; Hussain, Nguyen, Nguyen, & Nguyen, 2021):

The advantages of positive publication system according to Sudikno Mertokusumo are:

- a) The existence of absolute certainty from the land book
- b) The implementer of land registration is active and conscientious
- c) The work mechanism in the issuance of land rights certificate is easy to understand.

The disadvantages of positive publication system according to Sudikno Mertokusumo are:

- a) Time consuming as the result of active implementer of land registration
- b) The rightful owner of land rights might lose his rights
- c) The court authority placed under administrative authority, for instance issuing a certificate that cannot be contested.

As for the negative publication system use a deed registration system which the warranty is not the registration / records of person's name into a registration but the legal action taken that determines the transfer of rights from seller to buyer.

A registration carried out by someone does not automatically turn the person who obtained the land from an unauthorized party into a new rights holder. This system applies the principle of *nemo plus juris*, this principle makes a person cannot surrender or transfer rights beyond what he/she has. The land registration system adopted in a state is based on the legal principles adopted by the state in transferring the land rights. There are 2 (two) types of legal principles which are the principle of good faith and the principle of *nemo plus juris*. The principle of good faith means that the person who obtain a right in good faith will remain a legal right holder, while the principle of *nemo plus juris* means that people cannot transfer rights beyond the rights they own. The publication system used for the principle of good faith is a positive publication system, while the principle of *nemo plus juris* uses a negative publication system. In international society, there is no country that complies to one of these principles purely since each of these principles has advantages and disadvantages (Sutedi, 2010; Hussain, Ahmad, Quddus, Rafiq, Pham & Popesko, 2021).

Whereas in the land registration system in Indonesia as based on UUPA, Government Regulation Number 10 Year 1961 and Government Regulation Number 24 Year 1997 applies negative publication system that contains positive elements. It means the implementation of negative publication system is not purely negative since the land registration produces letter of evidence to the land rights which acts as strong proofs, this implies that the government as the organizer of land registration must strive. Thus, it is possible to present the correct data in the land book and in the registration map. So, as long as it cannot be proven otherwise, the data presented in the land book and land registration map must be accepted as rightful data. In other words, the information contained in the data has legal force and must be accepted as rightful information as long as there is no evidence to prove otherwise.

In addition, the publication system in the land registration system in Indonesia is referred to as negative system with positive element, it is acknowledged in the provision of Article 19 of UUPA. In this article states that registration includes "granting proof of rights which acts as a strong means of proof". In articles 23, 32 and 38 UUPA also states that "registration is a strong means of proof". These statements would not be contained in a land registration regulation with purely negative publication system.

The characteristics of negative publication system in land registration are:

- 1) The land registration system uses a registration of deed system.

- 2) Certificates issued as a strong proof of rights which physical data dan juridical data contained in the certificate are considered to be rightful as long as they are not proven otherwise by other instruments of evidence. The certificate is not the only proof of rights.
- 3) The state as the registrant does not guarantee that the physical and juridical data in the land registration is rightful.
- 4) This publication system uses an acquisitive verjaring or adverse possessive
- 5) Other parties who are disadvantaged by the issuance of the certificate can claim for objection to the registrant of the land registration to cancel the certificate or claim to the court to request that the certificate declared invalid
- 6) The land registration officer is passive who only accepts that is stated by the party who requests land registration.

Arie S. Hutagalung stated about the advantages and disadvantages of negative publication system as follows (Santoso, 2010):

### **Advantages**

- 1) The actual right holders protected from other parties who are not entitled to their land
- 2) Investigation of land history before issuing certificates
- 3) There is no time limit for the actual land owner to claim his rights that have been certified by another party

### **Disadvantages**

- 1) There is no certainty of the validity of certificates since at any time it can or might be sued and canceled if the issuance is proven invalid
- 2) The passive role of land registration official or cadastral does not support the accuracy and the validity of data contained in the certificate
- 3) The work mechanism of cadastral officials is less transparent, so it is not easy to understand for common people.

Based on several statements from scholars as mentioned above related to the positive and negative system, these systems if we refer to Indonesian Constitution on 1945 especially Article 28D paragraph (1) states “everyone has the right to recognition, guarantee, protection, legal certainty and fair treatment before the law.” Also, article 28J paragraph (2) explains: “In performing their rights and freedoms, every person is obliged to comply to the limitation stipulated by law with the sole purpose to guarantee recognition and respect for the rights and freedoms of others and to fulfill fair claim and in accordance with moral consideration, religious values, religion and public order in a democratic society.” Indonesia is a state based on a rule of law, where the legal objective is to obtain justice, utility and legal certainty. Thus, based on Tripartite Concept which is to respect, to protect and to fulfil, the state must be present in the midst of its people to provide protection and legal certainty as stated in the Indonesian Constitution.

Certainty is condition that is certain, provisions or stipulation. The law must be absolutely certain and fair. Certain and fair as a code of conduct and must support an order that is considered reasonable. Certainty and fairness are the reason law can perform its functions. Legal certainty is a question that can only be answered normatively, not sociology (Rato, 2010).

According to Kelsen, law is a norm system. Norms are statements that emphasize the *das sollen* aspects, including some rules that should be implemented. Norms are deliberative products and actions made by human. Laws contain general rules which serve as guidelines for individual’s behavior in society, both in relationship with fellow individuals and with

society. These rules become a limit for society in taking action against individual. The existence and the implementation of these rules give rise to legal certainty (Marzuki, 2008).

The negative publication system applied in Indonesia, even if it is not pure negative system but in reality, the practice of the system is not effective in terms of providing legal certainty for the community. In the absence of legal certainty, community rights can eventually be sued and there is no prediction when the lawsuit will arise, so it always creates misgivings in the community as the owner of the land rights certificate, since basically certificate is a weak guarantee. Based on the explanation from Sudikno Mertokusumo, Arie S. Hutagalung and Dr. Endang Pandamdari, S.H., CN, MH, they explain that the positive publication system provides more legal certainty and in line with the constitution. The author personal opinion is considering the principles in land registration for instance, security principles which means that land registration needs to be carried out carefully and accurately, so the results are able to guarantee the legal certainty. While, negative publication system, the cadastral who is the representative from the state is unable to fulfill the sense of security for the community, considering the task is passive and not active.

## CONCLUSION

Based on the comparison of the implementation of the positive and negative publication system, linked to the practices and phenomenon occur in Indonesia, it turns out that the implementation of negative publication system in terms of land registration in Indonesia is still not effective to guarantee legal certainty to the community. Legal certainty is pivotal since without legal certainty, the values of justice in community will not be fulfilled properly and proportionally. Legal certainty is the mandate of constitution and the duty of state is to guarantee the existence of legal certainty. The application of negative publication still cannot create legal certainty, considering many cases of land disputes as well as the duplication of land certificate. Therefore, the government should review and reconsider the implementation of negative publication system and take actions to implement positive publication system in land registration in Indonesia. Also, Indonesia should allow juridical consideration, thus it still accommodates a sense of justice in community in accordance with Pancasila philosophy.

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