

The Limited Positive Publication System in the Land Sector, Solution Towards Legal Certainty and Fair Legal Protection

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Abstract. *Land registration using the negative publication system had positive elements used in Government Regulation Number 24 of 1997 was believed to create just legal certainty. This research used a normative juridical approach, and supported by primary, secondary and tertiary data. The research results showed that certificates which were the products of the National Land Agency/Land Office had not been able to realize legal certainty that was fair to rights holders. This was reinforced by a number of court decisions canceling land certificates. The results of these findings recommended that a positive (limited) publication system was used as an alternative solution to realize legal certainty that was fair to people applying for land registration applications.*

Keywords: *Certainty; Fair; Limited; Publication.*

1. INTRODUCTION

Land is very important for people's lives, so in this case the government was trying to overcome problems that arise regarding land rights by strengthening legal certainty for rights holders ¹. Land is a valuable asset for everyone, and there were also laws that regulated land rights relations through the delivery of certificates as proof of land rights for the holder, as well as in the transfer of rights by buying and selling land and on the basis of control rights from the state through the government, as the obligation to carry out land registration throughout the territory of the Republic of Indonesia according to Law No. 5 of 1960 concerning Basic Agrarian Regulations². Then, Government Regulation no. 24 of 1997 concerning land registration which was the implementation of the provisions of Article 19 of Law No. 5 of 1960 concerning Basic Agrarian Principles. In the general explanation, it was stated that the land registration publication used a negative publication system with positive elements. This system was chosen as the basis for implementing land registration by the National Land Agency/Land Office, where the final product of the registration process is a certificate of land rights, with the aim of

¹ Nur Susilowati, Mulyani Djakaria, and Ida Nurlinda, (2020) "Analisis Prospek Pemberlakuan Sistem Pendaftaran Tanah Publikasi Positif Dan Aspek Kepastian Hukum Pemegang Hak Atas Tanah," *Acta Diurnal Jurnal Ilmu Hukum Kenotariatan dan ke-PPAT-an* 4, no. 1: 56.

² Yuda Oktavianus Ginting, (2023) "Pendaftaran Tanah Terhadap Hak Milik Dan Peralihannya Oleh Anak," *Notary Law Journal* 2, no. 2: 149.

providing legal certainty and legal protection to the rights holders and was used as the strongest evidence for the rights holders ³.

Land registration was a series of activities carried out by the Government on a prolonged, continuous and regular basis, including by collecting, processing, recording and presenting physical data and juridical data, presented with maps and lists, related to land plots ⁴. The purpose of land registration as formulated in Article 3 and Article 4 in the regulations above, was expressly stated to be to provide legal certainty and legal protection for land rights holders, however in its implementation, it actually created legal uncertainty and does not provide legal protection. This was due to the provisions of Article 32 of Government Regulation no. 24 of 1997 itself actually provided opportunities and possibilities for other parties who were able to prove that the land was theirs to submit objections and lawsuits to court regarding the issuance of a certificate of title to the land. The provision of Article 32 which provided opportunities for other parties to submit objections and lawsuits to court, apart from resulting in a lack of legal certainty and legal protection for rights holders, also had a negative impact on third parties such as banks and buyers who legally should receive protection by the state.

2. RESEARCH METHODS

This legal research was normative juridical research which did not leave legal facts as empirical data, where normative studies were carried out on secondary data consisting of Law No. 5 of 1960 and Government Regulation No. 24 of 1997 as well as other statutory regulations and books and other documents that are relevant to the object under study. The aim of this research was to examine whether the limited positive publication system could be used as an alternative solution to realize legal certainty and legal protection for land rights holders in Indonesia. The methods of processing the data were using qualitative methods, and deductive data analysis.

3. RESULT AND DISCUSSION

3.1. The Negative Publication System (Positive Elements) in Land Registration Did Not Reflect Legal Certainty and Legal Protection for Rights Holders

Land registration was divided into two types of land registration for the first time, including systematic land registration and sporadic land registration. Systematic land registration was a series of implementations of registering land for the first time which was carried out jointly and covers all objects of land plots that have not previously been registered in village/sub-district areas carried out by the government. Meanwhile, sporadic land registration was the work of registering land for the first time related to one or several land registration objects based on the wishes of the person concerned. The person who was entitled to obtain the registration object of the related land plot⁵.

Land registration for the community was very important because it ensured legal certainty. Legal certainty was legal protection for behaviour, all of which meant that someone would get what they wanted from a certain condition. Society really needed legal certainty because with this law society became orderly. Law had the task of creating legal certainty with the aim of bringing order to society. Guaranteeing legal certainty had many benefits, including:

³ Boedi Harsono, (2003), *Hukum Agraria Indonesia Sejarah Pembentukan Undang-Undang Pokok Agraria*, Jakarta: Djambatan, 56.

⁴ Lisnadia Nur Avivah, Sutaryono Sutaryono, and Dwi Wulan Titik Andari Andari, (2022) "Pentingnya Pendaftaran Tanah Untuk Pertama Kali Dalam Rangka Perlindungan Hukum Kepemilikan Sertifikat Tanah," *Tunas Agraria* 5, no. 3, 200.

⁵ *Ibid.*, 202.

- a. Improving the national economy, because having a certificate of title to a plot of land makes the certificate a collateral for the purpose of obtaining a bank credit loan.
- b. Preserving the environment, because a clear relationship between the rights owner and the object of the rights can motivate the rights owner to carry out something related to environmental preservation.
- c. Increasing state revenues, because the implementation of land registration activities results in order related to the administration of the transfer of rights as well as income from transfer of name fees.
- d. Helping the affairs of the community, especially those with a low economy, because if the land owner is given freedom in certain matters, then the person who has the right will receive appropriate relief.
- e. Reducing and preventing disputes/conflicts in the land sector.
- f. Obtaining support for spatial planning in development ⁶.

The negative publication system (with positive elements) or what could also be called the mixed system adopted in legislation and regulations in the field of land registration, was still a legal problem, because it denied guarantees of legal certainty and legal protection, and at the level of philosophy and legal theory hurts the sense of justice, so the system indirectly created structural victims (structural victimization), especially towards land rights holders, actual land owners and third parties through legal processes in court. The 1945 Constitution of the Republic of Indonesia, especially the fourth paragraph, clearly states: "...Furthermore, to form an Indonesian State Government which protects the entire Indonesian nation and all Indonesian blood and to promote general welfare, educate the life of the nation, and participate in implementing world order based on freedom, eternal peace and social justice..."

Paying attention to the sound of the phrase in the Preamble to the 1945 Constitution of the Republic of Indonesia above, and connecting it with the negative publication system with positive elements required by Government Regulation no. 24 of 1997, it could be stated that between the intentions of the preamble to the 1945 Constitution of the Republic of Indonesia and the wishes of Government Regulation no. 24 of 1997 there was disharmony seen from the aspect of evidence in the court realm. Even the land registration system was a negative publication system which had a positive tendency, this meant that the land certificate was not an absolute truth, which could not be contested anymore (indivisible title). So, it could be interpreted that as long as no other party could provide proof to the contrary, the land remained, and owned by the certificate holder. The land registration system with a negative publication system, with a positive tendency, apparently still left various problems, it could be proven that there were still many disputes, conflicts and land problems. Then, the legal certainty of land ownership could still be questioned, even being challenged in court ⁷.

Apart from there being disharmony between the purpose of land registration and the obligations of the state or government which must protect every holder of a land title certificate, it could be said that Government Regulation no. 24 of 1997 concerning land registration actually contradicts the government's (state) obligation to protect every citizen, especially in the land sector. The existence of disharmony in the legal regulations had resulted in the absence of guarantees of legal certainty for every right holder in a land certificate. This was because the negative system

⁶ Ibid., 203.

⁷ Bhim Prakoso, (2021) "Pendaftaran Tanah Sistematis Lengkap Sebagai Dasar Perubahan Sistem Publikasi Pendaftaran Tanah Di Indonesia" 1:1 *Journal of Private and Economic Law*," *Journal of Private and Economic Law*, no. May (2021): 65, <https://doi.org/10.19184/jpel.v1i1.23859>.

has positive elements adopted by Government Regulation no. 24 of 1997 could not guarantee legal certainty to land certificate holders, so this proved that each certificate holder could not be guaranteed certainty and could not have his legal rights protected if there were other parties who, based on existing evidence, could prove otherwise, as determined in Article 32 paragraph (2) Government Regulation no. 24 of 1997.

Land registration, the implementation of which was ordered by Law No. 5 of 1960 concerning Basic Provisions on Agrarian Principles, did not use a positive publication system where the correctness of the data presented was guaranteed by the state, but instead used a negative publication system. The negative publication system positions the government (National Land Agency/*Kakan Pertanahan*) as not being in a position to provide legal certainty regarding the veracity of the data presented by rights holders. This was because the position of the *BPN/Kankan Petanahan* was not active, but passive/waiting, meaning that the rights applicant must play an active role in collecting data relating to his rights application.

One of the fundamental problems in land disputes was the negative publication system with a positive tendency in land registration adopted by Indonesia. This meant that the state did not guarantee the correctness of the data in the land certificate even though the land acquisition was carried out in good faith. The publication system currently adopted could at any time be challenged by other parties, because they felt they had more rights or had stronger evidence of the land. In contrast to the positive publication system, it could guarantee legal certainty of land rights, because the state guaranteed the correctness of the data/information contained in the land rights certificate and if there was a loss from the right holder due to administrative defects in its issuance or due to implementing a court decision, the state compensated the loss, and the fault of one of the injured parties⁸.

Land that had not been registered and certified caused a high number of land cases. With the Complete Systematic Land Registration (*PTSL*) program for land parcels in the region, by 2025 it was targeted that all land parcels in Indonesia would be registered. Registering land plots throughout Indonesia would at least reduce land cases. The number of land plots throughout Indonesia was estimated at 126,000,000 (one hundred and twenty six million) land plots and would continue to increase every year, if there were changes to land registration data.⁹

The explanation above meant that the position or position of the government was in protecting the entire Indonesian nation from the legal rules in the PP. No. 24 of 1997 which substantially contradicted the guarantee of fair legal certainty and legal protection mandated by the 1945 Constitution of the Republic of Indonesia, especially Article 28D which confirmed in paragraph (1) that every person had the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. However, Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia with article 3 of Government Regulation no. 24 years 1997 Jo. Article 19 of Law No. 5 of 1960 concerning Basic Provisions on Agrarian Principles had differences in implementation, so it could not be said that fair legal certainty in the 1945 Constitution of the Republic of Indonesia was the same as legal certainty in Government Regulation No. 24 of 1997. In other words, the guarantee of legal certainty in the issuance of

⁸ Harvini Wulansari, Rochmat Junarto, and Dian Aries Mujiburohman, (2021) "Establishing a Positive Publication Land Registration System," *Riau Law Journal* 5, no. 1: 65, <https://rlj.ejournal.unri.ac.id/index.php/RLJ/artide/view/7875>.

⁹ *Ibid.*, 67.

land certificates in a negative publication system (with positive elements) was not the same as fair legal certainty in the 1945 Constitution of the Republic of Indonesia.

Responding to the problems mentioned above, of course the question is whether the limited positive publication system model can reflect the guarantee of fair legal certainty which originates from the 1945 Constitution of the Republic of Indonesia and Pancasila as the source of all sources of law. The next question is why the limited positive publication system model can realize guarantees of fair legal certainty which are explored and sourced from the 1945 Constitution of the Republic of Indonesia and Pancasila as the source of all legal sources. These two questions will be analyzed by putting forward the concept of a limited positive publication system in an effort to guarantee legal certainty and protection for land rights holders, because both cannot be separated from each other and are to complement each other, so that a logical picture is obtained and can be accepted as a scientific studies.

So far, understanding of the value of legal certainty had always been glorified by normative regulations, including Government Regulation no. 24 of 1997 which according to the researcher was not inspired by or did not originate from the value of fair legal certainty as mandated in the 1945 Constitution of the Republic of Indonesia and Pancasila. Normative legal certainty was a regulation that is created and promulgated with certainty because it regulated clearly and logically. Legal certainty was not an absolute thing to fulfill legal objectives, but rather as advice that was used according to situations and conditions by taking into account the principles of benefit and efficiency. Without legal certainty, a person did not know what would done and ultimately a feeling of discomfort arises, but if there was too much emphasis on legal certainty, too strictly obeying a rule the result would be rigidity and give rise to injustice.¹⁰

Legal certainty was an absolute requirement for the implementation of legal supremacy in a rule of law state. Legal certainty was an inseparable characteristic of law, especially written legal rules. Laws without the value of legal certainty would lose meaning, because they could no longer be used as guidelines for behavior for everyone¹¹. There are four (4) things related to the meaning of legal certainty. First, if the law was positive, it was certain that it was legislation (*gesetzliches recht*). Second, it was based on facts (*tatsachen*), not a formulation about the assessment that would later be made by the judge, such as; good will, politeness. Third, that the facts must be formulated in a clear way so as to avoid errors in meaning and also be easy to implement. Fourth, positive law must not be changed frequently¹².

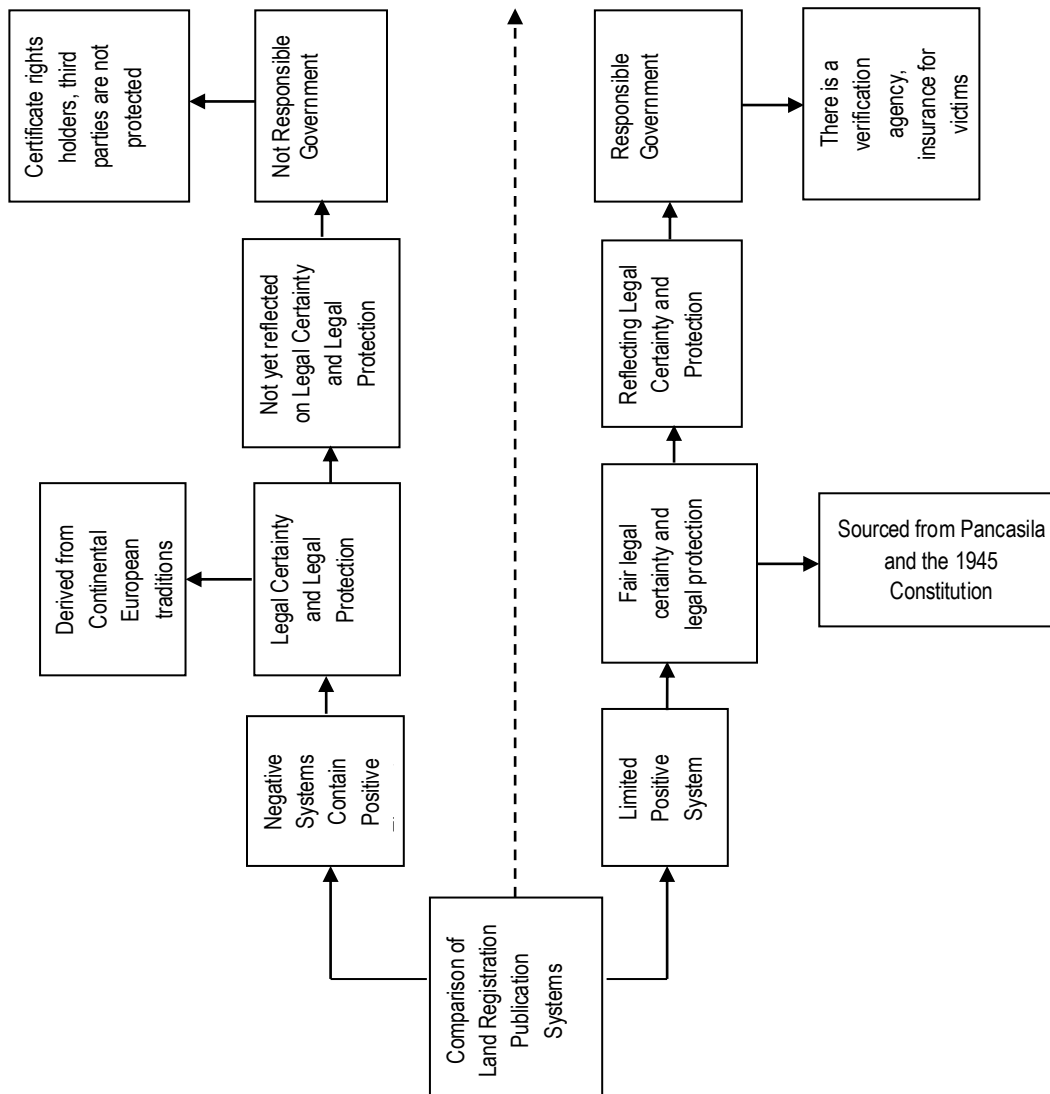
Legal certainty in the 1945 Constitution of the Republic of Indonesia and Pancasila, these two legal sources were normatively constitutional, and had placed legal certainty as a value system for enforcing and protecting land law in Indonesia. The comparison of two land registration systems that produced products in the form of land title certificates and were correlated 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 title certificate products, and it was issued by *BPN*. The following chart illustrated the comparison of the two land registration systems, as follows:

¹⁰ Isdiyana Kusuma Ayu, (2020) "Kepastian Hukum Pendaftaran Tanah Melalui Pendaftaran Tanah Sistematis Lengkap Di Kota Batu," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 31, no. 3: 346.

¹¹ Suratman Sulasiyah Amini, (2022) "Pentingnya Pendaftaran Tanah: Perspektif Teori Kepastian Hukum," *JURNAL HUKUM dan KENOTARIATAN* 6, no. 3: 1338.

¹² Aqsa Rajasa and Slamet Suhartono, (2023) "Kepastian Hukum Pendaftaran Tanah Secara Sistematis Lengkap (Ptsl) Di Kabupaten Madiun," *YUSTISIA MERDEKA: Jurnal Ilmiah Hukum* 9, no. 1: 42.

The Comparison of Legal Certainty and Legal Protection In the Land Registration System



Based on the chart above, it was explained that the legal certainty and protection contained in Government Regulation no. 24 of 1997 concerning land registration, had its roots and originated from the Continental European tradition or known as the civil law system which explicitly required in making legal rules they must be rigid, strict, clear and detailed, so they did not cause problems in the context of their implementation. Meanwhile, fair legal certainty and legal protection from the limited positive publication system originated from Pancasila and the 1945 Constitution of the Republic of Indonesia, thus it reflected legal certainty and legal protection and places the government as the party carrying out land registration to be responsible for the land rights certificate made.

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

The publication system used by Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles and Government Regulation No. 24/1997 was a negative system that contains positive elements. The system is not purely negative, because it was stated in Article 19 paragraph (2) letter c, that registration produces letters of proof of rights, which acted as strong evidence. This

was also stated in Articles 23 paragraph (2), 32 paragraph (2) and 38 paragraph (2). This publicity system emphasized that what was stated in the land book and the certificate of title that was issued is as absolute evidence, the party whose name was in the certificate of proof of title, gets absolute protection, even if at a later date the information contained in the certificate this evidence is not true. Those who were harmed, would be given compensation in other forms¹³.

The characteristics of land registration that used a positive publication system were:

- a) The registration system used a registration of titles system.
- b) The certificate issued as proof of rights is absolute, that was, the physical data and juridical data contained in the certificate could not be contested and provide absolute trust in the land book.
- c) The state as registrant guarantees that the physical data and juridical data in land registration were correct.
- d) Third parties who acquired land in good faith receive absolute legal protection.
- e) Other parties who suffered losses due to the issuance of land certificates received compensation in other forms.
- f) Land registration took a long time, land registration officers carried out their duties very carefully, and costs were relatively high¹⁴.

The positive publication system always used a rights registration system, so that there must be a register or land book as a form of storage and presentation of juridical data and a title certificate as proof of rights. It was the registration or recording of a person's name in the register as a rights holder that made the person the right holder to the land in question. The land register or book presented in this positive publication system was guaranteed to be correct by the state¹⁵.

In a positive land registration system, the land certificate that had been issued had absolute and perfect truth. A certificate was absolute proof of ownership of land rights and a certificate that had been issued could not be cancelled, if that happened, the state would provide compensation to the party listed on the certificate. Because the positive land registration system had positive sides: 1) There was certainty in the land book; 2) the active role of land title officials; 3) the working mechanism for issuing land certificates was easy for lay people to understand¹⁶.

In order to realize the implementation of a positive publication system, it was very necessary, among other things: (1) the lack of strong legal certainty of land rights which created insecurity and uncertainty of land ownership rights; (2) there was initial development of the land market; (3) there are quite high and protracted land dispute problems; (3) there was a need to provide basic credit, especially for farmers; (4) there were efforts to formulate the implementation of land redistribution by means of legalization and land redistribution¹⁷.

¹³ Arie Lestario and Erlina Erlina, (2022) "Sistem Pendaftaran Tanah Yang Memberikan Perlindungan Hukum Bagi Pemegang Sertifikat Hak Atas Tanah Di Indonesia," *Notary Law Journal* 1, no. 1: 6.

¹⁴ Andi Batari Anindhita, Farida Patittingi, and Chalis Al Rossi, (2021) "Perbandingan Sistem Publikasi Positif Dan Negatif Pendaftaran Tanah: Perspektif Kepastian Hukum," *Amanna Gappa* 29, no. 2: 109.

¹⁵ Susilowati, Djakaria, and Nurlinda, "Analisis Prospek Pemberlakuan Sistem Pendaftaran Tanah Publikasi Positif Dan Aspek Kepastian Hukum Pemegang Hak Atas Tanah," 57.

¹⁶ Bachtiar Effendie, (1983), *Pendaftaran Tanah Di Indonesia Dan Peraturan-Peraturan Pelaksanaannya*, Bandung: Alumnus, 32.

¹⁷ Wulansari, Junarto, and Mujiburohman, "Establishing a Positive Publication Land Registration System," 71.

In a positive publication system, the data presented was guaranteed to be correct. Not only it acted as a strong means of proof. It had been stated above that the data contained in the register had absolute evidentiary power. The publication system was not a positive system. it was also evident from what was stated in the General Explanation of Government Regulation no. 10/1961. Registration did not result in an indefeasible title. In a limited positive publication system based on the value of fair legal certainty and legal protection for land rights holders, this would have implications for several aspects of land registration:

First, the philosophical aspect, guided by grammatical and historical interpretation, fair legal certainty and social justice as an embodiment of legal protection for land rights holders had been established by the Indonesian people as one of the goals of the founding of the Republic of Indonesia, not something abstract and not a situation that could not be realized. The action needed was to revitalize the value of fair legal certainty and legal protection in various areas of Indonesian human life, including in the field of providing basic needs, namely land title certificates. Therefore, the way that could be taken was to operationalize or implement the value of fair legal certainty contained in it within the framework of a positive (limited) publication system in land registration.

Second, the theoretical aspect, the framework of thinking in state theory and the goals of the state required that the state under certain conditions had an obligation to protect the rights of every citizen in obtaining land rights, meaning that the role of the state was very much needed to be responsible in managing the state's right to control the agrarian sector. technically located and the responsibility of the institution or National Land Agency of the Republic of Indonesia/Regency/City Land Agency. Therefore, the positive (limited) publication system in land registration was one of the reinforcements to ensure legal certainty that was fair and socially just. A certificate that had been issued by the state, the state could guarantee continuous compensation if the land changed or revoked its rights without the will of the owner himself.¹⁸

Third, the dogmatic aspect, dogmatically Government Regulation no. 24 of 1997 concerning the Purpose of Land Registration, which needed to be revised or changed, included:

- a. Changes in political law regarding the State's Right to Control over management in the agrarian sector through the inclusion of Article 28D of the 1945 Constitution of the Republic of Indonesia and the fifth principle of Pancasila, so that the explanation in Government Regulation No. 24 of 1997 specifically relates to fair legal certainty and guarantees of legal protection, because Article 28D of the 1945 Constitution of the Republic of Indonesia and the fifth principle of Pancasila are spirits that must be included in the explanation relating to the limited positive publication system;
- b. Amending articles that open up opportunities for conflict in the land sector, including Law No. 5 of 1960 concerning Basic Agrarian Principles, especially Article 19 paragraph (1) which indicated that the purpose of registration was to guarantee fair legal certainty and legal protection for the rights holder; as well as Government Regulation no. 24 of 1997, especially Articles 3, 4 and Article 32 which provided government provisions, that the *BPN*/Land Office had an obligation to provide guaranteed of legal certainty in the process of issuing certificates of

¹⁸ Muhammad Syukur, La Ode Husen, and Ilham Abbas, (2021) "Perlindungan Hukum Kepada Pemegang Sertifikat Hak Atas Tanah: Studi Pada Kantor Pertanahan Kabupaten Wajo," *Journal of Lex Generalis (JLS)* 2, no. 10: 2649, <https://mail.pasca-umi.ac.id/index.php/jlg/article/view/703/748>.

land rights which it issued as well as other provisions for the realization of legal certainty and legal protection to holders of land rights.

The positive publication system was used for urban areas, and to support central government and regional government programs such as areas affected by reclamation programs and area sensitization using the transmigration system. Apart from that, the negative publication system with positive elements was still in place to maintain and protect land in rural areas, especially those which were still included in or controlled by customary law which still exists among the customary law communities concerned. Thus, in the future land registration in Indonesia (*ius constituendum*) could be argued that a positive (limited) publication system could be considered and used to provide guarantees of fair legal certainty in accordance with the objectives of the rule of law as confirmed in the Constitution of the Republic of Indonesia 1945, and was also in accordance with the values contained in Pancasila within the framework of the unitary state of the Republic of Indonesia. By using the principle of good faith, which meant that the person who obtained something in good faith remains the legal holder of that right, even though the person who transferred the right turns out not to be the person who had the right.¹⁹

4. CONCLUSION

A land registration system with a positive publication system that was implemented on a limited basis could guarantee legal certainty and fair legal protection for land rights holders, actual land owners and third parties in the future. A system was applied to plots of land in urban areas and new residential areas (such as reclamation and transmigration areas), taking into consideration in these areas the intensity of need for land (for development, settlement, various types of business, industry, offices, etc.) was already very high and residents view land no longer as a shared asset but land as a commodity, so absolute land rights certificates were really needed by the community. Meanwhile, the negative publication system with positive elements was still applied in rural areas and areas where the community still adhered to traditional values. A positive (limited) publication system and a negative system (containing positive elements) which were applied simultaneously and simultaneously in different legal areas could be called a double track land registration publication system.

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¹⁹ Lestario and Erlina, "Sistem Pendaftaran Tanah Yang Memberikan Perlindungan Hukum Bagi Pemegang Sertifikat Hak Atas Tanah Di Indonesia," 8.

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