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## Problems of the land registration system in Indonesia (A case study of a land registration system that does not guarantee legal certainty over land rights)

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### Abstract

The primary feature of the negative registration system is that land registration does not guarantee that the registered names are absolute and cannot be disputed if it turns out that the registered name is not the real owner. Another primary characteristic is that the official behind the name plays a passive role, meaning that the official concerned is not obliged to investigate the truth and the letters given to him.

The negative land registration system also brings about a lot of land disputes. Disputes become natural, considering that the certificate holder cannot feel safe about his rights due to the absence of legal certainty. The negative land registration system also does not incentivize officials who handle land registration to investigate the veracity of land rights applications and their letters or documents seriously.

In the event of a deadlock, Kuhn offers the concept of a paradigm shift, namely daring to switch paradigms or scientific revolutions in solving problems. According to Kuhn, the old paradigm or system is not a sacred thing, and humans are always dynamic in looking for systems, paradigms, and science to be better. Concerning Kuhn's thinking, a positive land registration system can be an attractive option in ensuring legal certainty for certified landowners and reducing the high level of land-related disputes.

**Keywords:** land, registration, kuhn, positive, negative

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### Introduction

The land is one of the most important needs for humans, not only to build residential buildings but also to carry out all daily life activities. Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "The land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people."

Each individual has different interests in land, so the government feels the need to make regulations that protect the rights and obligations of each individual. Land registration in Latin is called *Capistratum*, which means a register, capita, or unit made for Roman land taxes (Capotatio Terrens)<sup>[1]</sup>.

In addition, the *cadastre* is data on lands, the value of land, and their rights holders for tax purposes, while the *macadastre* is an appropriate tool to describe and identify land rights (Santoso, 2010)<sup>[2]</sup>. Related to that, the government is determined to provide legal certainty for land ownership in Indonesia so that a regulation is made that regulates land ownership, namely Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). The guarantee of legal certainty is meant by the availability of written law and the effective implementation of land registration. Article 19 paragraph (1) of the UUPA stipulates that "to guarantee legal certainty by the government, land registration is carried out throughout the territory of the Republic of Indonesia according to the provisions stipulated in a Government Regulation." To realize the mandate of Article 19 of the UUPA, Government Regulation Number 10 of 1961 was issued, which regulates land registration. This government regulation regulates the process of land registration in Indonesia, and as a result of the law, the final product is the issuance of a certificate of proof of title, called a land certificate<sup>[2]</sup>.

During its journey, the Government Regulation was deemed unable to achieve what the UUPA aspired to because only about 45% of the land area was registered. Thus, the Government Regulation was revoked and refined by Government Regulation Number 24 of 1997. According to Article 1 Number 1 of Law Number 24 of 1997, "Land registration is a series of activities conducted by the government on an ongoing basis and in an orderly manner, which comprise the collection, processing, recording, presentation, and maintenance of physical and juridical data in the form of maps and registers concerning land parcels and apartments, including the issuance of right-evidencing documents for land parcels on which rights have been established and for apartment ownership rights as well as for the encumbrances thereon."

Furthermore, one of the embodiments of development in the field of legal material is the legislative product promulgated in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA), which aims to supervise the use, control, ownership of land, and transfer of land rights, to support various development activities, especially development in the national land sector<sup>[3]</sup>.

To guarantee legal certainty over land rights in Indonesia, the government is obliged to carry out land registration throughout the territory of the Republic of Indonesia, as stated in Article 19, Paragraph (1) of the UUPA. To ensure legal certainty by the government, land registration is held throughout the territory of the Republic of Indonesia according to the provisions regulated by government regulations, namely, Government Regulation No. 10 of 1961, which was later issued as Government Regulation 24 of 1997 concerning Land Registration.

In this regulation, the system adopted is “a negative publication system with a positive tendency” because it will produce certificates of proof of rights that serve as strong evidence. However, the certificate is not absolute evidence, so the land certificate issued is still open to a lawsuit for cancellation. Therefore, a study was conducted to unravel the problems of the land registration system in Indonesia. This study examines the weaknesses of the negative publication system with a positive tendency in land registration and attempts to overcome the weaknesses of the negative publication system with a positive tendency in land registration from Thomas Kuhn's perspective on the dialectical theory of the scientific revolution or which can be understood as a paradigm shift dialectic <sup>[4]</sup>.

Moreover, this negative publication system is considered by some not to provide legal certainty for certificate holders. Many think that the negative publication system is not as ideal as the positive publication system implemented by developed countries. It is because it is deemed that the negative publication system does not provide legal certainty, so it has the potential to cause disputes. With a negative system, land registration officials tend to act passively, and the community also does not know the working mechanism. Here, the state also does not guarantee that the physical and juridical data in the certificate are correct, where if it is not proven by other evidence, changes can be made based on a court decision <sup>[5]</sup>.

Based on the description above, the authors are interested in reviewing and studying more deeply the land registration publication system in Indonesia from the aspect of legal certainty and legal protection as the main objectives of land registration activities by reviewing the legislation in the agrarian sector, expert opinions, and legal values that live in society. Thus, a more philosophical understanding is obtained.

### Methodology

The method used in this research was normative juridical, with a paradigm shift philosophical approach. According to Kuhn, the juridical method or legal review is to find out the applicable regulations, particularly in this study, those relating to applying a negative publication system to land registration. Secondary data in legal research consists of primary legal materials, secondary legal materials, and tertiary legal materials. In this study, three legal materials were used <sup>[6]</sup>.

Primary legal materials have binding power. In this study, the primary legal materials used were statutory regulations, including Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, Regulation of the Minister of Agrarian Affairs Number 6 of 1965 concerning Basic Guidelines for the Implementation of Land Registration, Government Regulations Number 24 of 1997 concerning Land Registration, and Regulation of the Minister of Agrarian Affairs Number 3 of 1997 concerning Provisions for Implementation of Government Regulation Number 24 of 1997 concerning Land Registration. Meanwhile, secondary legal materials consisted of textbooks on agrarian law, journals on land registration and publication systems, and other reference materials on land registration and publication systems <sup>[7]</sup>.

According to Kuhn, these legal materials were then analyzed comprehensively with a paradigm shift. This paradigm shift analysis is very interesting to observe, considering that if the negative land registration paradigm becomes positive, it is a significant change or dialectic of the scientific revolution. It is also an interesting thing, taking into account that there has been no research discussing it from the perspective of Kuhn's paradigm shift.

### Discussion

Thomas Kuhn illustrated that the truth of science would be found many times or in various scientific forms, even from the same object. The formulation of this paradigm theory suggests that a scientific truth (inherited truth) is identical to a teleological target based on detection known as the final cause (end) <sup>[8]</sup>.

The truth of science is not continued, improvised, evolutionary, or cumulative, but there is a paradigm shift called a revolution. Paradigm through shift moving is the same as gestalt switch (moving as a whole or not at all). In the gestalt switch, verification is expressed, which occurs at once or not at all. In addition, the concept of paradigm shifts opens a shared awareness that science researchers cannot work in an atmosphere of established objectivity. Paradigm also designs a world view or perspective framework to be more important, legitimate, and reasonable <sup>[9]</sup>.

In his magnum opus, *The Structure of Scientific Revolutions*, Thomas Kuhn criticized science's implicit and explicit truths. Thomas Kuhn, through his expertise, tried to reveal in detail the theoretical and practical position of science. Today, science is always improvising in the form of an evolution from a simple theory to a perfect theory.

Finally, Kuhn introduced his theory designation with the paradigm shift. Two characteristics characterize the substance of the paradigm. First, it offers specific new elements that draw followers away from the methods in previous scientific activities, and second, it offers (at the same time) new problems which are still open and unresolved. In this case, Kuhn's assumption of scientific objectivity is a justified final detection <sup>[10]</sup>. The epistemological foundation of the paradigm criticizes human belief in science as a representation of reality. The

epistemology of science is rational, empirical, and positivistic. The paradigm accepts the theory of revolution in the name of creationism to encourage the truth of science to be realistic, which fights against each other among sciences, while science has an autonomous space in the search for truth between prediction and detection <sup>[11]</sup>. According to Kuhn's theory, land registration with a negative publication system is an old system or paradigm that needs to be tested with a new paradigm or system that withdraws from the previous method or system. The positive land registration system also offers new, justified to find the truth (the best system) in prediction and detection.

Then, the publication system is used to test the power of proof of the certificate, namely strong or not strong and absolute or not absolute. There are two types of publication systems: positive and negative publication systems. As stipulated in UUPA, land registration in Indonesia uses a negative publication system with positive elements. It means that Indonesia does not use a pure positive publication system but does not use a purely negative one. One of the negative publication system characteristics is that the registration of land rights is not a guarantee for the name registered in the land book. In other words, the land book may change if it can prove the real owner of the land through a court decision that has permanent legal force.

Kuhn's shift paradigm also ensures that systems and thinking changes are not taboo. A negative land registration system is not a sacred thing, which must be defended desperately. In fact, the new land registration system offers challenges and epistemology, and this new proposition is worth trying.

As is known, the development of society with a growing rapidly population will inevitably result in the increasing need for land, while the quantity of land does not increase. Such conditions can certainly trigger the emergence of various conflicts and land disputes, in which land becomes the object of seizure, confiscation, and others. Throughout 2019 alone, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN) handled 3,230 cases of land disputes. It happens because the land has a very strategic economic value <sup>[12]</sup>.

In addition, another cause is the limited access of people with low incomes (including people in the regions) who depend on land for their livelihoods, triggering conflicts between individuals, both communities with communities and communities with other parties. In connection with the importance of land as a source of life, land registration is an urgent matter, especially in today's increasingly complex society.

Further, land registration with a positive system is an ideal solution to obtain an instrument with strong power or evidence (in the form of a certificate) for the holder of the land right that he is authorized or legally in charge of a land parcel registered <sup>[13]</sup>.

Thus, the land registration process produces a land title certificate, consisting of a copy of the Land Book containing juridical data, attached with a measuring document depicting physical data, and then bound together and given a green cover with a picture of an eagle. To test the strength of the certificate in land registration, a publication system is also known.

The publication system tests the power of proof of a certificate, whether strong and absolute or not. The positive publication system uses a rights registration system so that there must be a Register or Land Book for the storage and presentation of juridical data, while a certificate is a letter of proof of rights.

Recording a person's name in the Register as a right holder makes a person the holder of the right to the land concerned, not a legal act of transferring rights (title by registration, the Register is everything). This statement is the philosophical basis that underlies the Torrens system. With this positive publication system, the state guarantees the truth of the data presented. If a country uses a positive publication system, the certificate issued is absolute. Because the power of proof is absolute, as a result, a lawsuit cannot be filed against a certificate issued by that state. Thus, no changes can be made to the certificate of land rights <sup>[14]</sup>.

On the other hand, in a negative publicity system, the validity of the legal action determines the transfer of rights to the buyer, not the registration. Registration does not make people get land from parties who are not entitled to become the new rights holders. In the negative publication system, the principle of *nemo plus juris* applies, meaning that people cannot give up or transfer rights beyond what they have; therefore, the state does not guarantee the correctness of the data presented <sup>[15]</sup>.

When registering land, the first thing to register is the object, and the second is the ownership attached to land rights. A person who registers his land usually wants to register his ownership. Apart from registering their ownership, some only register their land rights. Ownership and land rights are often considered the same, but they are two different things.

In addition, land rights can be annulled for reasons regulated in law or revoked by the Land Office for neglecting land, while ownership cannot be revoked immediately. The primary problem of using this negative publication system is the lack of legal certainty for landowners. Even though they are listed as landowners in the certificate, landowners can still face the possibility of being sued by parties who feel interested in it the land <sup>[16]</sup>.

Therefore, when the court has decided that it turns out that the owner listed in the certificate is not the real owner, the ownership is canceled. In fact, ownership is also attached to land rights, so both will be erased. In essence, there is no guarantee of legal certainty about what is listed in the certificate of land rights, so all evidence of land acquisition must be kept; thus, one day, it can be opened. In contrast to the positive publication system, in the event of a lawsuit, both the registered and the actual owners are guaranteed by the state until the compensation is reached. Therefore, the Land Office must keep all its files, and there is no time limit.

Moreover, in Indonesia, there are still conflicts over land registration by the government. Viewed by substance, the land conflict encompasses issues relating to the designation and/or use and control of land rights, the validity

of a land right, procedures for granting land rights, and registration of land rights, including the proof of rights transfer and issuance.

In Muhammad Yamin's opinion, the land ownership system in Indonesia is different from the history of ownership known in royal countries, such as Britain and Malaysia. Even though the Dutch recently treated the land ownership model the same (negatively) as in their country, it was only because of the Dutch desire to make it easier for them to control the land in this country. It is in connection with its trade mission (*leverentien* and *contingenten*). The Dutch also treated the king as the owner of the land, known as the theory that "everything under the sky belongs to the king." Hence, when someone needed land, he just contacted the king or asked the king's permission so that they could control the land for their business interests in this country<sup>[17]</sup>.

In a negative system, the certificate is only or can be seen as preliminary evidence, not yet as final as evidence of land rights. In other words, the certificate is a strong means of proof so that everyone can question it. In addition, it contains a positive element, namely on the other hand, to equally provide legal certainty to parties with good intentions to control a plot of land and are registered as rights holders in the land book, with the issuance of a certificate as one strong evidence<sup>[18]</sup>.

In contrast to the negative land registration system, the positive land registration system has two systems. First, the *Stelsel Specialiteit* or Specialty System is the registration of land rights (*rechtskadaster*) that provides legal certainty (*rechtszekerheid*). Second, *Stelsel Openbaarheid* or Open System is that the Land Book is open to the public so that everyone, whether Indonesian citizens or foreigners, can request to be shown the Land Book to find out the position of a piece of land and can see what rights or burdens lie on certain plots of land<sup>[19]</sup>.

The positive publication system also always uses a rights registration system so that a Register or Land Book is needed as storage and presentation of juridical data, while a land certificate is a certificate of proof of rights. The registration or recording of a person's name in the Register makes a person the holder of the right to the land concerned, not a legal act of transferring rights.

In a positive publication system, a person in good faith and with payment obtains the right from the person whose name is registered in the Register to obtain what is called an indefeasible title if it is later proven that the registered person is not actually the holder of the right to be registered. The data contained in the Register has absolute evidentiary power. After completing registration with the right beneficiary, the actual right holder becomes forfeited. He also cannot demand the cancellation of the legal action from the buyer and can only demand compensation from the state<sup>[20]</sup>.

In individualist countries with the inviolability of recognizing individual rights, the registration of land rights is a supporter of these rights' sacred rights. This land registration is really functioned to guarantee someone's land rights. In addition, registration is not just land administration, but registration is giving land rights.

Hence, by registering someone's land, even if the state needs the land for public purposes, it cannot be revoked without going through a decision of the people's council. The state can no longer immediately revoke someone's land rights. Moreover, the country has adopted a land registration system with a positive publication system. The guarantee will be even more certain because this positive system gives someone the right to it, so the history of the land must be thoroughly examined from the beginning. In this case, the active role of the existing land registration official will perpetuate that person's rights later. Thus, once the land is registered in his name, the legal guarantee of the name in the certificate can no longer be disputed<sup>[21]</sup>.

Conversely, a land registration system with a negative system brings many disputes in the form of land disputes so that there is no legal certainty for landowners even if they are certified. The negative system also leads to the opportunity for the land mafia to take over the land under the pretext of land disputes. As a result of this negative system, the certificate owner cannot be calm, considering that he can lose his right to the land in dispute at any time.

In addition, as a fact, in the last four decades, the phenomenon of land disputes that have emerged to the surface is extraordinary. These disputes occur between the community and the government, the community and investors, the community and the community itself, and even between government agencies and government agencies. These problems arise due to land acquisition for infrastructure development, industry, housing, tourism, and large-scale plantations. In the regions, land disputes often occur between indigenous peoples who maintain customary rights to land and large capital owners who obtain forest and mining concessions, including oil and gas mining and agribusiness development under the PIR (People's Core Plantation) pattern<sup>[22]</sup>.

Various parties consider that the many conflicts and agrarian disputes are rooted in the negative *stelsel* land registration system policy, which does not provide legal certainty for rights holders so it can hinder the implementation of national development. However, in this case, it is necessary to discuss the philosophy of the negative publication system, taking into account the realities of living in Indonesia, so that an answer is obtained whether the negative publication system adopted really has bad implications or is actually relevant to the realities of people's lives<sup>[23]</sup>.

Under Kuhn's paradigm shift, the government or the state can change the paradigm that land registrations, which are prone to disputes and do not have legal force, can be resolved. Where the paradigm of the negative registration system becomes positive, the right owner, in this case, the certificate owner, gets certainty and clarity in the form of guarantees of rights that cannot be disputed.

Changes in systems and paradigms from Kuhn's perspective, as quoted by Patton, are commonplace and routine, and they are not something that needs to be defended desperately. According to Kuhn, humans are dynamic to

changes to find fairer, better, and more efficient solutions and ways. The constant change of paradigms and systems is the key to the progress of civilization <sup>[24]</sup>.

### Conclusion

The shift moving is a transformative perception. The concept of paradigm shifts opens a common awareness that it is impossible for science researchers to work in an atmosphere of established "objectivity", which acts nothing more and nothing less, and only as successors who walk in a mere linear progression.

The old paradigm (in this case, the negative land registration system) as a science, which was considered normal and legitimate, failed to answer the new problems that arose and, subsequently, would only emerge anomalies. Such a situation will invite a new paradigm that can offer alternatives. The dominance of new ideas, either explicitly or implicitly, requires that a paradigm shift bring about the idea that other options are quite possibly better apart from the established system.

On the other side, a positive publication system is when the government guarantees the truth of the data presented. It indicates that whoever's name is registered in the Land Book gets what is written, a right that cannot be contested, except in the case of forgery. In this positive publication system, as the registration organizer, the state guarantees that the registration is done is correct. With the guarantee of legality and legal certainty, it can be expected that land disputes will decrease, and the owner of the certificate cannot be sued for ownership (except in the case of forgery). Then, it requires the state to carefully examine the land database not contained in the negative land registration system.

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