

# The Future On Publication System Of Land Registration In Indonesia

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**Abstract**— The aim of study is to provide an overview of reform ideas on land registration publication system in order to achieve legal certainty in Indonesia. Legal certainty of land rights is an essential requirement for landowners and it will be realized if there is no doubt and worries of land ownership. However, in fact a certificate of land rights could be a legal case. The research method uses normative legal research, descriptive, and data analyzed qualitatively. One of the root causes of land conflicts is the publication system on land registration in Indonesia. There are two different publication systems: registration of deeds, which always uses a negative publication system, and registration of titles, which always uses a positive publication system. The result research in Indonesian Land Law is different from the law applicable in most other countries regarding publication system. Indonesian Laws follow registration of titles, and a negative tends to positive publication system. This is the root cause of many legal conflicts in Indonesia. I argue that in the future, Indonesia government has to change its land registration from negative but tends to positive publication system to positive publication system. Moreover, along with this transformation, an assurance fund should be established to compensate owners of registered rights who suffer from losses due the omissions or errors in the land registration system.

**Keyword:** Land Registration, Publication System, Indonesia.

## 1. INTRODUCTION

The legal certainty of land rights is an essential requirement and it will be recognized if there is no doubt and worries of land ownership. The consequence of land rights recognition, is that the government must give land rights certainty assurance so that it will be easier for a person to defend his right from other parties' obstruction.[1] However, lately, land conflict in Indonesia seems to be increasing. Various facts show that legal certainty of certificated land rights can still be disputed even in courts.[2] Accumulated land cases at the Supreme Court is around 60% to 70% each year excluding the cases that were settled at the first level courts (District Court) and courts of appeal (High Court).[3] Data of Ministry of Agrarian and Spatial Planning/National Land Agency recorded that there were 5,878 land cases of 2014. Those include 1,927 cases that had not been settled in 2013 and 3,906 new cases of 2014. Out of the 5,878 cases, 2,910 cases (57.92%) have been settled and 2,968 cases remain unsettled. The high number of land conflicts [4] shows that land administration in Indonesia needs improvement to give legal certainty of land rights. One of the root causes of land conflicts is the publication system on land registration in Indonesia which is a negative publication system with a positive tendency. Further, in the Elucidation of Article 32 paragraph (1) Government Regulation Number 24 of 1997, it is stipulated that "Certificate is a strong evidence unless it can be proven otherwise, the physical and juridical data contained therein must be deemed correct". Therefore, the land registration system in Indonesia does not guarantee legal certainty of land rights hence creating opportunity to cancel land rights. Based on that matter, it is necessary to take efforts to formulate more favorable policy for land owner as well as the government. One of the critical things to do is to change the current land regulations that apply a negative tend to positive publication system to positive publication system.

## 2. METHODOLOGY OF RESEARCH

The research method uses normative legal research or doctrinal research,[5] with secondary data consist of primary legal material, secondary legal material obtained from library research, and tertiary legal material. This study is descriptive, and the data were analyzed qualitatively[6] based on laws and regulations governing Land Registration as well as relevant laws. The research approach is legal and conceptual approach.[7] which is done by analyzing all concepts related to the legal issues of land registration. The research data were analyzed qualitatively; it means that the literature data is analyzed in depth, holistic, comprehensive. The use of qualitative analysis methods is based on consideration, which are: (1) the data analyzed are diverse, and it's has a different base from each other, and it's not easily be quantized. (2) The data analyzed are comprehensive and holistic, because of diversity data and it's requires in-depth information.[8]

## 3. RESULT AND DISCUSSION

### 3. a. Purpose of Land Registration

Article 19 Law Number 5 of 1960 state that, to guarantee legal certainty of land ownership, the government conducts the land registration that covers all the regions of the Republic of Indonesia. The implementation of land registration is regulated in Government Regulation Number 24 of 1997 concerning Land Registration. The main objective of land registration is:

- a) To give legal certainty and legal protection to owner of rights on land, apartment unit and other registered rights so that they can easily proof that they are owner of the rights concerned.
- b) To give information to concerned parties so that they can easily get the required data in taking legal acts pertaining to registered land and apartment unit.
- c) For orderly land administration.

### 3. b. Registration System

Basically there are 2 different registration systems,[9] namely registration of deeds system and registration of titles system.[10] In the registration of deeds system, those deeds are registered by the Land Registry Officer (registrar) passively.[11] It does not verify the correctness of the data

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mentioned in the registered deed. The duplicate is kept in the land registration office. Every time a change occurs, a deed shall be made as evidence, and then in this registration of deeds system, the necessary juridical data shall be sought in the relevant deeds. A legal defect in a deed may result in the invalidity of a legal act as evidenced by a later deed. To obtain juridical data, title search must be done which can be time consuming and costly, because title search requires expert help.<sup>[12]</sup> Thus Robert Richard Torrens created a simpler new system that allows people to get information in an easy way, without having to conduct title search on existing deeds.<sup>[13]</sup> He created the Registration of Titles system, which was later known as the Torrens System, that every legal act concerning a plot of land should be made a deed (written). A deed of legal acts is the source of its juridical data. For registration of rights and the changes that occur thereafter, a list of entries (registers) is provided. The legal act in the deed is subsequently registered at the Land Registry Office. If there is a change, there is no need to make a new register, it is sufficient to record the change in the existing register. Prior to registration and recording the changes later in the register, the Land Registry Officer (registrar) verify the data contained in the relevant deed.<sup>14</sup> The Land Registry Officer is active in registering. The register is kept in the Land Registry Office and is open to the public. Registration of Titles System is more practical because if a person wants to do legal deed with a plot of land, he simply looks at the certificate and the register to find out the juridical data of the land concerned. It does not require a title search, as research on physical data and juridical data is performed by registration officials.<sup>[15]</sup>

### 3. c. Publication System

Land registration in each country has different land publication system. Basically there are 2 different publication systems, namely positive publication system and negative publication system. The difference between the two publication systems lies in the type of registration system and legal certainty assurance created by the administration of the land registration.<sup>[15]</sup>

1. Registration of land with negative publication system always uses registration of deeds system, and the State does not guarantee the correctness of the data presented.<sup>15</sup> The risk of using such data is borne solely by the person who uses it. The rights is obtained not because the registration, but is determined by the validity of legal act. So even if the deed of granting or transferring the rights has been registered or the recipient of the rights has been registered as the owner of the rights in the register, the person always face the possibility of being sued by another person requesting the cancellation of the legal act that has been done. In a negative publication system, the person of registered rights may lose the rights to the land if the ownership of the land is sued by another person and the plaintiff won it in court. In this negative publication system the general principle of law applies, that one cannot grant or transfer rights beyond what he or she owns (*nemo plus iuris nemo plus iuris ad alium transferre potest quam ipse habet*). So in this system, before using the provided data, the concerned person needs to conduct research by himself to verify the correctness as far as possible (title search). Therefore, the help of experts is needed. In the United States for example, the results of

experts' research are even insured to special insurance companies (Title Insurance Company), sometimes the title search is done by the insurance company. The weakness of the negative publication system in the countries concerned is overcome by using "adverse possession"<sup>[16]</sup> or *acquisitieve verjaring*.

2. Registration of land with positive publication system always use registration of titles, and the State guarantees the correctness of the data presented in the register.<sup>[17]</sup> Any person may fully trust the data presented in the register. In performing legal acts concerning registered plot of land, one simply looks at the physical data and juridical data in the folio of the register ("the register is everything").<sup>[18]</sup> Any person who perform legal act in good faith and for value based on the data in the folio register, which is subsequently followed by the registration of his name as the owner of the rights in the register, obtains an "indefeasible title" that is a right that cannot be contested.<sup>19</sup> The actual rights owners can no longer claim cancellation, although later it is proven that the contemplated data is untrue ("title by registration").<sup>[20]</sup> The data contained in the register, has an "absolute" proof value.<sup>[21]</sup> In certain cases he can only claim compensation from the State. Therefore, the Government provides special funds known as "Assurance Fund". In the use of positive publication system, three expressions (the register is everything, indefeasible title, title by registration) are always formulated in the regulations governing the registration of land in the country concerned.<sup>[23]</sup>

Unlike the two systems above, Indonesia uses the registration of titles system, but does not use a negative publication system, nor does it use a positive publication system, but uses a positive tended negative publication system. In Article 19, 23, 32 and 38, Law Number 5 of 1960, there are only statements in that registration constitutes strong evidence. As it is stated in Article 19 Law Number 5 of 1960, the certificate of land title is valid as strong evidence (not absolute evidence). As long as it is otherwise inversely proven by the court, then the certificate of land title is the strongest evidence. These statements show that the publication system used is "negative", but not purely negative. In addition, generally the negative publication system uses the registration of deeds system. While the registration system in Indonesia is a system of registration of rights, by making available register to record the juridical data of the registered object and certificate as evidence of title. The "positive" element is that registration provides strong evidence. The State guarantees the truth of the data presented in the certificate of title as a powerful proof of rights, as long as there is no court's decision stating otherwise. In fact this always creates problems, questions, and doubts about the legal power of land title certificates as "evidence. Such positive tendency is strengthened by the new provision in Article 32 of the Government Regulation Number 24 of 1997, which confirms the meaning of "strong evidence" in articles 19, 23, 32 and 38 Law Number 5 of 1960 and uses the institution of "*rechtsverwerking*" from Customary Law in order to provide legal certainty for the parties who obtain and control the land in good faith and fulfill all applicable land registration requirements.

### 3.d. Towards A Positive Publication System In The Future of Indonesia

Taking into consideration various problems in the land sector in Indonesia, in the future it is necessary to change negative publication system with positive tendency to positive publication system. The legal certainty provided by the Government of Indonesia so far needs to be reviewed in an effort to increase legal certainty assurance for owner of land rights. The Ministry of Agrarian and Spatial Planning/The National Land Agency must have an active role in encouraging the creation of new era in the land sector by creating a new Land Law with a positive publication system. Land Law reform preceded by the development of land policy must necessarily start with the development of land law as part of the national legal system.<sup>[22]</sup> The assertion that land registration guarantees landownership security is common knowledge. Thus, efforts at securing landownership in particularly, the developing world have concentrated on the formulation and implementation of land registration policies.<sup>23</sup> Michel Foucault argues, in modern societies, the law serves to extend social control, knowledge, and institutional power over individuals for the purpose of being useful to legal institutions.<sup>[24]</sup> The idea of applying land registration of a positive publication system is based on the understanding that improvement of assurance of certainty and legal protection needs to be pursued in order to further strengthen the rights of the people over the land. Registration of land that provides stronger legal certainty, even absolute certainty to the subject of registered rights of land ownership as in the land registration of a positive publication system, becomes an obsession among the land owners and investors. The Government guarantees the truth of all information contained in the land title certificate. In the event of an administrative error by the government (for example double certificates), the government will provide compensation funds or indemnity for such administrative errors.

In an effort to realize changes in land registration of a positive publication system, several things need to be done:

- a. Change of negative publication system with positive tendency to a positive publication system will be phased. Thus, for a long period of time there will still be found areas of land that are registered under the negative publication system, in addition to the land areas registered under the positive publication system.
- b. In a positive publication system, physical data and juridical data included in the registration map, certificate of measurement, register are certain, and the truth is guaranteed by the State.
- c. Implementation of records management in the land registration of a positive publication system in the future depends largely on the readiness of the surveyor profession (the licensed surveyor) and Land Deed Officer (Notary).
- d. It is necessary to revise laws and regulations related to land registration, namely Law Number 5 of 1960 concerning Basic Agrarian Law and Government Regulation Number 24 of 1997 concerning Land Registration, consist of:
  - 1) Its' need to new article in Law or Government Regulation which regulates the three main principles of indefeasible law, such as the mirror principle,

curtain principle, and assurance principle. The article on indefeasible needs to be supported and clarified by other relevant laws or government regulations.

- 2) Its' need to new article in Law or Government Regulation which regulates types of indemnity for error in register.
- 3) Its' need to new articles in Law and Government Regulation which regulates the development of the National Land Registration Database Center.
- 4) It is need to to amend articles in Law Number 5 Year 1960, and Government Regulation Number 24 of 1997 concerning Land Registration.

### 3. e. Assurance Fund In the Future Positive Publication System in Indonesia

The regulation of Assurance Fund is closely related to positive publication system that applies registration of title system.<sup>[25]</sup> Theodore Burton Fox Ruoff state that, registration of title system is conducted based on three Torrens Principles.<sup>[26]</sup> In theory, there are three essential elements of title registration, known as Mirror, Curtain and Guarantee:<sup>[27]</sup>

1. Mirror Principle: This principle requires that the result of land registration (register of titles and certificate of title) reflect the up to date facts of land title ownership accurately and completely.
2. Curtain Principle: This principle states that a curtain is used on the register to give trust to purchaser. The purchaser does not need to investigate or review the history or chronology of land ownership as are already described in the register, and that the land ownership does not need to be proven by long and complicated document.
3. Assurance Principle: This principle explains that the compensation or assurance in registration of title system (positive publication system). If the register proves to be incorrect regarding the registered land, then the government must give compensation or indemnity to the affected land registering party.<sup>[28]</sup>

This Assurance Fund is established as an implementation of assurance principles or indemnity principle that the government must provide compensation (indemnity) to the true owner that suffer loss if there is any error in register made by the registrar of titles.<sup>[29]</sup> Assurance Fund is provided in order to give full protection to registered owner. The general pattern is by involving "retribution" or fee that must be paid by the person who uses the land register (registering land). According to Common Law, the right to have compensation from that special fund is in lieu of land recovery, is provided to a person who has lost his interest through Torrens system. Each regulation in various countries has its own precondition to receive compensation from the Assurance Fund.<sup>[30]</sup> Provision related to Assurance Fund as recognized in various countries can be applied in Indonesia, especially if the publication system in Indonesia has already been changed from negative publication system with positive tendency into positive publication system. Because this Assurance Fund is a new institution that was originally unknown in land laws and regulations in Indonesia, then it is possible to adopt foreign law institution including its regulation. However the existence of Assurance Fund must still be adjusted with and be based on the provision of National Land Laws sourced on Customary Law and shall

not be contrary to the basic philosophy of the state of Indonesia and the 1945 Constitution as well as other regulation. The application of Assurance Fund in Land Law in Indonesia can be done based on the theory of Legal Transplants. Legal transplants, namely taking over foreign law to create law in its own country,<sup>[31]</sup> or legal borrowing, or legal adoption terminology introduced by Alan Watson,<sup>[32]</sup> to refer to a process of borrowing, adopting or transplanting laws from a place or country or nation to another place, and then that law is applied at the new place together with existing law. The basis of thought of the Assurance Fund system stands on the principle that the owners of rights on registered land possess an "absolute" ownership on his land. Thus if a person loses rights due to land registration or other reasons stipulated by the Laws, then it becomes the obligation of the State to provide compensation (indemnity) to the person who suffer damage or loses interest on registered land. Therefore, if in the future Indonesia already uses positive publication system, then a certificate issued by Land Office cannot be revoked or canceled although in court verification, it is proven that there is a legitimate owner. The legitimate owner, although has been adversely affected because his land is already certificated under another person's name will receive compensation from Assurance Fund. Therefore, Assurance Fund should be available as manifestation of State's responsibility toward its citizen to give legal protection by assuring payment of compensation. The choice of legal transplants politics in the national legal development policy nowadays and in the future will continue to be the choice of legal politics in Indonesia. The policy to make laws that combine element sourced from foreign laws and laws sourced from paradigmatic value of native Indonesian society and culture, must be conducted carefully and full of calculation, so that the laws to be applied in this country is not uprooted from the ideological-philosophical root of the country and nation of Indonesia. "Adoption of regulations of various countries must take into account the social structure and culture of the society in that country".<sup>[33]</sup> Because apart from governing the society, the laws has its own social structure. Without considering that, the adopted laws cannot be implemented successfully, even can cause unexpected result.<sup>[34]</sup> The way of thinking of the legal transplants theory is very simple. It depends much on the government's political will to implement foreign legal principles and legal institution in solving national cases. However, harmonization is still needed because of the same philosophy and goals. Based on the aforementioned, in the future, the implementation of Assurance Fund in Indonesia by applying positive publication system has the same philosophy and goal with the various countries, namely to give protection and certainty of rights to owner of the land right who suffers damage.

In the future, in Indonesia, Assurance Fund needs to be established to regulate and create a fair legal certainty to protect the rights of owner of rights of registered land who suffers damage or loss. Assurance Fund will be established based on the following steps:

1. Assurance Fund Board needs to be formed to regulate and manage Assurance Fund under the Ministry of Agrarian and Spatial Planning/National Land Agency.
2. The function of Assurance Fund Board is to decide compensation claim amount awarded to the plaintiff.
3. If the plaintiff is not satisfied with the decision of the Assurance Fund Board, the plaintiff can appeal to the court and legal costs will be charged to the plaintiff.
4. Assurance Fund Board has a transparent and accountable special account of Assurance Fund.
5. Source of Assurance Fund can be provided from cost percentage charged to all of title transfer transaction that must be paid to Assurance Fund Account.
6. Assurance Fund only pays compensation to person who suffer damage in a situation such as:
  - a. Error related to land pursuant to the law;<sup>[35]</sup>
  - b. False registration by other person as owner;
  - c. Error, omission or violation in Register;
  - d. Loss, damage or misuse of documents which is kept at the Land Office.
7. Limitation of person who can submit claim to Assurance Fund.
8. Limitation on total amount of payment of claim from Assurance Fund.
9. Limitation of claim period of 5 (five) years as of the person's suffering damage/loss.
10. Procedure of submission of claim to Assurance Fund.
11. Procedure of payment of compensation to person suffering damage/loss.

Fig. Land Registration System

Fig.1. Land Registration System in the other country and Indonesia in the present and the future

#### 4. CONCLUSION

Based on the above discussion, this research concludes that assurance of legal certainty provided by the Government of Indonesia during all this time needs to be reviewed in connection with an effort to increase legal certainty assurance to owner of land rights. Taking into consideration various problems in the land sector in Indonesia, then in the future, it is necessary to change the publication system from negative publication system with positive tendency to positive publication system. The use of positive publication system is also expected to reduce problems related to land dispute and to encourage the creation of a conducive investment and economic climate that can increase the competitiveness of the national economy. Along with this transformation, an assurance fund should be established to compensate owners of registered rights who suffer from losses due the omissions or errors in the land registration system. Land registration that gives absolute certainty of rights becomes the obsession of land owner and then justice in Indonesia will be realized.

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