



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"



IMAM AS SYAFEI BUILDING
 Faculty of Law, Sultan Agung Islamic University
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD ISLAMIC UNIVERSITY
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Welcome to Participants on International Conference

"LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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Nagoya University, Japan
2. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
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4. Assoc Prof. Dr. Ahmad Zaharuddin S.
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5. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Indonesia, September 05th 2017

WORLD ISLAMIC UNIVERSITY
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Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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FACULTY OF LAW
Sultan Agung Islamic University

5
September
2017

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Nagoya University, Japan
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Sultan Agung Islamic University, Indonesia

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

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AND CALL FOR PAPER
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.


Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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THE DEVELOPMENT OF LAW OF BUYING AND SELLING LAND IN INDONESIA

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Suteki

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Abstract

Land has an important meaning for human life, because on the land the human do the activities, Ranging from cultivating crops, establishing houses of residence, doing business, and so forth, in addition to the economic value of the land that continues to be higher so that it is not uncommon the land is used as an investment object.

Everyone is always expecting to have a plot of land and one way to get it is by buying and selling. Recognizing the importance of land transactions, then every ruling government always regulates the institution of sale and purchase of land in order to ensure legal certainty and legal protection.

The objectives of this study were (1) to know the provision of buying and selling land of customary rights before the enactment of BAL; (2) to know the provision of buying and selling land of western rights before the enactment of BAL; and (3) to know the provision of buying and selling land after the enactment of BAL. This study was a normative juridical research. The method of collecting data was by literature study. Data analysis used was qualitative analysis.

The findings of this research were (1) Making the deed of buying and selling of customary land rights before the enactment of the BAL had been solely made by the seller and the buyer, witnessed by the village head; (2) Making the deed of buying and selling of western rights land before the enactment of BAL had been made in front of notary and the juridical delivery had been made with the deed of transport as well as the registration by transfer of title officer; and (3) Making the deed of buying and selling land after the enactment of BAL was made before the official of the land deed officer (LDO) and the registration of its right transfer was registered in the land office.

Keywords: Buying and selling, Land.

The Background of the Study

Land is the surface of the earth, which in its use may include also some of the earth's underlying body and part of the space above it, with restrictions are being merely necessary for the immediate interests connected with the use of the land concerned.

Land has an important meaning for human life, because on the land the human do the activities, Ranging from cultivating crops, establishing houses of residence, doing business, and so forth, in addition to the economic value of the land that continues to be higher so that it is not uncommon the land is used as an investment object.

Everyone is always expecting to have a plot of land and one way to get it is by buying and selling. Recognizing the importance of land transactions, then every ruling government always regulates the institution of sale and purchase of land in order to ensure legal certainty and legal protection. Therefore, this paper will discuss the development of law of buying and selling land before and after the enactment of Law No. 5 of 1960 (Basic Agrarian Law) hereinafter in this paper it is abbreviated as BAL.

The Problem of Study

1. What was the provision of buying and selling land of customary rights before the enactment of BAL?
2. What was the provision of buying and selling land of western rights before the enactment of BAL?
3. What was the provision of buying and selling land after the enactment of BAL?

The Objectives of the Study

1. To know the provision of the buying and selling land of customary rights before the enactment of BAL.
2. To know the provision of buying and selling land of western rights before the enactment of BAL.
3. To know the provision of buying and selling land after the enactment of BAL.

The Discussion

1. The provision of buying and selling land of customary rights before the enactment of BAL?

Regarding the buying and selling land of customary rights, the provisions of the sale and purchase of land according to customary law applied. Buying and selling of land under customary law were not a legal act which were called obligatoir agreement, but rather a legal act of transfer of rights with cash

payments, meaning that a mutually agreeable price was paid in full at the time of purchasing concerned. In the customary law it was not known that juridical delivery was as the fulfillment of legal obligations for the seller, because precisely what was called the land purchase was the delivery of right of the sold land to buyers at the same time the sellers paid the full price which had been agreed upon.

The followings were the opinions of some customary law experts in providing restrictions on the selling and buying of land:

- a. Buying and selling was the act of exchanging with payment, where the seller handed over the goods he had sold and received the payment, and the buyer handed over the money and received the goods. So the selling and buying of land were the delivery of the land at a certain price and they were not an agreement that created an obligation to submit, according to the notion of customary law, the selling and buying were one.¹
- b. Buying and selling of land were to hand over the land to receive payment of some money in cash, without the right of redeem, so the handover was valid forever.²
- c. Buying and selling of land were the delivery of a plot of land forever with the receipt of cash, which the money was called the purchased money.³

In conclusion the buying and selling of land according to customary law were:

- a. Buying and selling of land were legal acts of transferring the rights of the land from the seller to the buyer.
- b. Contingent handling means the delivery of objects and payment of the price occurs by cash, which was simultaneously submit the object and pay the price. The legal consequences of the cash was the buyer directly became the owner of the land, If there was a shortage of payment, it was a receivable debt between the former buyer and the former seller, which could not be used as an excuse to cancel the buying and selling on the basis of breach of contract.
- c. Concrete / real / visual means the buying and selling were considered to occur when they were marked by a real bond that could be captured with the five

¹ Hilman Hadikusuma, Customary Agreement Law, PT. Citra Aditya Bakti, Bandung, 1990, p. 77

² Imam Sudiyat, Customary Law of Sketches and Principles, Liberty, Yogyakarta, 1978, p. 32

³ S.A. Hakim, Sell Off, Sell Pawn, and Sell Yearly, Bulan Bintang, Jakarta, 1965, p. 5

senses. The agreement alone was not a treaty binding on the parties, if either party cancelled; the other party could not claim anything. If the prospective buyer wished from the beginning, then the prospective buyer submitted a bond signature in the form of down payment to the prospective seller.

- d. Transparent (not covert) means the buying and selling were made in the presence of the village head with a written agreement made on seal paper between the seller and the buyer witnessed by the head of the village

In customary law it adhered to the principle of horizontal separation in which the buildings and plants were not part of the land, So that the right to land did not necessarily involve the ownership of the buildings / plants on it. Legal acts on land did not necessarily include the building / plant owned by the landowner. If things were meant covering also building / plant then it was expressly stated in the relevant legal acts.

2. The provision of buying and selling land of western rights before the enactment of BAL

Regarding the buying and selling of land for the land of western rights, then the sale and purchase provisions contained in the book III the criminal code. One of them was article 1457 of the criminal code which stipulated that the so-called buying and selling (land) was an agreement in which the party who owned the land called "seller" promised and bound himself to surrender the rights to his land concerned to another party called "buyer ", while the buyer promised and bound himself to pay the agreed price. According to article 1458 of the Code of Civil Law, the agreement was the occurrence of buying and selling even though the object had not been submitted and the price had not been paid.

With the occurrence of such buying and selling, there had not been any change in the rights to the land concerned even if the buyer had paid the full price and the land had been physically delivered to the buyer. Therefore, in spite of the land, the legal provisions concerning the buying and selling were not a provision of land law, but the provisions of civil law, namely the law of the western treaty, the buying and selling were made in the presence of a notary.

The rights to the land sold were transferred to the buyer only, if the seller had given the legal right of the land to the buyer in order to fulfill his legal obligations (1459 Civil Code). Under the terms of the Civil Code, the articles

governing the procedure of juridical handed over as a continuation of the buying and selling of the land had not been valid until revoked by the BAL. Originally the procedure were as follows, after the sale was made in the deed of buying and selling before the notary, Subsequently, the juridische levering submission (set forth in article 616, 620 Civil Code) should be conducted by a deed also made in the presence of a notary namely the deed of transport (transport acte), then the deed of transport was registered to an official called "hypotheek storage officer"

The applicable provisions were based on the Overschrijvings Ordonantie (S. 1834 number 27) where it was determined that the duty to make the deed of transport and to register was "transfer of title officer" (overschrijvings ambtenaar).

From the above provision, it was clear that according to the provisions of the western civil law, that the "buying and selling land" was entirely separate between the "the sale" which was the obligatory agreement with "surrender" namely the zakelijk agreement.⁴

According to western law which adhered to the principle of accessie or the principle of attachment, Buildings and plants that exist on the land were one-unit with the land. So the right to land by itself included also the ownership of buildings / plants existing on the land (article 500 jo. 571 Civil Code). Thus the legal act of the land by itself included the building / plant on it

3. The provision of buying and selling land after the enactment of BAL

The enactment of BAL had ended the diversity of legal instruments that govern the land sector and created a single national land law, which was based on customary law. In addition to the law, the BAL also identified land tenure and land rights. All land rights which were regulated in the old legal instruments of land, were simultaneously declared to be deleted and converted into one of the rights set forth in the BAL.

In general explanation figure III (point 1) BAL stated that "with the new agrarian law itself must be in accordance with the legal consciousness of the people. Since the Indonesian people were largely subject to customary law, then the new agrarian law would be based also on the provisions of customary law, as

⁴ Subekti, Various Agreements, Alumni, Bandung, p. 23

the original law, which was perfected and adapted to the interests of society in a modern state”

In chapter 5 of the BAL stated that "the agrarian law that applied to the earth, water and air space were the customary law, as long as they did not contradict national interests and state, which was based on the unity of the nation, with Indonesian socialism and with the rules set out in this law. In order to establish national land law, customary law was the main source for obtaining its materials, in the form of conceptions, principles and legal institutions, to be formulated into written legal norms.

In meeting the needs of modern society, the land buying and selling agencies undergo modernization and adjustment without changing their nature as legal actions of transfer of land rights with the payment of its price in cash, and its character as a real and bright act. Buying and selling of land according to the BAL should be evidenced by a deed made by the land deed officer (LDO), a change that aimed to improve the quality of evidence of legal acts committed. This change of procedure did not exclude the provisions of customary law governing the material terms of the land sale agency, as interpreted by the some parties.⁵

It could be concluded that according to BAL that the material law of land sale agency was based on customary law, while its formal law was regulated in government regulation no. 24 year 1997 on Land Registration and its implementation regulations.

Procedures of buying and selling land according to BAL which had been implemented by government regulation no. 24 year 1997 and PMNA / KBPN no. 3 years 1997 were as follows:

- a. Buying and selling of land were carried out in the presence of the land deed officer (LDO) by making the deed of buying and selling. The nature of cash was maintained, so the deed proved that the buyer had become the new rights holder. As it was known that the official administration of the land deed officer was closed to the public so that the stage was only known by the parties involved, two witnesses, and the land deed officer. To obtain stronger and broader evidence of its evidentiary power, then it was registered in the land office to be recorded on a land book and certified as a proof of a strong right.

⁵ Boedi Harsono, Indonesian Agrarian Law, Publisher Djambatan, 1999, p. 204

The nature of the administration of the land office was opened to the public, and then at this stage the general public was considered to have known the transfer of rights from the seller to the buyer.

- b. The nature of Transparent and permanent was a requirement for the transfer of rights, and previously the transfer of rights must be made in the presence of the village head, so now the transfer of the rights had been done in the presence of the land deed officer (LDO).
- c. The nature of the concrete / real was also maintained that the deed signed by the involved parties showed the real legal act of buying and selling land.

Here was the jurisprudence of the Supreme Court which proved that buying and selling land were materially based on customary law:

- a. Related to the nature of cash:

- 1). Supreme Court decision no. 674.K / Pdt / 1989 on 8th December 1990. Buying and selling land in front of the land deed officer which was not followed by registration / returning the name were still valid, because they were based on buying and selling according to the customary law that was contingent (kontante handling / simultaneous transfer).
- 2). Supreme Court decision no. 2373.K / Pdt / 1989 on 18th February 1988. Buying and selling of land measured from Article 1320 jo. 1471 Civil Code were wrong, because buying and selling of land were based on customary law.
- 3). the jurisprudence of the Supreme Court no. 544.K / Sip / 1976 on 26th June 1979. Based on Article 19 of Government Regulation no. 10 of 1961 any transfer of land rights should be made in the presence of the Land Deed Officer (LDO), at least in the presence of the village head.
- 4). Supreme Court Decision no. 601.K / Sip / 1972. Buying and selling of land known to the headman and subdistrict / land deed officer (LDO) proved the existence of legitimate buying and selling. While the registration according to Article 19 BAL did not determine the validity of buying and selling of land.
- 5). Supreme Court Decision no. 123.K / Sip / 1970. In customary law the act which caused the transfer of rights was in cash, while the registration according to BAL and the administrative regulations was merely administrative.

b. Relating to the transparency:

- 1). Supreme Court decision no. 3438.K / Pdt / 1987 on 30th 30 of 1989. To measure the buying and selling of land could be seen from two ways, first, according to government regulation no. 10 year 1961 namely in the presence of deed land officer, (if it was not in the presence of deed land officer), then go to the second way, that was according to the customary law, it should be neutral and cash.
- 2). Supreme Court decision no. 1252.K / Sip / 1983 on 9th April 1986. Buying and selling of land with "Certificate of legal Sale" without known by the village officials were a sale that was not transparent, so it was illegal and must be cancelled.
- 3). Supreme Court decision no. 1589.K / Pdt / 1989 on 16th July, 1992. Buying and selling of land were cash and clear, although they were not yet followed by the record in the village book, then they were still valid.

In the practice, it was possible that legal acts concerning to the land also included buildings / plants on it, with the provision that the building / the physical plant was the unity with the land (A building that had a foundation and a perennial plant), and the owner of the land, and such intention was expressly mentioned in the relevant sale deed.⁶ In national land law based on customary law, the principle that had been adopted was the principle of horizontal separation. This was evidenced in the practice of justice as follows:

- 1). Supreme Court decision no. 2339.K / Sip / 1982 on 23th May, 1983. According to Article 5 of the BAL that the land customary law was applied, which meant that the house could be traded separately from the land?
- 2). Supreme Court Decision no. 574.K / Pdt / 1992 on 14th May, 1994. a plot of land which had buildings, At first the building was sold to the first buyer, then the land (which the seller said that it was an empty land) was sold to a second buyer, then the second buyer (landowner) could not sue the first buyer (building owner) to vacate and hand over the building.

The provision of the implementation of buying and selling deed in the presence of deed land officer was regulated in government regulation no. 24 year 1997 on Land

⁶ Sudargo Gautama, Comments on the Implementation rules of BAL, Citra Aditya Bakti Publishers, Bandung, 1997. p. 55

Registration, which had been implemented with PMNA / KBPN No. 3 of 1997 included:

- 1). In the case of transfer of land rights through buying and selling could only be registered if it could be proven by deed made before the deed land officer (DLO)
- 2). in making a deed, it should be attended by the involved parties to take legal actions and witnessed by at least two witnesses who were qualified to act as witnesses.
- 3). after the deed had been completed, not later than 7 (seven) working days from the date of signature of the deed concerned, the land deed officer had to submit the deed and the relevant documents to the land office for registration, the documents included:
 - a). letter of application for registration of rights transferred by buyer.
 - b). deed of buying and selling which had been made before the land deed officer.
 - c). proof of identity of the involved parties.
 - d). the original certificate of land rights which had been affixed with the record of its compliance with the existing list in the land office.
 - e). Proof of payment of BPHTB in case that the fee was due.
 - f). Proof of payment of income tax in case that the tax was owed.

The conclusion

1. Making the deed of buying and selling of customary land rights before the enactment of the BAL had been solely made by the seller and the buyer, witnessed by the village head.
2. Making the deed of buying and selling of western rights land before the enactment of BAL had been made in front of notary and the juridical delivery had been made with the deed of transport as well as the registration by transfer of title officer.
3. Making the deed of buying and selling land after the enactment of BAL was made before the land deed officer (LDO) and the registration of its right transfer was registered in the land office.

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