

# The Development of Customary Doctrine of *Rechtsverwerking*: How to Ensure Legal Certainty in Land Registration?

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## Abstract

The doctrine of *rechtsverwerking* has been applied in the context of customary law related to land ownership in Indonesia for a long time. However, its application in the registration process did not ensure legal certainty. Therefore, this research reviewed the reformulation of the registration process to enhance the legal certainty of land ownership. This led to the use of diverse legal methods to examine relevant written laws and court decisions. Additionally, a hermeneutical approach was applied to understand the text and context of *rechtsverwerking*. In view of the discourse, the current legal framework on the land rights registration system lacks legal certainty. This led to the significance of enacting a new National Law on Lands, which offered greater certainty and broader regulations. This upcoming law is also expected to include provisions on compensation for errors made by land officials regarding the transfer of ownership.

## 1. INTRODUCTION

Land ownership policies in Indonesia are generally governed by Agrarian Law,<sup>1</sup> although to some extent covered by other legal fields. This includes Private,<sup>2</sup> Administrative,<sup>3</sup> Human Rights,<sup>4</sup> and Customary Laws.<sup>5</sup>

<sup>1</sup> Lucy Erdika et.al, "Integration of Customary Law in Agrarian Law Development in the the Industrial Revolution 4.0 Era: Significance and Urgency," *Peradaban Journal of Law and Society* 3, no.1 (2024): 89.

<sup>2</sup> Pandapotan Damanik and Shem Yafet Cundus Pratama Damanik, "Legal Protection of Land Rights in Mixed Marriages Ending in Divorce," *Indonesian Journal of Law and Economics Review* 19, no. 3 (2024): 10-11.

<sup>3</sup> Cecep Miptahuddin, "The Problem of Ownership of Land Rights is Reviewed Based on the Law and Government Regulations," *Advances in Social Humanities Research* 2, no. 5 (2024): 797-799.

<sup>4</sup> See Mulyadi Tanzili, "Kepemilikan Hak atas Tanah Berdasarkan Surat Keterangan yang diterbitkan oleh Camat," *Varia Hukum* 2, no. 39 (2018): 133.

The enactment of Law No. 5 of 1960 concerning Basic Agrarian Law (BAL) focused on the State's obligation to regulate land ownership, ensuring its use throughout the sovereign territory was for the greatest prosperity of the citizens, both individually and through mutual cooperation.<sup>6</sup> Based on the State's control, several types of rights over land may be granted to individuals and legal entities.<sup>7</sup>

The right of ownership is the legal control, an individual or entity has over a piece of land.<sup>8</sup> The inherited ownership rights was easily maintained.<sup>9</sup> This was characterized by an unrestricted and firm nature similar to the *eigendom* right.<sup>10</sup> Furthermore, the nature contradicted the customary law and social function of land rights.<sup>11</sup> The BAL also mandated that the ownership right should be handled by the State for the collective interests of the public, and due to voluntary surrender by the owner, or abandonment<sup>12</sup>

The purpose of the BAL is to establish legal unity and certainty regarding land rights.<sup>13</sup> Under this law, Western and customary ownership rights were no longer recognized<sup>14</sup> rather, it exclusively acknowledged property rights defined by the provisions. To ensure legal certainty for property rights, the government engaged in efforts associated with land bookkeeping, which included measuring and mapping of land, as well as registering the ownership.<sup>15</sup> The process also included providing legal subjects with official proof of land rights, ascertaining that those who had registered ownership were recognized.

Land registration does not logically adopt a positive publication system where the reality of the data presented is guaranteed by the local

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<sup>5</sup> Ira Safitri Darwin, Haryo Winarso, and Denny Zulkaidi, "The Role of Customary Land Ownership in Land-Use Conversion in the Peri-urban of Bukittinggi, Indonesia," *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 175, no. 4 (2019): 534, 536.

<sup>6</sup> See Law No. 5 of 1960 on Basic Agrarian Law, Preamble, the View (d) and Art. 2

<sup>7</sup> *Ibid.*, Art. 4 (1).

<sup>8</sup> Zuman Malaka, "Kepemilikan tanah dalam Konsep Hukum Positif Indonesia Hukum Adat dan Hukum Islam," *Al-Qānūn, Jurnal Pemikiran dan Pembaharuan Hukum Islam* 21, no.1 (2018): 108.

<sup>9</sup> Boedi Harsono, *op.cit.*, 288.

<sup>10</sup> *Eigendom* right is a Dutch (Western) land law regulated by the Civil Code which refer to the full ownership over a land. See Art I and Art II of Conversion Terms of the Law No. 5 of 1960 concerning Basic Agrarian Law and Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law," *Yale Journal of International Law* 22, no.1(1997): 175, 183.

<sup>11</sup> Siti Maryam Patajai, "Nilai Pembuktian Serifikat Hak atas Tanah," *AL-ISHLAH: Journal Pendidikan*, 2, no. 1 (2019): 35.

<sup>12</sup> See Law No. 5 of 1960 on Basic Agrarian Law, Art. 27.

<sup>13</sup> *Ibid.*, Memory of Explanation of the Draft of the BAL, Part A.I. See also Fitzpatrick, *op.cit.*, 183.

<sup>14</sup> See Memory of Explanation of the Draft of The BAL. Even though a series of state policies have greatly diminished *adat* (customary) law's scope and importance, it has remained in Indonesia's legal system. See Tody S.J. Utama, et.al, "New Ways of Teaching Adat (Customary) Law at Indonesian Law Schools," "New Ways of Teaching Adat (Customary) Law at Indonesian Law Schools," *The Indonesian Journal of Socio-Legal Studies* 4, no. 1 (2024): 2.

<sup>15</sup> Law No. 5 of 1960 on Basic Agrarian Law, Art. 19 (1).

National Land Agency.<sup>16</sup> This was because rights could be contested, and the validity of proof of ownership defended by the entitled party.<sup>17</sup>

Following the description above, the two main theoretical types of land registration are negative and positive systems. The major difference was the level of protection offered to third parties, such as buyers, who entered into legal agreements in good faith based on land recorded in the public register. In a positive system, these third parties received absolute protection. However, the negative system served as a means of verifying the validity of land rights transfers.<sup>18</sup>

The negative land registration system used in Indonesia failed to provide legal certainty in land ownership and justice for communities.<sup>19</sup> This inadequacy was evident in the high number of land disputes arising from overlapping ownership claims.<sup>20</sup> The negative system was not fully effective due to the concept of *rechtsverwerking*,<sup>21</sup> which caused the government to play a passive role in the registration process. Additionally, land registries only needed to submit data and documents, with the registration process reliant on the provided information which lacked thorough government verification.

The issues associated with the negative publication system were addressed by applying *rechtsverwerking*, a customary law doctrine used during court rulings. This doctrine helped in the prevention of land disputes that arose from delays in filing objections or lawsuits related to the registration process.<sup>22</sup> *Rechtsverwerking* refers to a legal principle mandating that supposing the original owner of a land fails to manage it for a specific period, and another person decides to use the property in good faith, the original owner can no longer reclaim the land. In simpler terms, the landowner loses the right to reclaim the land after a certain period has passed without management. However, the enactment of *rechtsverwerking* does not diminish the supreme authority of the judiciary in making decisions on legal cases.<sup>23</sup>

Several scientific research had been conducted on the concept of *rechtsverwerking* (Irfan & Kurniati 2018<sup>24</sup> and Kusuma 2022).<sup>25</sup> Ikhwan

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<sup>16</sup> Supreme Court Decision No. 495/K/SIP/1975 dated September 18, 1975.

<sup>17</sup> Law No. 5 of 1960 on Basic Agrarian Law Art. 19(2)(c), Art. 23(2), Art. 32(2), and Art. 38(2).

<sup>18</sup> Giandiva Fahlika Erizal, "Penerapan Sistem Pendaftaran Tanah yang menggunakan Stelsel Negatif Bersendikan Positif pada Objek Tanah yang telah Terdaftar di Kantor Pertanahan," *Jurnal Notarius* 3, no. 1 (2023):145.

<sup>19</sup> Irene Eka Sihombing, "Lembaga *Rechtsverwerking* Solusi Mengatasi Sengketa Tanah," *Jurnal Hukum Prioris* 2, no. 1 (2008): 51.

<sup>20</sup> Nia Kurniati and Jordan Mordekhai, "Strengthening Land Registration System through Implementation of Domain Approach in Manifesting Legal Certainty and Community Justice," *Sosiohumaniora* 23, no. 3 (2021): 330.

<sup>21</sup> Nur Hidayani Alimuddin, "Implementasi Sertifikat Elektronik Sebagai Jaminan Kepastian Hukum Kepemilikan Hak Atas Tanah di Indonesia," *SASI* 27, no.3 (2021): 338.

<sup>22</sup> Anindhita, et al, *op.cit.*, 113.

<sup>23</sup> Erni Herawati, "*Rechtsverwerking* dalam Hukum Tanah Nasional," <https://business-law.binus.ac.id/2017/03/27/rechtsverwerking-dalam-hukum-tanah-nasional/>.

<sup>24</sup> Muhammad Irfan and Nia Kurniati, "Kepastian Hukum Hak Atas Tanah dan Eksistensi Lembaga *Rechtsverwerking* Dalam Perspektif Peraturan Pemerintah Nomor 24

(2022), conducted similar research under the Indonesian Agrarian Law. Meanwhile, Arif & Sukirno (2024) focused on the issue of legal certainty in the context of *rechtsverwerking*.<sup>26</sup>

Based on the description above, this research focused on the reformulation of land registration arrangements in Indonesia, aimed to enhance the legal certainty of the agrarian law system, particularly concerning ownership rights. A legal research method, examining relevant official laws and court decisions, was adopted. To some extent, it interpreted the legal instruments using a hermeneutical approach to evaluate both the text and context of *rechtsverwerking*.<sup>27</sup> Additionally, the present research conceptualized law as a norm or rule applicable in society,<sup>28</sup> within the *rechtsverwerking* framework.

## 2. RESULTS AND ANALYSIS

### 2.1. The Concept of *Rechtsverwerking*

#### 2.1.1 The Origin of *Rechtsverwerking*: A Customary Land Law Idea

The Indonesian Agrarian Law is an example of legal pluralism, as it acknowledged the importance of customary practices and local traditions including national legislation.<sup>29</sup> This approach fostered a dynamic and responsive legal framework that respected historical rights as well as promoted social justice. Additionally, the approach enabled adaptation to changing societal dynamics, ensuring inclusivity and fairness in land ownership, property rights, and dispute resolution processes.<sup>30</sup>

The BAL adopted a dualistic approach in the following national Agrarian laws, *Adat* (Customary Law) and Western laws.<sup>31</sup> Additionally, it was stipulated that the States' rights of control over land maybe granted to

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Tahun 1997 Tentang Pendaftaran Tanah," *Acta Diurnal: Jurnal Hukum Kenotariatan dan ke-PPAT-an* 1, no. 1 (2018): 163-174.

<sup>25</sup> Nadya Novina Kusuma, "The Juridical Analysis of the Application of the *rechtsverwerking* Institution," *Jurnal Konstaterring* 1, no. 2 (2022): 397-411.

<sup>26</sup> Muhammad Miftachul Arif & Sukirno, "Analisis Perlindungan dan Kepastian Hukum bagi Pemegang Hak atas Tanah dikaitkan Lembaga *Rechtsverwerking*," *Notarius* 17, no. 2 (2024): 995-1013.

<sup>27</sup> See Anindhita, et al, *op.cit.* 113-114; Irfan and Kurniati, *op.cit.*, 165; Mochtar Lutfi, "Hermeneutika: Pemahaman Konseptual dan Metodologis," *Masyarakat, Kebudayaan dan Politik* 20, no. 3 (2007): 203-207; Cristóbal Orrego, "The Legal Hermeneutics of Representation," *Espíritu* 71, no. 164 (2022): 354.

<sup>28</sup> Mathias M Siems and Daithi Mac Sithighs, "Mapping Legal Research," *Cambridge Law Journal* 71, no. 3 (2012): 653-654.

<sup>29</sup> See Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 14 of 2024 concerning the Implementation of Land Administration and Land Registration of Customary Land Rights of Customary Community, Preamble, Considerations. a and b; Fitzpatrick, *op.cit.*, 174-175 ; Linda Yanti Sulistiawati, "Legal Pluralism in Adat Land Conflict Resolution: A Case Study of Eastern Indonesia," *KLRI Journal of Law and Legislation* 9, no.2 (2019): 159; and Iskandar Syah, et.al, "Comparative Study of Land Registration Systems in Indonesia and Sweden: Review of Legal, Institutional, Procedural, and Technological Aspects," *Marcapada: Jurnal Kebijakan Pertanahan* 4, no. 2 (2025): 155, 166.

<sup>30</sup> Erdika et.al, *op.cit.*, 91.

<sup>31</sup> Law No. 5 of 1960 on Basic Agrarian Law, Preamble, Considering (c). See also Erni Herawati, "The Implementation of *Rechtsverwerking* Principle in Indonesia Land Register," Conference: Proceedings of The 1st Workshop Multimedia Education, Learning, Assessment and its Implementation in Game and Gamification 2019: 3.

the *masyarakat hukum adat* (customary communities).<sup>32</sup> The Agrarian law, applicable to lands is a Customary Law, as far as it does not conflict with the national and State's interests.<sup>33</sup>

*Adat Law* embodied a communal-religious concept that permitted individuals to have control over land based on personal rights while also integrating communal aspects.<sup>34</sup> This concept was used to explain *rechtsverwerking*,<sup>35</sup> a principle acknowledged and practiced under customary law. The term, which originated from the Dutch, was commonly used in the context of agrarian law, reflecting the relinquishment of rights doctrine.<sup>36</sup> It simply referred to the passage of time as the loss of land rights. *Rechtsverwerking* is a legal principle mandating that supposing the original land owner fails to manage it for a certain period, and another person decides to use the property in good faith, the original owner can no longer reclaim the land. This principle was rooted in customary law, which stipulated land was the communal property of indigenous communities. Additionally, the principle was intended for the benefit of community members, and cannot be enacted without active use.<sup>37</sup>

The term *rechtsverwerking* is closely related to the concept of expiration. It implied that a person who holds ownership rights to a piece of land (the owner) may lose the rights assuming another individual (the user) possesses control of and uses the land in good faith over a specified period. The process ensured the previous rights of the owner was lost and transferred to the user. Therefore, land abandonment is the main indicator in determining changes in ownership rights related to a parcel of land.<sup>38</sup> The concept of *rechtsverwerking* is similar to the loss of property rights due to the owner's failure to take action, often referred to as neglect.

### 2.1.2. *Rechtsverwerking* in Other Legal Context

Section 2.1.1 reported that the doctrine of *rechtsverwerking*, rooted in customary law, was mainly applied in the context of Agrarian Law. However, *rechtsverwerking* is not an exclusive legal doctrine applicable to customary land law.

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<sup>32</sup> *Ibid.*, Art. 2 (4) and Art. 3.

<sup>33</sup> *Ibid.*, Art. 5.

<sup>34</sup> Bono Budi Priambodo, "Positioning Adat Law in the Indonesia's Legal System: Historical Discourse and Current Development on Customary Law," *Udayana Journal of Law and Culture* 2, no.2 (2018): 154.

<sup>35</sup> In Indonesia, law scholars use various terms to refer *rechtsverwerking*: *doctrine of rechtsverwerking*, concept of *rechtsverwerking*, or *rechtsverwerking* institution.

<sup>36</sup> Joseph Noviadri & Togi Marolop Pangaribuan, "Perbandingan *Rechtsverwerking* Sebagai Doktrin Hukum di Indonesia dan Doktrin Estoppel di Amerika Serikat pada Bidang Hukum Perjanjian," *Lex Patrimonium* 2, no. 2 (2023): 5.

<sup>37</sup> See Arie S. Hutagalung, "Penerapan Lembaga *Rechtsverwerking* untuk Mengatasi Kelemahan Sistem Publikasi Negatif dalam Pendaftaran Tanah," *Jurnal Hukum & Pembangunan* 30, no.4 (2000): 337; Ikhwan, *op.cit.*, 185; and Herawati, *loc.cit.*

<sup>38</sup> Konsorsium Pembaruan Agraria, "Potensi Konflik Agraria yang Terus Berlanjut di Indonesia," <https://www.kpa.or.id/2025/02/27/potensi-konflik-agraria-yang-terus-berlanjut-di-indonesia/>

The concept was often compared to similar legal concepts, such as Estoppel.<sup>39</sup> For example, the phrase Estoppel by silence, also known as Estoppel by acquiescence, refers to a doctrine that has legal consequences, such as when the obligated party, decides to remain silent or fails to take action in a particular situation.<sup>40</sup> This doctrine was based on the premise that if a person failed to provide an explanation or response, then the other party possessed a protected right or belief.<sup>41</sup>

Asides from contract law,<sup>42</sup> *rechtsverwerking* was applied in other legal contexts, which served as an analogy for the waiver of rights in political elections.<sup>43</sup> The concept was also applied in cases related to employment relations and civil procedure law.<sup>44</sup>

## 2.2. Regulation of the *Rechtsverwerking* in Land Registration in Indonesia

### 2.2.1. The Existing Law on *Rechtsverwerking*: The *Ius Constitutum*

Before the 1960s, the enactment of *rechtsverwerking* was confirmed by the rulings of the Supreme Court. This included Decision No. 210/K/Sip/1955,<sup>45</sup> decided on 10 January 1955, case in Pandeglang Regency; Decision No. 329/K/Sip/1957, decided on 24 May January 1958, case in South Tapanuli Regency; and Decision No. 70/K/Sip/1955, decided on 7 March 1959, case in Kotapraja Malang.<sup>46</sup>

The enactment of Law No. 5 of 1960, known as the BAL, established a general framework for land registration and ownership, which was partially related to *rechtsverwerking*. According to Article 19 of the BAL, the purpose

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<sup>39</sup> The term 'Estoppel' is used in various legal contexts. See for example Andreas Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals", *European Journal of International Law*, 27, no. 1 (2016): 788–789; Dolot Alhasni Bakung, Thanh Nga Pham & Mohamad Hidayat Muhtar, "Disparity in the Doctrine of Promissory Estoppel between Indonesia, the Philippines and the United Kingdom," *Journal of Law & Legal Reform* 5, no.1 (2024): 268; and Magnis Florencia Butar-Butar, R. Suharto, and Ery Agus Priyono, "Pemenuhan Prestasi Sebagai Akibat Adanya Perjanjian Anjak Piutang di Indonesia," *Diponegoro Law Journal* 6, no. 2 (2017):16.

<sup>40</sup> Noviandri and Pangaribuan, *op.cit.*, 5.

<sup>41</sup> See Jack Wass, "Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals," *British Yearbook of International Law* 86, no. 1 (2017): 155; Elise Bant & Jeannie Paterson. *Misleading Silence* (Oxford: Hart Publishing, 2020), 264; H.Ali Achmad Chomzah. *Hukum Agraria (Pertanahan Indonesia) second edition* (Jakarta: Prestasi Pustaka, 2004),15.

<sup>42</sup> See Noviandri and Pangaribuan, *op.cit.*, 2.

<sup>43</sup> Constitutional Court of the Republic of Indonesia. Minutes of the Hearing of Case No. 1/PHPU.PRES-XXII/2024, Case No. 2/PHPU.PRES-XXII/2024 concerning Dispute over the Results of the Presidential and Vice Presidential General Election of 2024 Evidence Proceedings by the Related Parties, Jakarta, 4 April 2024, 97.

<sup>44</sup> Agung Hermansyah, "Rekonstruksi Konsep *Rechtsverwerking* di Luar Sengketa Tanah," Hukum Online, <https://www.hukumonline.com/berita/a/rekonstruksi-konsep-rechtsverwerking-di-luar-sengketa-tanah-lt60b06161ad438/?page=2>

<sup>45</sup> See the recognition of this jurisprudence in Decision of Supreme Court No. 425 K/Pdt/2016, 11 and Decision of District Court of Ambon No. 216/Pdt.G/2017/PN.Amb., 56.

<sup>46</sup>Arie S. Hutagalung, "Penerapan Lembaga *Rechtsverwerking* untuk Mengatasi Kelemahan Sistem Publikasi Negatif dalam Pendaftaran Tanah," *Jurnal Hukum & Pembangunan* 30, no.4 (2000): 328.

of land registration was to ensure legal certainty. This included the following main components a) surveying, mapping, and recording the land, b) registering and transfer of rights, as well as c) providing documentary evidence of those rights, which serves as strong proof.<sup>47</sup> Articles 23, 32, and 38 of the BAL determined the crucial role of land registration for several types of rights.<sup>48</sup> Registration was an effective way to show the termination of ownership rights and the legality of transferring or encumbering those rights.<sup>49</sup> It also served as a reliable method for proving the transfer and termination of the right to cultivate (*Hak Guna Usaha/HGU*) and build (*Hak Guna Bangunan/HGB*), except in cases of expiration due to respective terms.<sup>50</sup> This led to the enactment of Government Regulation No.10/1961 concerning Land Registration (Government Regulation 10/1961), aimed to regulate more detailed norms derived from BAL.

Based on BAL and Government Regulation No. 10/1961 concerning Land Registration, the courts interpreted the applicability of *rechtsverwerking* in several cases. This included the jurisprudences of the Supreme Court of the Republic of Indonesia in Decisions Nos. 620K/SIP/1970<sup>51</sup> and 783 K/Sip/1973 dated January 29, 1976.<sup>52</sup> The Supreme Court decision No. 495/K/SIP/1975 dated September 18, 1975, stated that in line with the negative system, the recording of a person's name in the land register does not imply absolute ownership, if the invalidity can be proven by other parties.<sup>53</sup> The concept of *rechtsverwerking* led to a legal framework that focused on the assumption of the rightful owner abandoning the land for a period of five years. This could cause another party with good intentions to control and register its rights, while the original owner forfeits the right to sue supposing a lawsuit was not filed in court within that time.<sup>54</sup>

The Government Regulation No. 10/1961 was then amended to Government Regulation No. 24/1997 concerning Land Registration (Government Regulation 24/1997). The law further stated that the registration process aimed to ensure legal certainty in the land sector by establishing a negative publication system, while also incorporating positive elements. This system produced proof of rights letters, which served as

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<sup>47</sup> See Flevin, Basic Agrarian Law (UUPA) Act No. 5 of 1960 re the Basic Provisions concerning the Fundamentals of Agrarian Affairs, Translation/Editing, File Name : Land-594, [https://www.flevin.com/id/lgso/translations/Laws/Law%20No.%205%20of%201960%20on%20Basic%20Agrarian%20Principles%20\(ETLJ\).doc](https://www.flevin.com/id/lgso/translations/Laws/Law%20No.%205%20of%201960%20on%20Basic%20Agrarian%20Principles%20(ETLJ).doc)

<sup>48</sup> Arif & Sukirno, *op.cit.*, 1000.

<sup>49</sup> Law No. 5 of 1960 on Basic Agrarian Law, Art. 23 (2).

<sup>50</sup> *Ibid.*, Art. 32 (2), and Art. 38 (2)

<sup>51</sup> Anne Gunadi. "The Embodiment of Adat Law as an Element of Legal Certainty in Administration of Adat Rights." *Indonesia Law Review* 9, no. 3 (2019): 261.

<sup>52</sup> Decision of Supreme Court of the Republic of Indonesia No.2/Pdt.G/2020/PN Rah,

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<sup>53</sup> Andi Batari Anindhita, Farida Patittingi, and Chalis Al Rossi, "Perbandingan Sistem Publikasi Positif dan Negatif Pendaftaran Tanah: Perspektif Kepastian Hukum," *Amanna Gappa* 29, no. 2 (2021): 112.

<sup>54</sup> Reza Fahmi, "Rekonstruksi Regulasi Sengketa Lahan Pertahanan Indonesia Berbasis Keadilan Pancasila," Dissertation, Doctor of Law Program, Faculty of Law Universitas Islam Sultan Agung, 2023, 211.

strong evidence of ownership.<sup>55</sup> In addition, recent court decisions implied that judges considered previous jurisprudence regarding *rechtsverwerking*.<sup>56</sup>

Building upon the description above, Government Regulation 24/1997 officially established *rechtsverwerking* as a norm, in respect to the customary community law. This was proven by Article 32 (2) of the regulation that<sup>57</sup>

In a case, where a certificate was legally issued on behalf of a certain individual or corporate body that had acquired a parcel of land in good faith, any other parties assumed to possess rights thereon can no longer claim those rights. However, this is possible if within five (5) years of the issued certificate, there was no written objection to the holder and the Head of the relevant Land Office. This also included not filing a lawsuit with the court over the possession of the land in question or the issuance of the said certificate.<sup>58</sup>

The norm strengthened the doctrine of *rechtsverwerking* and the existing jurisprudence of customary agrarian law.<sup>59</sup> Moreover, the statutory regulations on the registration process and the Supreme Court's jurisprudence showed that *rechtsverwerking* was not concerned with the expiration of periods. It focused on the efforts and actions of a party to assert and defend its rights during the set period. Assuming a party failed to adopt relevant steps to fight for and protect own rights, it showed that they were no longer exercising that right, losing the reclamation ability.<sup>60</sup>

Land registration in a negative publication system was characterized by positive attributes when using a registration process based on rights, such as the Torrens system (registration of title). The publication aspect was not entirely positive, as the physical and legal data provided in the land certificate may not always be accurate. Although courts must accept this information as correct, there was no evidence available for the contestation. Supposing a party loses land rights due to its illegal transfer by another party or errors during the registration process, the government does not guarantee compensation. Moreover, since concepts such as adverse possession were not recognized in Indonesia, the customary law doctrine of

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<sup>55</sup> Government Regulation No. 24/1997 on Land Registration, Explanation, Part. General.

<sup>56</sup> See the Supreme Court Decision No. 2044 K/Pdt/2015, 10, 15-20. <https://putusan3.mahkamahagung.go.id/direktori/putusan/acdd5bfb6d9ddb473a9817230e9ab1ea.html> and Salsabila, Alfian Nur - Lembaga *Rechtsverwerking* Dalam Penguasaan Tanah Adat Berdasarkan Hukum Agraria Nasional (Studi Kasus Putusan Mahkamah Agung Republik Indonesia Nomor 2044 K/PDT/2015), [https://all.fh.unair.ac.id/index.php?p=show\\_detail&id=20641](https://all.fh.unair.ac.id/index.php?p=show_detail&id=20641)

<sup>57</sup> Hutagalung, *op.cit.*, 339.

<sup>58</sup> As a comparison for translation, see Flefin, Government Regulation of the Republic of Indonesia No. 24 of 1997 Re Land Registration, Translation File Name : Land-688, [https://www.flevin.com/id/lgso/translations/Regulations/Government%20Regulation%20No.%2024%20of%201997%20on%20Land%20Registration%20\(ETLJ\).pdf](https://www.flevin.com/id/lgso/translations/Regulations/Government%20Regulation%20No.%2024%20of%201997%20on%20Land%20Registration%20(ETLJ).pdf)

<sup>59</sup> Supreme Court of the Republic of Indonesia. Decision No. 2260 K/Pdt/2012, 7.

<sup>60</sup> Agung Hermansyah, *loc.cit.*



*rechtsverwerking* was used to address the shortcomings of the publication system.<sup>61</sup>

Legal certainty in land ownership rights in Indonesia had shifted towards uncertainty (vague). This was evident in the provision that land registration was only a valid proof rather than absolute proof of ownership. Meanwhile, other regulations governing the *rechtsverwerking* were not implemented optimally considering the policies monitored the existence of abandoned land that had not met legal certainty for more than five years.

The Hans Kelsen's concept of the normativity of legal system<sup>62</sup> served as a basis to support legal certainty. Besides, Habermas' thoughts on certainty also suggested that *the crucial aspect lies not in the ability to predict such outcomes, but in the guarantee that authorized parties have the opportunity to expose its legal conditions through the judicial process based on a set of established procedural provisions.*<sup>63</sup>

The absence of legal certainty over land often triggered disputes and feuds in various regions. In addition, certain mortgage certificates had been canceled. This was because of a court decision on the cancellation of ownership certificate attached to the mortgage, resulting in land conflict.<sup>64</sup>

In the context of ministerial regulations, Complete Systematic Land Registration (PTSL), referred to related activities initially carried out simultaneously for all Land Registration processes throughout the country. This included the collection of several physical and legal data for similar purposes.<sup>65</sup> Additionally, Article 4 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 6 of 2018 stated that PTSL covered all land registration processes, including the collection of physical and legal data.

Article 22 of the BAL stated that in the absence of evidence, a statement must be made in good faith. This provision reflected a commitment to operationalizing the principle of good faith in a comprehensive and systematic land registration system, aimed to strengthen legal certainty. Regarding the system, the state acted as a guarantor, guaranteeing the accuracy and truthfulness of registrations performed in good faith.<sup>66</sup>

In the context of legal proceedings, good faith was considered a crucial principle. Legal proceedings referred to situations where a person loses

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<sup>61</sup> Roswandi, "Rekonstruksi Pengaturan Pendaftaran Tanah Absentee Melalui Pendaftaran Tanah Sistematis Lengkap (PTSL) yang Berbasis Keadilan" (Dissertation, Doctor of Law Study Program, Faculty of Law, Universitas Sultan Agung, 2023), 30.

<sup>62</sup> Elina Paunio, "Beyond Predictability-Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order," *German Law Journal* 10, no. 11 (2009): 1474.

<sup>63</sup> *Ibid.*, 1474-1475.

<sup>64</sup> Mulyo Santoso, "Kepastian Hukum Sertipikat Hak Tanggungan terhadap Putusan Pengadilan atas Pembatalan Sertipikat Hak atas Tanah" (Master Thesis, Law Study Program, Graduate School, Universitas Pakuan Bogor, 2022), 8.

<sup>65</sup> Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 6 of 2018 concerning Complete Systematic Land Registration, Art.1 (2).

<sup>66</sup> Arif Firmansyah and Lina Jamilah, "The Concept of Good Faith in Complete Systemic Land Registration in Realizing Legal Guarantee," *Administrative and Environmental Law Review* 3, no. 1 (2022): 65.

certain rights due to past actions or omissions. However, this was inapplicable if the party acquiring those rights acted dishonestly or lacked good faith.

### **2.2.2. The Proposal for the Upcoming Law: The *Ius Constituendum***

Land registration was generally divided into negative and positive publication systems. However, the negative publication system was characterized by a legal element, termed expiration.<sup>67</sup> This research reported that the negative publication system guaranteed the registered party as the holder of land rights, and the validity of the transfer process, for example legal acts of sale and purchase, grants, or recognition of good faith. The system applies the principle of *nemo plus juris* in the deed registration system.<sup>68</sup>

The negative publication system used complementary tools to overcome the weaknesses of land registration, such as the norm on issued certificates which cannot be sued after a certain period, giving rise to new legal problems in society. This tended to occur when a detrimental error was observed in the registration process, namely control of certificates.

In the positive publication system, even though a party had been registered, once the actual right holder can prove that the rights were lost by suing the government through an authorized party, then compensation could be claimed for the losses.<sup>69</sup> This was in line with the Torrens system, reviewed from the perspective of Joseph Herron Crowley, that

The Torrens system is a method of registering property ownership invented by Sir Robert Torrens. The ownership of the registered land was confirmed through court proceedings. The process was essential for validity, providing secured tenure and protection from adverse claims. The court officials thoroughly examined the written application and proof of ownership before deciding on the registration process.<sup>70</sup>

As a result, the Torrens system was considered inadequate.<sup>71</sup> Hutagalung assessed the enactment of the *rechtsverwerking* in Government Regulation 24/1997. First, its adoption as a norm in the said regulation led to a shift from a negative publication system to a quasi-positive one, despite its positivity because of time constraint. This shift was in line with the main

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<sup>67</sup> Fina Ayu Safitri, et.al, "Akibat Hukum Penggunaan Sistem Publikasi Negatif Berunsur Positif dalam Pendaftaran Tanah di Kota Semarang", *Notarius* 13, no. 2 (2020): 788-789.

<sup>68</sup> Fanny Amelia Legianty, Yunanto, Irawati, "Perjanjian Jual Beli Tanah yang Melanggar Asas Nemo Plus Juris pada Pendaftaran Tanah," *Notarius* 12, no. 2 (2019):1027.

<sup>69</sup> M. Yazid Fathoni, Adi Sulistiyono, and Lego Karjoko, "Reformulation of Sale and Purchase Agreement Regulations in Creating Legal Certainty and Justice in the Transfer of Land Rights in Indonesia," *Jurnal IUS Kajian Hukum dan Keadilan* 12, no. 1 (2024) 55-67. See also Joseph Herron Crowley, "The Torrens System," *Marrquette Law Review* 6, no. 3 (1922): 117.

<sup>70</sup> See Jamie Glister, "Security interests and knowing receipt," *Legal Studies* 43, no. 4 (2023): 624-640.

<sup>71</sup> Yonatan, Yonatan and Agustina, "The Feud of Nemo Plus Iuris Ad Alium Transfere Potest Quam Ipse Habet and Nemo Dat Quad Non Habet (Nemo Dat Rule) Legal Principles Against The Legal Principle of Good Faith (Bona Fides) in Indonesian Courts," *Indonesia Law Review*, 12 no. 2 (2022): 102.

objective of land registration, aimed to establish legal certainty and secured property rights.<sup>72</sup> Second, both district courts and state administrative courts related to land dispute can apply *rechtsverwerking* as an exception when settling land cases that cannot be generalized with other civil evidence systems related to property.<sup>73</sup> Sumardjono stated that the establishment of a positive land registration system to ensure legal certainty was crucial. Furthermore, Sumardjono also outlined the importance of implementing *rechtsverwerking* regarding the forfeiture of the right to sue for certificate cancellation.<sup>74</sup>

The application of the validity period in the negative land rights registration system based on Government Regulation 24/1997 led to legal uncertainty regarding changes to an individual's land rights.<sup>75</sup> In cases where the certificate contained errors made by the officials, the expiry date could be legally challenged. Moreover, when a valid term was waived, it led to the following questions why did the law impose prohibition? how can legal certainty be protected? The rights could be waived by declaring the end of the validity period, when the legal relationship was established.

The issue of wavering was addressed by incorporating specific provisions into a legal instrument enacted through a national legislative process. This was aimed to provide greater clarity and establish a comprehensive framework. The new Law was expected to resolve the main disputes concerning norms outlined in a government regulation, which had a lower hierarchical status in the system.<sup>76</sup> Meanwhile, the consequences of *rechtsverwerking* were not explicitly and expressively stated in the Indonesian Civil Code.<sup>77</sup> The newly enacted law should then include provisions for compensation of errors made by officials that resulted in improper transfers of ownership due to infringement of legal rights. This ensured that the rightful owner of a land received both certainty and justice, in line with the objectives of establishing and implementing land laws.

The new law would support the current problem related to land registration. The monitoring of the Agrarian Reform Consortium (KPA) showed there was a significant increase in conflict cases over the past five years. In 2024, the number of conflicts reached its peak, of approximately 295 cases, depicting a 21.9 percent rise compared to the previous year.<sup>78</sup> This situation increased the risk of issues related to land ownership rights, focusing on the need for progressive approaches to address potential legal problems in this sector.

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<sup>72</sup>Arie S Hutagalung, *op.cit.*, 344-345.

<sup>73</sup> *Ibid.*, 345.

<sup>74</sup> Maria SW Sumardjono, *Agenda yang Belum Selesai: Refleksi atas Berbagai Kebijakan Pertanahan*, Fakultas Hukum Universitas Gadjah Mada, Sleman, 2020, 57

<sup>75</sup> Arie Lestario, Erlina, "Sistem Pendaftaran Tanah yang memberikan Perlindungan Hukum bagi Pemegang Sertifikat Hak Milik atas Tanah" *NoLaj Journal*, 1 no. 1 (2022):3

<sup>76</sup> Law No.12 of 2011 concerning the Establishment of Laws and Regulations, Art. 7(1).

<sup>77</sup> Agung Hermansyah, *loc.cit.*

<sup>78</sup> Agrarian Reform Consortium, "Potensi Konflik Agraria Yang Terus Berlanjut Di Indonesia" <https://www.kpa.or.id/2025/02/27/potensi-konflik-agraria-yang-terus-berlanjut-di-indonesia/>

The present research relied on the enactment of a new National Law on Lands (Bill of Lands). This bill had been initiated for over 10 years, and required political support to make it official.

The bill proposed that *rechtsverwerking* led to the cancellation of land rights, by the government, resulting in its revocation.<sup>79</sup> The issue of *rechtsverwerking* was raised by Arie Sukanti Hutagalung during the Public Hearing of Commission II of the Indonesian House of Representatives on March 25, 2015.<sup>80</sup> The Land Bill also legalized the concept of *rechtsverwerking* by stipulating that if the rights holder failed to exercise ownership rights, and another party made use of the land, then it could be revoked. In addition, the bill entailed that the land must be controlled directly by the state.<sup>81</sup>

The Regional Representative Council of the Republic of Indonesia supported the existence of *rechtsverwerking* in the Land Bill. It considered that the registration process comprised the rights of individuals and legal entities including customary communities, in accordance with the principle of *Contradictoire de limitatie*. The specification of a 20-year time limit led to conflict and disputes, caused by unequal legal knowledge, including advancements in science and technology. The Council stated that the rationale for setting a 20-year time limit lacked a firm basis in relation to *rechtsverwerking*, referred to the relinquishment of the right to sue after a certain period, as stipulated by customary law. However, it referred to Article 32 (2) of Government Regulation 24/1997, which established a five-year timeframe from the issuance of the certificate.<sup>82</sup>

The current negative publication system, which applied the *nemo plus juris* principle commonly used during deed registration, only guaranteed the registered party as the land rights holder, but failed to validate the transfer process (legal acts of sale, gift, or recognition of good faith). Therefore, legal norms should be established in the future law-level regulation governing the validity of the transfer process (legal acts of sale, gift, or recognition of good faith). Reflecting that the negative system required complementary tools to address the weaknesses of the registration process e.g. detrimental error made during the registration process, the prospective legal norms should regulate rights holders who demand for compensation.

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<sup>79</sup> *Bill of Lands, version 2019, Art. 41 (3)(c)* <https://www.mongabay.co.id/wp-content/uploads/2019/09/Draf-RUU-Pertanahan-per-9-September-2019.doc>

<sup>80</sup> Commission II of the Indonesian House of Representatives, Brief Report of the Public Hearing, March 25, 2015, <https://berkas.dpr.go.id/akd/dokumen/K2-14-8da05213ad01fe4c8a5fccbb1f83d834.pdf>

<sup>81</sup> Bakhrul Amal. "Pembaharuan Hukum Tanah Nasional Dalam Rangka Memberikan Perlindungan Dan Kepastian Hukum Pemegang Sertifikat Hak Milik." *Crepido* 6, no. 2 (2024): 14.

<sup>82</sup> Decision of the Regional Representative Council of the Republic of Indonesia No. 70/DPD RI/IV/2012-2013 concerning the Views of The Regional Representative Council of the Republic of Indonesia on the Draft Law on Land Affairs, 492, <https://jdih.dpd.go.id/common/dokumen/keputusanno70tahun2013.pdf>

### 3. CONCLUSION

The national legal framework for land registration, derived from the Basic Agrarian Law and Government Regulation 24/1997 did not guarantee certainty. Moreover, the use of fixed date in the negative system lacked protection rights for original landowners in the event of a fraudulent registration process. This issue was addressed by applying the doctrine of *rechtsverwerking*, resulting in the need for legislative action to ensure legal certainty within the agrarian system, especially concerning land ownership. The process also outlined the significance of enacting Law, a legal instrument enacted through the national legislative procedure. This upcoming Law is aimed at establishing a comprehensive national law that ensured legal certainty within the agrarian legal system, particularly regarding land ownership.

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