

## Legal Standing of Customary Land in Indonesia: A Comparative Study of Land Administration Systems

Mustafa Bola

Faculty of Law, Hasanuddin University, Indonesia. E-mail: [mustafa.bola@unhas.ac.id](mailto:mustafa.bola@unhas.ac.id)

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### ABSTRACT

Prove of land ownership by customary land is generally unwritten, just a confession of the surrounding communities with nature sign boundaries. If land ownership cannot be supported by strong evidence, the land may be registered by someone else who has getting physically for 20 years or more in consecutively and qualified on Government Regulation No. 24 of 1997 concerning Land Registration. Proof of old rights derived from the customary land law is rationally difficult to prove because there are no written documents. Customary land law does not know written ownership, only physical possession continually so it is very prone to conflict or dispute. In order to develop land administration in Indonesia, the values of customary land law contained in its principles is expected to be reflected in the land administration so it can reduce land conflict in the community. The role of customary land law has a large portion of the national land law. The role of government or ruling is very important to create a conducive condition in the land sector. A land is not allowed for personal or group interests, its use must be adjusted with the condition and the characteristic of their rights so useful, both for the prosperity and helpful to community and state.

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### 1. Introduction

Land for human life is not only having economic value and wealth alone, but also relates to the issues of social, politics, culture and also contains defense and security aspects. Starting from the assumption, then in the development today, the need for land is increasing and in problem-solving should pay attention and undertake an integrated approach and always guided by a policy which is based on the 1945 Constitution, Act No. 5 of 1960 on the Basic Agrarian Law (hereinafter referred BAL) and other legislation.

Nowadays, the development of Agrarian Law, the issue of security of rights and land title subject gets serious attention. This is can be seen in Article 19 of BAL stated that to ensure rights and legal certainty regarding the land, the Government held land

registration. Land registration includes measurement, mapping, land titles registration, right transition to another party, and right certificate as strong evidence.

Right evidence in the form of certificates which are preceded by land registration, mainly devoted to the subject of rights in order that the subject of right to obtain certainty about that right.<sup>1</sup> It is a guarantee given by the law, so that every subject of land right must register the land in order to know clearly about the situation, location, area and boundaries of land concerned. If it turns out the subject of rights not register the land, then this can lead to difficulties later in life when disputes arise, especially disputes with adjacent landowners, in other words, the disputes of land border for each parties do not know land boundaries clearly as result of the absence of certificates.

Disputes over land ownership rights have grown to be the case that predominates in the judiciary in Indonesia. Land disputes are unavoidable in today. This is due to the various needs of land is very high today while the number of area is limited. It requires improvements in structuring land use for the welfare of community and especially its legal certainty. For that, various efforts made by the government, which is working to solve land disputes quickly to avoid the accumulation of land disputes, which can be detrimental to the community such as land cannot be used because the land in dispute. During the conflict, land which became the object of conflict are usually in a state of *status quo*. As a result, a decline in the quality of land resources which could harm the interests of many parties and not achieving the principle of land benefit.

The land disputes is caused by the ownership rights to land owned by more than one party. In other words, land disputes arise because conflict of interest between one and another party. The emergence of land disputes due to the complaint by a party that contains objections and demands land rights, both the demands on the land status, priority, or ownership in the hope of obtaining the settlement is administered in accordance with the provisions.

## 2. Doctrines of Possession and Ownership

Definition of common property in the possessing of natural resources in extensive literature, can be summarized by the phrase "*everybody's property is nobody's property*".<sup>2</sup> This means that a natural resource is called "*common property*", if physically and law can be used by more than one user so that the natural resources that can be said to be used by anyone based on the principles of free competition. Included in the category of "*the commons property*" is the division of property rights over natural resources so that some owners have same rights to use these resources. Possession in this sense is only limited to use, does not include the right to divert it. Heirs of the owners together would have together only because of membership in the group (race, village, etc).

In the western legal system, particularly in *common law* system is explicitly stated that *possession is the root of title*. Traditionally, in western law, ownership rights divided into 3 (three) types, *private property*, *common property*, and *state property*. Differences in shape

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<sup>1</sup> Arisaputra, M.I. (2016). "Access Reform Dalam Kerangka Reforma Agraria Untuk Mewujudkan Keadilan Sosial," *Jurnal Perspektif*, 21(2): 83-96.

<sup>2</sup> Patittingi, F. (2012). *Dimensi Hukum Pulau-pulau Kecil di Indonesia: Studi Atas Penguasaan dan Pemilikan Tanah*. Jakarta: Rangkang Education, p. 14.

the kinds of rights is based on the naturalness of the person given their rights. Each of these kinds of rights granted, the three more influenced by politics and economics.

In philosophical, politics and economics in the 17<sup>th</sup> and 18<sup>th</sup> centuries, that the private property to possess and transfer is natural right of the individual. This concept is based on the teachings of John Locke (1632-1702), known as *the Labour Theory of Property* based on natural law. It suggests that the existence of private property existed long before the state and free from the law that governed by state, because *the property right* is the natural right, in which natural law is governed on the principles of natural justice. Therefore, the government is prohibited to regulate such rights without the permission of rights owner. As quoted by Panesar, John Locke stated that:

*Property rights existed before the state and independently of laws prescribed by the state. Property rights were natural rights of the individuals and those governed by principles of justice; governmental interference of reorganization of this rights was not permissible without the concession of the individual.*<sup>3</sup>

Based on the statement of John Locke, then the property rights existed before the state and rules prescribed by the state. Property rights are the natural rights of each individual based on the principle of justice. Government relations in the rearrangement of these rights can be done throughout the last concession to the rights of individual. According to John Locke, natural rights were revealed by God and are based on moral principles, are universal which contains the right to life and demands of happiness. Therefore, human is not possessed absolutely. Thus, the government to protect the property rights is just along rights to life and liberty.

In line with property rights, Farida Patittingi argued that:

*Possession and ownership reflects their inherent relationship to something (an object) by a person or legal entity, but actually its meaning different from each other. Under the draft law, the relationship of person and objects is a relationship called "rights". The meaning of this term is the object ownership or known as property right, which mean that "property rights are right to things".*<sup>4</sup>

Then, possession is more factual, which is concerned with the fact at some time, and also is temporary until later there is a certainty of relationship between the people who possess the property, the property were subjected to possess.<sup>5</sup> Although the possession must be regulated, it must be presented with the facts, not by law. At that time, it not needs the legitimacy of other, except that the goods in his/her hands. Therefore, possession is factual, the measure to provide any legal protection is factual as well, obviously properties that are under his/her possession. In contrast to the possession, the ownership is more clear and definite. Ownership showing the relationship between a person and an object that was subjected to ownership, the complex consists of the rights were classified under the *ius in rem*, since it applies to all people, and *ius personam* that applies to certain people.

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<sup>3</sup> Patittingi, F. (2008). *Hak Atas Tanah Pulau-Pulau Kecil*. Dissertation. Faculty of Law Hasanuddin University, pages. 23-24

<sup>4</sup> *Ibid*, page. 9

<sup>5</sup> *Ibid*, page. 64

Etymologically, possession comes from the word “power” which means the ability or willingness to do something, the power or authority over something or to determine (to rule, to represent, to manage and so on) something, while the “possession” can be defined as a process, a way, act to possess or ability to use something.<sup>6</sup> In contrast to the possession, the ownership is more clear and definite. Ownership showing the relationship between a person and an object that was subjected to ownership, the complex consists of the rights were classified under the *ius in rem*, since it applies to all people, and *ius personam* that applies to certain people.<sup>7</sup>

Based on the concept of possession and ownership above, it can be said that the possession as initial for ownership (*property*) where the sense of belonging itself is attached to the right so that it can be distinguished the term private property to show the private- and public property and also state property. Therefore, the possession still requires the intervention of law to determine whether the possession is recognized and protected or on the contrary does not obtain legal recognition. Government Regulation No. 24 of 1997 is a policy that has significance for the possession of land so that the only physical evidence for 20 consecutive years or more are supported by the good intention of owner, it can be used as proof of land ownership.

According to Urip Santoso<sup>8</sup> that the definition of “possession” can be used in sense of physical and juridical. And also in private and public. Possession in the juridical sense is the possess that is based on rights, which are protected by law and generally authorizes the holder of right to possess land in physical, e.g land owners to use or benefit from the land which they are entitled, not outsourced. There is juridical possession, who even gave the authority to possess the land which physically in right, in fact the possession of physical conducted by other parties, such as a person who owns the land does not use its own land but rented to other party, in this case legally the land owned by landowners but physically carried out by the tenant. There is also a legally possession that does not give authority to possess the land in question physically. Furthermore, the possession right of land contains a series of authority, obligations, or restrictions for the rights holder to do something about the land in right. Something that may be, compulsory, or prohibited to done which is the content of tenure that is the criterion or benchmark distinction between the rights of tenure stipulated in the Land Law.<sup>9</sup>

As a modern state, we know various kinds of state power in various organs of state that were previously unknown in customary communities. Nevertheless, the powers of state in the functioning should always be returned to its basic idea, namely the mutual cooperation.<sup>10</sup> With the basic, it is not expected the fight or unhealthy competition between one powers with other. All powers that be in the country directed to happiness together in accordance with the basic idea of the destination countries that have been outlined in the Preamble of 1945 Constitution.

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<sup>6</sup> Departemen Pendidikan Nasional. (1990). *Kamus Besar Bahasa Indonesia*, Edisi Keempat, Jakarta: PT. Gramedia Pustaka Utama, pages 467-468

<sup>7</sup> Rahardjo, S. (1991). *Ilmu Hukum*, Cetakan Ketiga. Bandung: Citra Aditya Bakti, p. 29.

<sup>8</sup> Santoso, U. (2006). *Hukum Agraria dan Hak-Hak atas Tanah*. Jakarta: Prenada Media, p. 73

<sup>9</sup> *Ibid*, p. 74

<sup>10</sup> Hadjon, P.M. (2007). *Perlindungan Hukum Bagi Rakyat; Sebuah Studi Tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi*. Surabaya: Penerbit Peradaban, p. 90

By looking at the concept of possession as described above, it can be said that the state control/possession over natural resources sourced from people known as *The Nation Right*. In the state control rights over natural resources, then the relevant object of state is a wealth according to Montesquieu and objects (wealth object) by Roscoe Pound as both a source of the country economy and peoples' welfare subjects.

### 3. Proof of Ownership According to the Law of Customary Land

Land title in the form of letters made by the sub-district head or notary with a variety of diverse forms and to create written proof of the lands occupied by citizens. Issuance of land tenure evidence, there is built on land that has not been converted and the lands controlled by the State and then the land is occupied by people, either intentionally or regulated by the Village Head and approved by the district head, as if such land has a right of a person or category of customary rights.<sup>11</sup>

In its development, land title is known as Land Certificate. The certificate of sub-district head on the land is necessary as the land title of the land transfer that has not certified which is still the land of the State that can be diverted or indemnity by or in front of sub-district head called the Statement of Waiver with Indemnity. The certificate of sub-district head on the land is the land title to be used if will put forth the effort to improve the status of land into land rights certificate in the local Land Office.

Everyone who argues that he has a right or to affirm their own right as well as denied a right of others, refers to an event is required to prove their rights or the event. Among so many nexuses of law in society, many events that give rise to disputes, such as the sale and purchase of land, which is one form of land transfer. In resolve disputes in court, each party will submit a proposition contradictory where the judge will examine and specify the correct arguments and the arguments are not correct according to the rules of evidence.

Basic Agrarian Law (BAL) is unification in the field of agrarian law. Thus, there is only one system of agrarian law applicable in the entire territory of the Republic of Indonesia and apply to everyone. Nevertheless, BAL remains essentially acknowledges the rights on land that is already held before the BAL apply, but must be adapted to the rights set forth in the BAL through legal order conversion is not contrary to the provisions of the BAL, particularly the provisions that indicate the nature of nationality of BAL, namely that only citizens or Indonesian legal entity can have a relationship that is entirely with earth, water and space.

In Article 1 (1) of Presidential Decree No. 32 of 1979 on Principles of Policy in the Context of New Right for Land Granting as Conversion of Western Rights stated that the land for business, for building and for use as conversion of western right, the period will expire at the latest on 24 September 1980 as mentioned in the BAL, and at the expiration of the relevant right will be directly possessed by the state. For land rights are subject to customary law has held special provisions, namely by Decree of the Minister of Home Affairs No. 26 DDA/1970, where conversion of customary rights

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<sup>11</sup> Phahlevy, R. (2016). The Concept of Village Autonomy in Indonesia (Indonesian Constitution Perspective). *Rechtsidee*, 3(1), 27-40. doi: <http://dx.doi.org/10.21070/jihr.v3i1.151>

is no deadline for special considerations regarding the cost, procedures, and ignorance of the people to obtain a certificate for the land.<sup>12</sup>

Under the provisions of Article 88 paragraph (1) point a Regulation of the Minister of Agrarian (BPN) No. 3 of 1997 on the implementation of Government Regulation No. 24 of 1997 on Land Registration that for ex- customary lands that full written evidence or not but there is witness statements or statements concerned that credible by the Head of the Land Office, confirmed conversion to property right. This is in accordance with the provisions of the old rights of proof in Article 24 paragraph (1) of Government Regulation No. 24 of 1997 which for evidence can be applied assertion of rights. Evidence like this is collected and shown before it was announced at the Land Office and in sub-district to provoke a reaction in those who have more right.<sup>13</sup>

Certificate is a letter of proof applicable right as a strong evidence of physical and legal data, in accordance with the existing data in the measure letter and land book rights are concerned. This means that the law only provides guarantee for proof of ownership rights to someone, and this evidence is not the only evidence, just as strong evidence alone.<sup>14</sup> Moch. Isnaini arguing that the certificate of land rights is not only evidence is absolute, just the opposite is just the beginning of evidence that can be abolished at any time other parties which are more competent.<sup>15</sup>

Under the draft law, the term “to possess” or “possessed with owned” or “belongs in the context of judicial” has different meaning and also different laws. The meaning of “possessed” is not synonymous with the notion of “owned”. If mention the land is possessed or to possess in the sense of “*possession*”, then the meaning of juridical of land is possessed by person physically and in a factual sense it is cultivated, inhabited, but not necessarily that legally it is the owner or have the land. Similarly, if mentioned that the land is owned or belongs in the sense of “*ownership*” within the meaning of juridical, it means that the land legally is land owned or belong to, but that does not mean anyway it physically possess the land for possible relationship of cooperation or certain contractual.<sup>16</sup>

Article 88 paragraph (1) sub b, the Regulation of the Minister of Agrarian/KBPN No. 3 of 1997 states that land rights are evidence of ownership does not exist but it has been proven physical possession for 20 (twenty) years, as described previously recognized as a property right. Plots that the period of Dutch Indies is not registered in *rectcadaster* and generally classed as customary land is now as main target of the registration. In addition, the ease of the majority of members of the community who do not have written evidence is assisted by proof ways through the possession of real physical meaning land constantly been possessed for 20 (twenty) years, either by the possessed parties or its predecessors, can registered and issued its certificates.<sup>17</sup>

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<sup>12</sup> Parlindungan, A.P. (2009). *Konversi Hak-hak Atas Tanah*. Bandung: Mandar Maju, page. 21.

<sup>13</sup> Parlindungan, A.P. (1994). *Bunga Rampai Hukum Agraria Serta Landreform*, Bandung: Mandar Madju, page. 101.

<sup>14</sup> Lubis, M.Y., and Lubis, A.R. (2010). *Hukum Pendaftaran Tanah*. Bandung: CV. Mandar Maju, page. 112.

<sup>15</sup> Isnaini, M. (2000). “Benda Terdaftar dalam Konstelasi Hukum Indonesia,” *Jurnal Hukum*, 7(13): 56.

<sup>16</sup> Naibaho, M.F. (2015). “Pengkakuan Penguasaan dan Pendudukan Tanah Tanpa Alas Hak Kepemilikan yang Berakibat Sengketa; Studi Kasus Putusan MA No. 2511K/PDT/1995”, *Jurnal Universitas Sumatera Utara*, 3, pp. 5-6.

<sup>17</sup> Lunnay, C., and Soesangobeng, H. “Status Reformasi Pertanahan dalam Undang-Undang Pokok Agraria dan Proyek Administrasi Pertanahan dengan Perspektif Sebesar-besarnya Kemakmuran Rakyat,” *Land National Seminar*, Bandung, page. 3.

Furthermore, Brotosoelarno,<sup>18</sup> concluded that this provision is a new technical and legal aspect in the land registration in Indonesia which also provides a way out if the rights holder cannot provide proof of ownership, either in the form of written or other form of evidence that can be trusted. In this case, the proof can be performed not by ownership, but based on evidence of physical possession that has been done by the applicant and its predecessor.

This provision reflects the attention and legal protection of the possession and land ownership by members of indigenous communities based solely on physical possession, but do not administer ownership letter. According to the provisions of Article 4 BAL hereinafter specified in Article 16 (1) of BAL, to private or legal entities can be given as a kind of land rights.

Furthermore, to further facilitate the implementation of tasks related to land rights issued by Minister Regulation No. 6 of 1972 on Delegation of Authority for Land Rights Granting to the Governor/Regent/Mayor of Regional Head and Head of Sub-district in the position and its function as a government representative. It was later amended by the Decree of the Minister of Agrarian/Head of the National Land Agency No. 3 of 1999 on Delegation of Authority to Grant and Cancellation Decisions for Granting Rights to Land State. Land title is a government decision that gives rights over state land, including the extension and renewal rights. The series of land titling process quite a lot and not merely by looking at aspects of the procedure alone but granting rights must also be assessed in terms of the law.

The few things that need to be considered in the process of entitlement, i.e, on the application subject in the form of personal data of the applicant, on the location of land, plot, and boundaries firmly on the land, as well as letters of proof acquisition rights are systematically appropriate with the applicable regulations. Type of land rights is a process that starts from the entry application to the competent agency to the advent of land rights that applied for it. An application for land rights can be assessed as eligible by law to be processed if the subject can petition to legally prove that he is the only one entitled to the land petitioned it. An assessment of the evidence conducted at the request of the executive officer of the starting point to the history of acquisition of land in question is valid and reliable. In the assessment of the evidence a history of the origins of this land, can be found in the civil aspect in the application for the land rights. If the civil legal aspects have qualified votes, then followed in terms of government planning, allocation, use of land, and the status of the land which is the legal aspects of land administration.

In the process of land registration, includes the collection and determination of the truth of physical data and juridical data about the object of land registration. Therefore, the written evidence is required as a basis to determine land rights. In the activities of juridical data collection, the distinction of new and old rights. The new rights are the rights on land recently given or created since the entry into force of the BAL. While the definition of old rights are rights to land arising from the conversion rights that existed at the time began to apply the BAL and the rights that have not been registered in accordance with Government Regulation No. 10 of 1961 on Land Registration.

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<sup>18</sup> Brotosoelarno, S. (1994). "Aspek Teknis dan Yuridis Pendaftaran Tanah Berdasarkan Peraturan Pemerintah Nomor 24 Tahun 1997," *Seminar Nasional Kebijakan Baru Pendaftaran Tanah dan Pajak-pajak yang terkait*, Yogyakarta, page. 4

In the period before the entry into force of the BAL, occurred dualism of land law in Indonesia, which is applicable customary law and Dutch colonial law simultaneously. Proof of customary land tenure is generally not written, only the recognition of surrounding community with natural sign boundaries. While proof of ownership according to the Dutch colonial law is in written form as *rincik* and *girik* which is essentially a proof of payment of land tax. *Girik* is not proof of land ownership, but merely a proof of payment of land tax. Social reality shows are still many *rincik* or *girik* that serve as proof of land ownership, even used in evidence in court in the event of a land ownership dispute in court.

Thus, if same plot there are claims of *girik* holders and claims of certificates holder, the certificate holder according to the law will have the right to claim a stronger material. Since the issuance of BAL, where proof of land ownership by Dutch Colonial Law and Customary Law is no longer strong as a proof of land ownership in Indonesia so that their position is only limited evidence of possession and proof of payment of taxes only.

Although until now has been a lot of adverse events for owners whose land is still based on Western law and customary law, still many land owners are not certify or convert or to register their land rights into rights over land according to the BAL. Because of these omissions, then there is a dispute multiply particularly the case in areas in the development process where the parties usually consist of the Company against the local community, and even between the Government and the public.

Although there is intention of the owner of prior land rights to certifying the land, be aware that not all the evidence possession and ownership of land by the West Law and Customary Law cannot necessarily be certified. Based on the research results and the search conducted by the authors, the documents can be land certificates are:

- 1) Grosse *eigendom* rights certificates issued by *Overschrijvings* Ordinance (S.1834-27) that have been stamped notes that the *eigendom* rights concerned is converted into property rights.
- 2) Grosse *eigendom* rights certificates issued by *Overschrijvings* Ordinance (S.1834-27) since the entry into force of the BAL until the date of land registration held under Government Regulation No. 10 of 1961 in the regions concerned.
- 3) Letter of proof of property rights issued pursuant to Rule of *Swapraja* concerned.
- 4) Titles issued based on the Minister of Agrarian No. 9 of 1959.
- 5) The decree granting property rights of the competent authorities, both before and since the entry into force of the BAL, which is not accompanied by an obligation to register the rights granted, but have met all the obligations referred to therein.
- 6) *Landrente, girik, pipil, kekitir* and *Verponding* Indonesia prior to the enactment of Government Regulation No. 10 of 1961 on Land Registration.
- 7) Deed of right transfer made under the hand that stamped by the Customary Chief/Head of Village/Ward created before the enactment of Government Regulation No. 10 of 1961 on Land Registration, accompanied by the right base to be diverted;
- 8) Deed of land transfer made by PPAT whose land has not been accounted for with the right base to be diverted.



- 9) Deed of endowment made before or since commenced Government Regulation No. 28 of 1977 on Land Endowment accompanied with the endowment right base.
- 10) Treatise of the auction made by the authorized auction official, where the land has not been accounted for with the right base to be diverted.
- 11) The letter of appointment or plot purchase which is a substitute for land taken by the Government.
- 12) Letter of land history ever made by the Tax Office with accompanying land and building the right base to be diverted.
- 13) Other forms of writing evidence by whatever name called as referred to in Article II, VI and VII Conversion Provisions of BAL.

In addition to proof of ownership, according to the West and Customary law which existed before the entry into force of the BAL, other documents that are or may be used as the right base is a deed made by the Land Deed Official (PPAT). If a land ownership cannot be supported by evidence that is strong, that land may be registered by someone else who has possessed physically for 20 years or more and qualified in Article 24 paragraph (2) of Government Regulation No. 24 of 1997 on Land Registration, namely:

- a) The possession is done in good faith and openly by the person concerned as entitled to the land, and is reinforced by the testimony of people who can be trusted.
- b) The possession both before and during the announcement as referred to in Article 26 is not disputed by customary law communities or villages/wards concerned, or the other party.

There is a false understanding of the physical possession. Indeed, in Article 1963 BW it is possible to be the owner for a person who in good faith to possess immobile object. Then in Article 1967 BW also organize such things and no longer requires the existence of good faith. However, this provision is no longer valid after the entry into force of the BAL. Government Regulation No. 24 of 1997 on Land Registration does regulate also such things, but the physical possession for 20 years or more is a second priority.

Article 24 of Government Regulation No. 24 of 1997 actually wanted to arrange that if someone wants to certify their land rights are derived from the old right, then he must complete written evidence. If there is no written evidence, it is proved by witnesses or his/her statement that the levels of truth are considered sufficient. If there is no writing evidence and/or witnesses, then stepped to the second evidence, namely the fact the physical possession over land in question for 20 (twenty) years or more by the applicant or his/her family/ancestors. But even this is also a condition that (1) is done in good faith; and (2) not disputed by other parties. So, society or for the party that possess only other land even if the period is more than 20 years, almost no way to certify the rights of others because of the requirement of good faith alone is difficult. How can it be assessed in good faith that other peoples' land and then recognized as their own land. Similarly, the second condition, how can the land owners do not mind if he knew that his land will be certified by others.

Based on the above, it is clear that the old rights can be categorized into 2 (two) types of land law, that is the Western land law and customary. Rights derived from the Western land law can be converted into land rights according to the BAL by using 13 types of documents that constitute proof of possession and ownership of land rights. This means that proving the old rights are derived from the west land right can be proven rationally because there is a written document. Unlike the case with the customary old rights law is rationally proof will be difficult because there are no written documents. Customary land law knows no written proof of ownership, only physical possession is hereditary so it is very prone to conflict or dispute.

In Article 24 of Government Regulation No. 24 of 1997 determined the physical possession over 20 years and in good faith as previously described. In related to the requirement of good faith, it can be said that everyone who possess a plot and want to certify, then he must prove that it is not the land it possess land owned by others. It should also be evident in the fact that the subject of legal possession of land is dependent on the land in terms of life and livelihoods are on the land and thus there will be no abandonment of land.

Conditions as described above reveal the emotional relationship between human and their land that in the customary law is known as religious-magical relationship. Land for human life is not only having economic value and prosperity alone, but also relates to social issues, politics, culture and also contains aspects of defense and security. In traditional thinking of Indonesian people, there is a view of the close relationship at all between the citizens with the land where he lived as a legal relationship and linkages that manifested itself in practice. That view has been grown for centuries and been growing among people in almost the entire country, even in the form and style that continues to experience growth and change in accordance with the dynamics.

The nature of the soil itself is a treasure that is seen is eternal because it will not be destroyed, in addition to a variety of the reality experienced where the soil serves as a residence for the citizens of the community, as a place where they find a place of life, as the place where will be buried if you die the world, and again in view of the religious magical ancestral spirits as a place to stay and that they consider to be a protective alliance. Therefore, it is very difficult for indigenous people to relinquish rights to the land they own, even though it is in the interest of development.

Based on above, it can be interpreted that in land administration, the position of old rights over land still get its own place in the system of land law in Indonesia. This can be seen by the conversion of regulated institutions in the BAL and in Government Regulation No. 24 of 1997 on Land Registration. Especially for land rights under customary land law, the conversion can be performed without a time limit as stipulated in the Decree of Minister of Domestic Affairs No. 26 DDA/1970. In development of land administration, old rights over customary land gave its own character in the repertoire of land administration in Indonesia. Rights to land under customary land law consisting of the right of association and the right of individuals assert their social function in the rights over the land set out in the BAL. Customary land law is the basis and the main source for national land laws. There are several principles of customary land law adopted by the national land law as contained in the BAL, namely the principles of Religiosity (Article 1); ethnicity/nationality (Article 1, 2, and 9); democracy (Article 9); community, equity, and social justice (Article 6, 7, 10, 11, and 13); land use and maintenance in planning (Articles 14 and 15); and horizontal

separation. The principle of ethnicity/nationality in customary land law shows that the land law in Indonesia is a land law that pro interests of the state, pro-socialism Indonesia, not contrary to higher law or regulation, and coupled with religious elements.

Based on these understanding, in the development of land administration in Indonesia, the values of customary land law contained in its principles is expected to be reflected in land administration so as to reduce the land conflict is so much happening in the community. The role of customary land law has a fairly large portion of land in national law. The role of government or the ruling is very important to create conducive condition in the land sector. It's just that should be given attention because depart from the role of Government, it is often the agrarian policies have political tendencies than its law. Therefore, the principle of social interests can be emphasized that all wisdom of land sector should not be allowed to harm social interest. Land is not allowed for private or group interest alone, its use must be adjusted to the condition and characteristic of their rights so useful, both for the prosperity and helpful to community and state.

The legal basis of land functions referred to in Article 6 of BAL, namely "All land rights has social functions". This means that the land rights existing in a person, it is not justifiable that the land would be used or not used solely for their own interests, especially if it causes damage to the community. Land use must be adapted to the circumstances and nature rather than rights that benefit the well-being and happiness have it or useful for society and the State. This provision does not mean that individual interests will be driven by the public interest as the BAL taking into account the interests of the individual.

BAL is unification of land law that existed before, namely the Western land law and customary. Although the basic principles of the Western land and customary still accommodated by the BAL, but it has not been able to reduce the number of conflicts or disputes related to land in the community. This happens because the land is now seen as a valuable asset that can provide economic benefits. But in addition, the view that land is a gift from God Almighty which can be utilized for the life and livelihood is still practiced by a minority of people, even a class society like this is sometimes the victim of the class of people who believe that the land is an asset very profitable.

#### **4. Comparison with Land Registry System in Dutch**

Nowadays, colonization by the Dutch for more than 350 years ago in Indonesia resulted in laws that apply in Indonesia is still influenced by the Dutch's law. No exception in land law that applies in Indonesia, the nuances of Dutch's land law that liberal is still strong in land law in Indonesia. This can be seen in broadest freedom to the individual to land with a status of property right in order to meet their respective needs, though these freedoms remain restricted by the State for matters of public interest.

As known that the nature of west's law is individualistic, hence law enacted in Indonesia is also individualistic, the legal system is derived from the people of Europe, especially from France capitalistic which is reflected in the French Civil Code. Therefore, the Dutch never colonized by the French, then the consequences is French Civil Code was enacted in the Dutch in 1811 to 1 October 1838. The Civil Code affirms

that the property rights are provides the greatest ability to enjoy the things that are his/her property. Besides that, giving absolute mastery over objects owned.<sup>19</sup>

The enacting of Dutch's land law in Indonesia is actually something that is wrong because geologically between Indonesia and the Dutch indeed very different. According to Kolkman et al,<sup>20</sup> the Dutch is a country that is a bit small, flat and very landscape with only a slight difference in geology and population density, while Indonesia is a country that is very broad with many forests, rivers, unmanaged land, with fertile and critical land, as well as rural and urban areas. Diversity of landscapes and natural resources is very large, as well as the use of land. This makes regulation about land and land use in Indonesia, compared to the Dutch, especially in rural areas, it becomes rather difficult.

In addition, Indonesia's legal traditions and the Dutch are also different. Dutch's law on the land registration is begun when the Dutch Civil Code is first made. At the same time, the government under King William I began to build a land registration system that was originally only for the purposes of determining the tax. It all happened at the beginning of the 19<sup>th</sup> century. Since then, the system to acquire land ownership and to register the land, even though nowadays are very advanced technically, basically it remains similar to this day.

In the Dutch, the need to regulate the property rights and land use is longstanding. In the early centuries, it is entrusted to the ancient court institutions. After codification in the early 19<sup>th</sup> century, this function is taken over by the government in this regard in cooperation with the notary. The public's archives (certificate registration) is connected with registrations that conducted by *Cadastral* (plot index, owners and map). Thus, the system of deed and titling system in some way is combined into a hybrid system.

In the system of land registration in the Dutch, the notary has a very important role. It has a monopoly to conduct land transaction or buildings, for example, transfer or assign rights to an immovable property in the form of property land. *Cadastral* administer all disclosure to the public for almost all transactions related to the land. It offers to the public all information on the land. It is easy to find out about the information in public records and in the Land Registry Office. The system is able to handle the large number of land transactions quickly. In just one day after the signing of the deed of transfer, the buyer becomes owner and the seller gets the money. Disputes about land transactions are relatively few. The system is safe and reliable because the quality of work both notary and *cadastre*. However, modern techniques, land deed registration are relatively inexpensive, accurate, and very fast compared to other countries. The land registration system offers nearly 100% legal certainties over land rights. There is full disclosure to all land rights and land registration information is available for a variety of public services such as national statistics, policy planning, and taxation and so on. In some ways and means, the State becomes greatly benefited by the land registration system that functioning properly.<sup>21</sup>

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<sup>19</sup> Patittingi, F. (2012). *Op.Cit.*, page. 96.

<sup>20</sup> See: Hutagalung, A.S., Kolkman, W.D., Verstappen, L.C.A., Vonck, F.J., Nurlinda, I., Puswitasari, H., Qadariani, M., & Sujadi, S. (eds). (2012). *Hukum Pertanahan di Belanda dan Indonesia*. In cooperation between Universitas Indonesia, Leiden University, and Groningen University. Denpasar: Pustaka Larasan, pp. 3-4.

<sup>21</sup> *Ibid*, p. 5

The as described above shows the presence of legal certainty and protection of land dominated and owned by someone along the land was registered in the Land Registry Office so it has ownership evidence. The evidence that owned by owner is provides security for all denials from other parties. In the theory of land administration, it is known as positive publicity system,<sup>22</sup> whereas it is well known that the land registration system adopted in the Dutch is a negative publicity system.<sup>23</sup> So, it can be said that the Dutch's legislation in the sector of land gives appreciation and legality security to the law for object ownership (the land).<sup>24</sup>

In a land registration system in the Dutch is known the term of Deed Registration and Right Registration. Right registration that it is not the deed, which explains the transfer of rights that are registered but the legal effect of the transaction that the right itself is legally provided to the buyer. So, the right together with the claimant's name is entitled to and the object of this right with any restrictions and costs are listed. By this registration, the rights were created. Most special legal advisor (lawyer or notary) must be involved in order to register the transaction. Registration creates public confidence. Rights registrations are often held by the court. The advantage of this system is to provide a high level of security and the overall status quo of land rights. However, disadvantages are very large, the system is very complicated and detailed, and it requires skilled personnel. This requires high initial capital to begin this system.

As for the Deed Registration, this system means that the deed itself (i.e a document that describes a special transaction) is registered. This deed is evidence that certain transactions have taken place, but in principle the deed itself is not evidence of the legal rights of the parties involved and as a result, in fact it is not evidence of legality or its validity. So, before any of agreements can be safely produced, the real owner must trace its ownership back to the good source of the right. Deed registration requires some legislation in order to unify the way the deed is made and the information from the deeds that are processed in the central system and computerized data processing. Have a stack of certified copies of the deed is not enough. People need to have an overview of the relevant transactions were related to the plot of land, as well as all information about the plot, the owner and general restrictions that may apply.<sup>25</sup>

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<sup>22</sup> Positive publications system is a system in which for who get land rights that will be granted stronger. Therefore, they or people who are registered on the list of land book it is definitely the landowner. Third parties must believe and not have to worry that one day they or people who are registered in the list of public will lose their right or harmed. See: Chomzah, A.A. (2004). *Hukum Agraria (Pertanahan Indonesia)*, Jilid 2. Jakarta: Prestasi Pustaka, p. 15-16

<sup>23</sup> Negative publication system is a system that the landowner is given a guarantee stronger as compared to the protection provided to a third party. Thus, then the landowner can sue their rights to a plot of land of those registered in the *cadastre*. See in *Ibid*, page 15.

<sup>24</sup> According to Kolkman, W.D., Verstappen, L.C.A., Vonck, F.J., that the Dutch's land system called moderate-negative system because on one hand it does not guarantee ownership of the registered owner of the immovable object, on the other hand it secures a high level that the transfer will not be canceled. The moderate negative system is also determined by the transfer causal system. Because the system is causal, it could be canceled because the invalidity of the right to the transfer. Thus, the registration does not affect in a negative system. But there are other systems, such as in Germany, where the courts are still registering land transactions. Because the in-depth investigation about the acquisition of land use, they have a positive system: once you have registered, only the court can change the registration and you remain the owner until the court proves otherwise. See Hutagalung, A.S., et.al., *Op.Cit.*, p. 51.

<sup>25</sup> *Ibid*, p. 50.

Different in Indonesia, land registration in Indonesia does not distinguish between right registration and deed registration. Ideally, any land owned by the subject of law must be registered at the Land Office to gain legitimacy from the State. Land registration is both land registration for the first time or from transfer of rights (transfer or transferred). In relation to land registration in the Dutch, the actual process is almost similar. For example, in the first time land registration, the applicant must obtain a certificate of land from the village head to get a complete history of the land. This was done also in the deed registration in the Dutch where the owners have to trace back land ownership.

Dutch's system is perhaps the deed registration system is the most advanced. There are 2 (two) archives, the public archives of the deed and right registration. Thus, one could argue that this is a mixed system of two registrations highly integrated public archives for the deed and right registration. Both were saved by the *Cadaastre*, a separate legal entity with an autonomous power and without political powers. This cadastral only provide services paid by the users, i.e people who want to register a deed and require information from the cadaastre. So, the cadaastre is independent financially.<sup>26</sup>

As described above, it can be said that the land administration in Indonesia and the Dutch are essentially different, especially in the publishing system that was followed. Land registration in Indonesia is adopting a negative publicity tend to positive,<sup>27</sup> while in the Dutch adopts a negative publicity. Although in the Dutch adopts negative publicity, but the legal guarantee of land ownership in the Dutch are highly protected by the State. Different in Indonesia, evidence of land ownership is strong evidence which the State only guarantees judicially that the contents of the certificate must be considered by all parties is correct as far as not proven otherwise.

#### 4. Conclusion

Suitability between proof of ownership with the right title in the possession and ownership can be seen from the documents submitted in the proof of land rights ownership (certificates). The documents in question can be either a Certificate of Land or proof of ownership of old rights over land (land rights under the Western and customary law). Especially for the old rights according to customary law, if could not be evidenced in writing, it can be proved with physical possession over the 20 years or so in good faith and openly by the person concerned as entitled to the land, and is reinforced by the testimony of people who can be trusted.

In order to develop land administration in Indonesia, the values of customary land law contained in its principles is expected to be reflected in the land administration so as to reduce land conflict is so much happening in the community. The role of customary land law has a fairly large portion of land in national law. The role of government or the ruling is very important to create conducive condition in the land sector. It is just that should be given attention because it departs from the role of Government, it is often the policies of agrarian sectors have political tendencies than its legal. Therefore, the principle to first social interests can be intended that all wisdom of land sector should not be allowed to harm social interest. Land is not allowed for private or group

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<sup>26</sup> *Ibid*, pages. 50-51

<sup>27</sup> Negative system tends to positive means that existing remarks, it actually not true, it can be changed and corrected. See: Chomzah, A.A., *Op.Cit.*, page. 16

interest, its use must be adjusted to its condition and characteristic of their rights so it useful, both for the prosperity and happiness for owner and helpful to community and state.

Land administration system in Indonesia is still influenced by the Dutch's land registry system, but in fact is still different. Land registration in the Dutch gives legal certainty and protection of State for land owned, while in Indonesia the State only provides guarantee that the contents of the certificate shall be considered to be true to the extent not proven otherwise. Certainty and legal protection of land in the Dutch have an impact on not many land disputes in court so that Indonesia needs to learn how to legislation in the sector of land can provide certainty and legal protection on the land so that the land disputes that dominate the courts in Indonesia can be eliminated.

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