



Limited Positive Publication System Inland Field (Solutions Towards Legal Certainly and Fair Legal Protection)

Suharyono M. Hadiyono

Faculty of Law, University Muhammadiyah Palembang, Indonesia

Corresponding e-mail: lawoffice.suharyono@gmail.com

ARTICLE INFO

Keywords

Fair legal certainty; Limited Positive Publication System; Fair Legal Protection



This is an open access article under the [CC-BY-SA](https://creativecommons.org/licenses/by-sa/4.0/) license.

ABSTRACT

Land registration in the negative publication system with positive elements used by Government Regulation No. 24 of 1997 is believed to realize fair legal certainty. This study uses a normative juridical approach supported by data. The study results show that the certificate, which is a product of the National Land Agency or Land Office in its implementation, has not realized legal certainty that is fair to rights holders. This is reinforced by some court decisions which cancel the Land Certificate. These findings recommend that a positive (limited) publication system can be used as an alternative solution to realize fair legal certainty for the community applying for land registration

© 2022 Published by UAD Press

Introduction

The researcher's anxiety regarding the agrarian legal system used in Indonesia is regulated through Government Regulation no. 24 of 1997 concerning land registration which is the implementation of Article 19 of Law Number 5 of 1960 concerning Basic Provisions for Agrarian Principles (Hutagalung, 2000). The general explanation states that the publication of land registration uses a negative publication system with positive elements. This system was chosen as the basis for the implementation of land registration by the National Land Agency / Land Office, whose final product of the registration process is in the form of a Land Rights Certificate, to provide legal certainty and legal protection to the holder of the right and can be used as the most substantial evidence for the holder of the request (Harsono, 2007).

The purpose of land registration as formulated in Articles 3 and 4 in the above regulations, is explicitly stated to provide legal certainty and legal protection for land rights holders, but in its implementation, it creates legal uncertainty and does not provide legal protection. This is because the provisions of Article 32 of Government Regulation no. 24 of 1997 itself provide opportunities for other parties who can prove that the land is theirs to file objections and lawsuits to the court for the issuance of certificates of rights to the ground. Given the opportunity for other parties to file complaints and cases to the court by the

provisions of Article 32, in addition to resulting in the absence of legal certainty and legal protection for rights holders, it also harms third parties such as banks and buyers who legally should receive protection by the state.

Considering the description above, the problem to be studied in this research is why the limited positive publication system can be used as an alternative solution to realize legal certainty and legal protection for land rights holders.

Methodology

This study aims to examine whether the limited positive publication system can be used as an alternative solution to realize legal certainty and legal protection for land rights holders in Indonesia. This legal research is normative juridical research, where a normative study will be carried out on secondary data consisting of Law Number 5 of 1960 and Government Regulation no. 24 of 1997, as well as other laws and regulations and books and other documents that are relevant to the object under study, the data processing method, is qualitative methods and deductive data analysis.

Results and Discussion

Negative Publication System (Positive Elements) in Land Registration Does Not Reflect Legal Certainty and Legal Protection to Rightsholders

The negative publication system (positive elements) or can also be called the hybrid system adopted in legislation and regulations in the field of land registration, is still a legal problem because it denies guarantees of legal certainty and legal protection. At the philosophical and legal theory level, it hurts the sense of justice, so the system. This indirectly creates structural victims (structural victimization), especially against land rights holders, actual landowners, and third parties, through legal processes in court. The 1945 Constitution of the Republic of Indonesia, especially the fourth paragraph, explicitly states (Suteki, 2008):

"...Then from that to form an Indonesian State Government that protects the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace, and social justice...."

Taking into account the above phrase in the preamble to the 1945 Constitution of the Republic of Indonesia and related to the negative publicity system with positive elements required by Government Regulation no. 24 of 1997, it can be stated that between the intent of the preamble to the 1945 Constitution of the Republic of Indonesia and the will of Government Regulation no. 24 of 1997 there is disharmony seen from the aspect of evidence in the court realm.

In addition to disharmony between the purpose of land registration and the obligation of the state or government to protect every holder of land rights certificates, it can be said that

Government Regulation no. 24 of 1997 concerning Land Registration is contrary to the obligation of the government (state) to protect every citizen, especially in the land sector.

The existence of disharmony in the rule of law causes no guarantee of legal certainty for each right holder in the land certificate. This is because the negative system has positive elements adopted by Government Regulation no. 24 of 1997 cannot guarantee legal certainty to land certificate holders, so this proves that every certificate holder cannot be guaranteed assurance and cannot protect his legal rights if other parties based on the available evidence can prove otherwise, as determined in Article 32 paragraph (2) Government Regulation no. 24 the year 1997 (AP. Parlindungan, 2015).

Land registration, whose implementation is ordered by Law Number 5 of 1960 concerning Basic Provisions for Agrarian Principles, does not use a positive publication system where the state guarantees the truth of the data presented but uses a negative publication system.

The negative publication system positions the government (National Land Agency/ *Kakan Pertanahan*) not to provide legal certainty guarantees for the truth of the data presented by rights holders. This is because BPN/ *Kankan Petanahan* is not active but passive/ waiting, meaning that it is the right applicant who must play an active role in collecting data related to the application for his rights. The explanation above means that the position or position of the government in protecting the entire Indonesian nation from the rule of law in the PP. No. 24 of 1997, which substantially contradicts the guarantee of fair legal certainty and legal protection mandated by the 1945 Constitution of the Republic of Indonesia, especially Article 28D, which affirms in paragraph (1) everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law.

The researcher's belief in the norms in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia with Article 3 Government Regulation no. 24 of 1997 Jo. Article 19 of Law Number 5 of 1960 concerning Basic Provisions on Agrarian Principles has been different in its implementation, so it cannot be said that fair legal certainty in the 1945 Constitution of the Republic of Indonesia is equated with legal confidence in Government Regulation no. 24 of 1997. In other words, the guarantee of legal certainty in the issuance of land certificates in a negative publication system (positive elements) is not the same as fair legal certainty in the 1945 Constitution of the Republic of Indonesia.

In response to the problems mentioned above, whether the limited positive publication system model can reflect the guarantee of fair legal certainty comes from the 1945 Constitution of the Republic of Indonesia and Pancasila as the source of all legal bases. The next question is why the limited positive publication system model can realize a guarantee of fair legal certainty, extracted and sourced from the 1945 Constitution of the Republic of Indonesia and Pancasila as the source of all legal authorities. The two questions above will be analyzed by presenting a Limited Positive Publication System concept to Ensure Legal Certainty and Protection for Land Rights Holders because both cannot be separated from one another and complement each other so that a logical and acceptable picture is obtained. As a scientific study.

So far, the understanding of the value of legal certainty, which normative rules have always glorified, including Government Regulation no. 24 of 1997, which according to the

researcher, is not inspired or does not originate from the value of fair legal certainty as mandated in the 1945 Constitution of the Republic of Indonesia and Pancasila. Whereas many writers such as Soerjono Soekanto, Mardjono Reksodiputro, Satjipto Rahardjo explicitly stated that the value of legal certainty is always in tension with the values of justice. The existence of tension between the values of legal certainty and justice in the views and thoughts of western philosophy has been explicitly resolved or reconciled by the 1945 Constitution of the Republic of Indonesia and Pancasila because the two sources of law are constitutionally normative in placing both. These values become a value system which in principle cannot be separated from one another.

Comparison of two land registration systems that produce products in the form of land rights certificates and have a correlation with the value of fair legal certainty and legal protection for rights holders, actual owners, and third parties as well as state (government) responsibility for land rights certificate products issued by BPN/Kakan Pertanahan. The following chart illustrates or illustrates the comparison of the two land registration systems, as follows Figure 1:

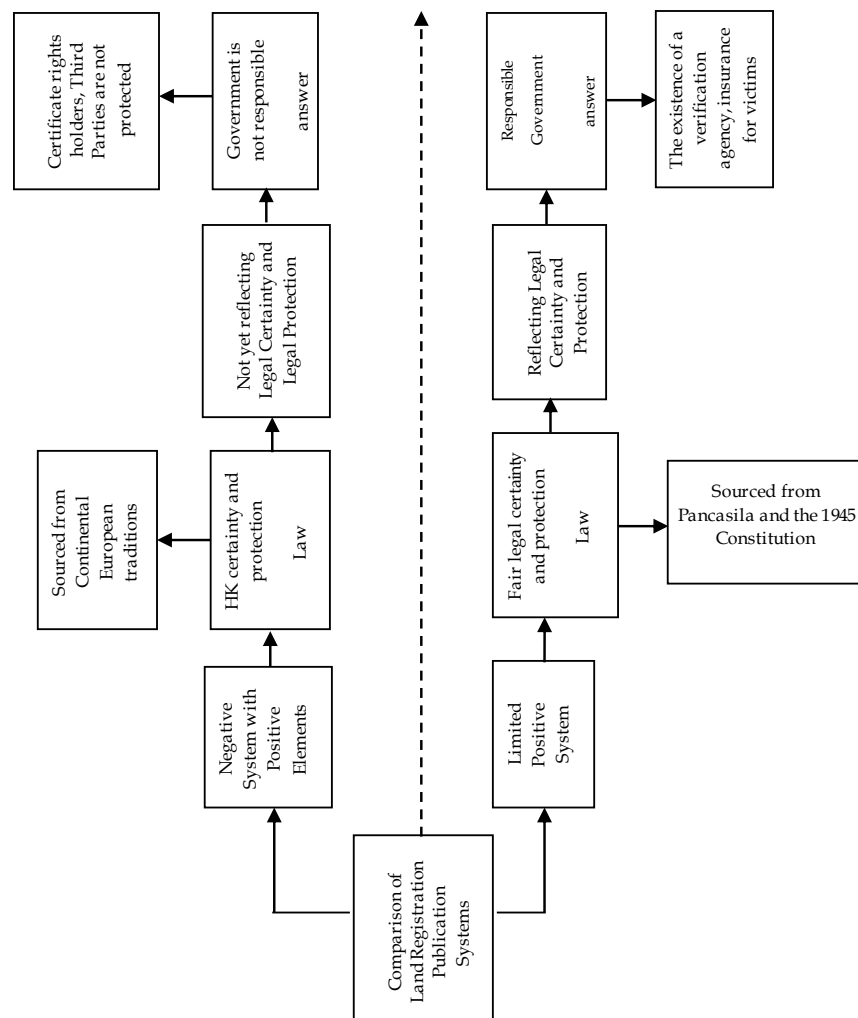


Figure 1. Comparison of Legal Certainty and Legal Protection
In the Land Registration System
Source: Secondary Data

Based on the chart above, it can be explained that the legal certainty and protection contained in Government Regulation no. 24 of 1997 concerning land registration is rooted in and sourced from the Continental European tradition or known as the civil law system, which explicitly requires that in making legal regulations it must be rigid, strict, clear and detailed, so as not to cause problems in the context of its implementation. Meanwhile, fair legal certainty and legal protection from the limited positive publication system are sourced from Pancasila and the 1945 Constitution of the Republic of Indonesia to reflect legal confidence and legal protection and place the government as the party implementing land registration to be responsible for land rights certificates issued.

Factors Causing Legal Certainty and Legal Protection for Land Rights Holders in a Negative Publication System (Positive elements)

The implementation of Article 19 of Law Number 5 of 1960 concerning Agrarian Principles shows that there are weaknesses in the opposing system promoted by Government Regulation no. 10 of 1961, which has been replaced by Government Regulation no. 24 of 1997, namely the position of the government, in this case, the BPN / Kakan Pertanahan Regency / City in the management of land registration which produces products in the form of certificates of land rights, in essence, has caused a prolonged conflict in the land sector so that it is challenging for the community to get legal certainty and protection law based on the purpose of land registration itself. This is due to the crucial problems behind it, including (Supriyanto, 2008):

1. Aspects of Philosophy

Viewed from the philosophical aspect of the purpose of land registration as stated in Government Regulation no. 24 of 1997 concerning land registration is oriented to the value of legal certainty originating from the western philosophical paradigm and not sourced and extracted from the Constitution of the Republic of Indonesia and Pancasila values which are more oriented to the value of fair legal certainty and social justice values that have been this has never been touched by the National Land Agency of the Republic of Indonesia (BPN) / Kakan Pertanahan.

2. Theoretical Aspect

Judging from the theoretical aspect of the purpose of land registration as stated in Article 3 of Government Regulation no. 24 of 1997 concerning land registration, especially in the phrase providing guarantees of legal certainty and legal protection, is contrary to the concept of the theory of the rule of law which places the Republic of Indonesia as a state of law and should protect the entire nation and the homeland of Indonesia. This means that in theory, the concept of the rule of law as affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia does not support the purpose of land registration which is oriented towards legal certainty and legal protection in Government Regulation no. 24 of 1997, and this is supported in the practice of implementing land registration where it is possible that each BPN/Kakan Pertanahan product does not guarantee legal certainty and legal protection.

3. Dogmatic Aspect

Legal certainty and legal protection in a lawful dogmatic manner have been formulated in Article 3 of Government Regulation no. 24 of 1997. Still, Article 3 conflicts with Article 32 of Government Regulation no. 24 of 1997. Thus, the guarantee of legal certainty and dogmatic legal protection has not yet realized legal certainty and legal protection in the negative system of land registration used by BPN / Kakan Pertanahan.

Positive Publication System (Limited) To Ensure Fair Legal Certainty and Legal Protection for Land Rights Holders.

In implementing a legal cadastre, land rights holders are given a letter of proof of righteousness. With the certificate of title, he can easily prove that he is the one who has the right to the land in question. The data already available at the Land Registration Service office is "open" to the public who need it. Thus, prospective buyers and potential creditors can quickly obtain the information they need to secure the legal action to be taken, whether obtained from the Land Registration Service or the holder of the land rights concerned.

In a negative publication system, the benchmark for legal certainty is not "registration" but the validity of "legal actions" taken to determine the transfer of rights to the buyer. Registration does not make the person who acquires land from the appropriate party the new right holder. In this system, the principle is known as *Nemo plus Juris* applies.

This principle comes from Roman law, complete *Nemo plus Juris in alium transferred potest quam ipse* Abel meaning that people cannot transfer or relinquish rights beyond what they have, so the data presented in the registration with a negative publication system should not be trusted to be true.

The state does not guarantee the truth of the data presented. Even though they have registered, the buyer always faces the possibility of a lawsuit from a party who can prove that he is the actual right holder. The "acquisitive perjury" institution overcomes the weakness of this system by countries that use it. " The publication system used by the Logga and Government Regulation No. 24/1997 is a harmful system that contains positive elements. The system is not purely negative because it is stated in Article 19 paragraph (2) letter c that registration produces letters of proof of rights, which act as strong evidence. Likewise, it is stated in Article 23 paragraph (2), 32 paragraph (2), and 38 section (2).

In a purely negative publicity system, there would be no such statement. This statement implies that the government, as the organizer of land registration, must make every effort to present the correct data in the land book and registration map as far as possible. Until it cannot be proven otherwise, the land book and registration map data must be accepted as correct data. Both in daily legal actions, as well as in litigation in court. Likewise, the data is contained in the certificate of title, as long as the data follows what is in the land book and registration map. However, the system is not positive either.

In a positive publication system, the data presented is guaranteed to be correct. It not only applies as a piece of solid evidence. It has been stated above that the data contained in the register has absolute proving power. The publication system is not favorable, and it is also evident from what is said in the General Elucidation of Government Regulation no. 10/1961. Registration does not result in an indefeasible title.

The recording of a right in the land book register in a person's name does not mean that the person who is entitled to the land will lose his rights, meaning that person can still claim the person's rights registered in the land book the person authorized. So the registration method regulated in this regulation is not positive, but harmful."

From the provisions in Government Regulation No.24/1997, the use of the rights registration system does not always indicate a positive publication system (there are inconsistencies with the Government Regulation). On the other hand, a positive publication system always requires a rights registration system. In the rights registration system, the land registrar shall test the validity of the data before making a land book and take measurements and make maps. The deed registration system always shows that the publication system is negative. The choice of a limited positive publication system based on the value of fair legal certainty and legal protection for land rights holders will have implications for several aspects of land registration, namely (Harsono, 2003):

1. Philosophical Aspects.

Guided by grammatical and historical interpretations, fair legal certainty and social justice as the embodiment of legal protection for land rights holders have been determined by the Indonesian people as one of the goals of establishing the Republic of Indonesia, not something abstract and not something abstract an irreversible situation. Make it happen. The action needed is to revitalize the value of fair legal certainty and legal protection into areas of Indonesian human life, including providing basic needs, namely land rights certificates. Therefore, the way that can be taken is to operationalize or implement the value of fair legal certainty contained in it within the framework of a positive (limited) publication system on land registration.

The paradigm of the certificate issuance process within the framework of a negative publication system has a positive element that refers to the legal rules contained in Government Regulation no. 24 of 1997 focuses more on land objects as a commodity by carrying out a negative system plan that is hidden in the purpose of land registration, compared to the positive (limited) publication system, namely fair legal certainty and legal protection and social justice.

2. Theory Aspect

The framework of thinking in the theory of the state and the goals of the state requires that the state under certain conditions should protect the rights of every citizen in obtaining land rights, meaning that the role of the state is needed to be responsible for managing the state's right to control the rural sector which is technically located and becomes the responsibility of the National Land Agency or Agency of the Republic of Indonesia / District / City Land Affairs Office. Therefore, the positive (limited) publication system inland registration is one of the reinforcements to ensure fair legal certainty and social justice.

3. Dogmatic Aspect

Dogmatically Government Regulation no. 24 of 1997 concerning the Purpose of Land Registration, which needs to be revised or amended, includes:

-
- a. Changes in legal politics regarding the State's Right to Control the management in the agricultural sector through the inclusion of Article 28D of the 1945 Constitution of the Republic of Indonesia and the fifth Precept of Pancasila so that the explanation in Government Regulation no. 24 of 1997 in particular concerning fair legal certainty and guarantees of legal protection because Article 28D of the 1945 Constitution of the Republic of Indonesia and the fifth precepts of Pancasila are spirits that must be included in the explanation regarding the limited positive publication system;
 - b. Amend the articles that open up opportunities for conflicts in the land sector, including Law Number 5 of 1960 concerning Basic Agrarian Principles, especially Article 19 paragraph (1), which indicates that the purpose of registration is to ensure fair legal certainty and legal protection for the right holder; as well as Government Regulation no. 24 of 1997 in particular Article 3, 4 and Article 32 which provide government provisions, namely the BPN / Land Office should provide legal certainty guarantees in the process of issuing land rights certificates that are published as well as other conditions for the realization of legal certainty and legal protection to holders land rights.

After conducting research and analysis related to the land registration system in the future (ius constituent), it can be stated that the positive (limited) publication system can be considered and used to provide guarantees of legal certainty that is just under the objectives of the rule of law as stated in the Constitution of the Republic of Indonesia. 1945, and following the values contained in Pancasila in the unitary state of the Republic of Indonesia.

The positive publication system is used for urban areas. It supports central government and local government programs such as areas affected by the reclamation program and sensitization using the transmigration system. In addition, the negative publicity system with positive elements is still enforced to maintain and protect lands in rural areas, especially those that are still included or controlled by customary law that still lives during the friendly law community concerned.

Conclusion

The study results and discussion of the three legal issues in this study concluded that: Land registration with a limited positive publication system can provide legal certainty and adequate legal protection for land rights holders, actual landowners, and third parties in the future. Such a system is applied to plots of land in urban areas and new residential areas (such as reclamation and transmigration areas), taking into account the intensity of the need for land (for development, settlements, various types of businesses, industries, offices and others). It is already very high, and its citizens see land no longer as an ordinary asset but land as a commodity so that the community needs a certificate of absolute land rights. Meanwhile, the negative publicity system with positive elements is still enforced in rural areas and areas where traditional values are still adhered to by the community. The positive (limited) publication system and the negative (positive element) system, which are applied simultaneously and concurrently in different jurisdictions, can be called: "Double track system of land registration publications

References

- AP. Parlindungan. (2015). *Konversi Hak-Hak Atas Tanah di Indonesia*. Wwww.Kompas.Com. www.kompas.com
- Harsono, B. (2003). *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, dan Pelaksanaannya* (Edisi Revi). Djambatan.
- Harsono, B. (2007). *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi, Dan Pelaksanaannya* (Edisi Revi). Rineka Cipta.
- Hutagalung, A. S. (2000). Penerapan Lembaga Rechtsverwerking untuk Mengatasi Kelemahan Sistem Publikasi Negatif dalam Pendaftaran Tanah. *Jurnal Hukum & Pembangunan*, 30(4), 328. <https://doi.org/10.21143/jhp.vol30.no4.319>
- Supriyanto, S. (2008). Implementasi Kebijakan Pertanahan Nasional. *Jurnal Dinamika Hukum*, 8(3), 221-231. <https://doi.org/10.20884/1.jdh.2008.8.3.78>
- Suteki. (2008). *Rekonstruksi Politik Hukum Tentang Hak Menguasai Atas Sumber Daya Air Berbasis Nilai Keadilan Sosial (Studi Privatisasi Pengelolaan Sumber Daya Air)*. Universitas Diponogoro.