

RECONSTRUCTION OF REGULATION OF LAND REGISTRATION (Sale and Purchase of Ownership of Legal Land According to Customary Law Can be Registered at Land Office)

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ABSTRACT

This research is due to the existence of legal issues of sale and purchase of ownership of their legal land according to customary law that is done clearly and in cash in the front of chief of the tribal council or village chief can not be registered at the Land Office because it is blocked by the provision of Article 37 paragraph (1) and Article 45 paragraph (1) of Government Regulation Number 24 of 1997 on the Land Registration. However, legal vision of Basic Agrarian Law (BAL) is to realize the unification of the agrarian law by establishing customary law as the basis of the national agrarian law, which means including sale and purchase of ownership of land. According to Article 37 paragraph (1) of Government Regulation 24 of 1997, transfer of rights can be registered if it is proven by deed made by PPAT. In Article 45 paragraph (1) Head of Land Office refuses registration of sale and purchase of ownership of land if it is not proven by a deed of PPAT. That provision makes people who do sale and purchase of ownership of legal land according to customary law, in order to be able to be registered it must repeat with deed of PPAT in accordance with Article 23 BAL paragraph (2).

Regulation Number 24 of 1997 does not regulate the provision of registration of sale and purchase of ownership of legal land according to customary law. Any decisions of supreme courts are not at one, some argue that registration is administrative action, some argue that it should be registered. This is due to the reduction of meaning of customary law in Article 5 of BAL, the government's act that is hesitate about recent customary law and the existence of insynchronous Articles which are Article 37 and Article 45 of Government Regulation of 24 of 1997 with BAL. To achieve fairness, certainty and legal protection, it needs reconstruction of Article 37 and Article 45 of Government Regulation Number 24 Year 1997 so that the sale and purchase of ownership of legal land according to customary law can be registered at the land office in order to meet a simple agrarian law and ensure legal certainty.

Keywords: sale and purchase of ownership of legal land, customary law, land registration.

A. Introduction

Philosophically BAL has terminated dualism of agrarian law which is based on the law of western land and customary land law law of customary land, which by establishing customary law as the basis of the national agrarian law. In the preamble "arguing the letter a" BAL, it is mentioned that it needs National Agrarian Law which is based on Customary Law on a simple land and ensure legal certainty for all Indonesian people. Regarding customary law as the basis for an agrarian law it is set out in Article 5 of BAL:

"Agrarian law which is applied on earth, water and space is customary law, as long as it is not contrary to the national interest and State, which is based on the unity of the nation, with socialism of Indonesia and with the regulations which are regulated in this Act and with another law and regulation, all things with regard to the elements that rely on religious law".

In general explanation of BAL in letter b it stresses that the aim of BAL is putting the basis to hold the unity and simplicity in agrarian law and in letter c putting the basis to provide legal certainty regarding the rights of land for the whole people, which is on new rights of land and the transfer of rights of land. In Article 2 paragraph (2)

letter c of BAL, the State is authorized to determine and regulate the legal relationships between persons and legal acts concerning the earth, water and space. That article becomes the basis of the authority of State in regulating the transfer of rights of land, including regulating legal acts of sale and purchase of ownership of land.

To ensure legal certainty, in Article 19 paragraph (1) of BAL, it is stated that the Government hold land registration in all territory of the Republic of Indonesia according to the provisions that are regulated in Government Regulation. That land registration, according to Article 19 in paragraph (2) letter b includes registration of rights of land and transfer of those rights. Furthermore, in paragraph (2) letter c-mentioned that provision of letters of proof of rights, which is applied as a strong evidential tool.

BAL does not set out clearly regarding the institution of sale and purchase of rights of land. However, in Article 23 paragraph (1) of BAL, it is said that the transfer of rights should be registered at the Land Office in accordance with Article 19 of BAL. Furthermore, Paragraph (2) mentions that the registration is a strong and legal evidence of sale and purchase of rights of land. Moreover, in Article 37 paragraph (1) of Government Regulation Number 24 of 1997 concerning Land Registration, it is stipulated that the transfer of rights except through the auction could be registered if it is proven by the Deed made by the PPAT. Article 45 paragraph (1) of Government Regulation Number 24 of 1997, the Head of Land Office refuses registration of sale and purchase of rights of land if it is not proven by the deed of PPAT, which is also applied to the sale and purchase of ownership of land.

Rights of ownership is a type of rights of land that is strategic for Indonesian. Provisions regarding Rights of ownership in Article 20 paragraph (1) and paragraph (2), Article 21 paragraph (1), Article 22 and Article 50 paragraph (1) of BAL that will be set out in Act, until now the Law on Rights of ownership has not established yet.

Provision of Article 37 paragraph (1) and Article 45 paragraph (1) Government Regulation 24 of 1997 raises the juridical problem, because society who carry out sale and purchase of ownership of legal land according to customary law, to be able to be registered at Land Office it is forced to have to repeat sale and purchase with deed of PPAT. This provision is inconsistent with the purpose of BAL as the national agrarian law based on customary law which is simple and ensure legal certainty. If sale and purchase of ownership of land according to customary law is not registered, then the purpose of land registration to give legal certainty and legal protection is not realized. Order of agrarian administration that means giving information of data of subject and object of recent land area to the people who need it is also not realized.

After BAL is legislated 67 years, sale and purchase of ownership of legal land according to customary law has not been followed up in the regulation of land registration according to national agrarian law. According to Achmad Sodiki, customary law that ideologically becomes a legal basis of national agrarian experiences fundamental problem, whether the concept of customary law remains as formulated by Van Vollen Hoven and Ter Haar and whether the change of customary law as the basis for development of national law has been able to accommodate all legal issues related to Indonesian people who have become a nation¹.

Indonesian people is plural, there are still many people who live in the rules of customary law². Although today there are many Law and government regulation that have been established, the signs indicate that the arrangement of provision of implementation of BAL has been much influenced by Western civil law.³ This condition requires the reconstruction of land registration, which are in Article 37 paragraph (1) and Article 45 paragraph (1) of Government Regulation Number 24 of 1997 which is operationalization of Article 23 paragraph (2) of BAL, in order that the sale and purchase of ownership of legal land according to customary law can be registered in Land Office.

Based on the background above, this research has three problems, which are:

- 1) What is the meaning of customary law as the basis of the national agrarian law as referred to UUPA?

¹ Achmad Sodiki. *Politik Hukum Agraria*, (Jakarta: Konstitusi Press 2013), hlm 98.

² Muhammad Bakri. *Unifikasi dalam Pluralisme Hukum Tanah di Indonesia, Rekonstruksi Konsep Unifikasi dalam UUPA*. (Denpasar: **Jurnal KerthaPatrika** Vo.33 No 1, Januari, Fakultas Hukum Universitas Udayana, 2008).

³ Achmad Sodiki dan Yanis Maladi, *Politik Hukum Agraria*, (Yogyakarta: Mahkota Kata, 2009), hlm 133.

- 2) How is the legality of sale and purchase of ownership of land according to customary law, law and regulation and jurisprudence?
- 3) How is the regulation of the land registration which equitable, provide protection and ensure legal certainty in national agrarian land law in the future?

B. Methodology

This study is normative law research with *philosophical approach*, *statute approach*, and also *case approach*.¹ The research uses primary legal materials and secondary legal materials. Primary legal materials include: NRI Act of 1945; Act Number 5 of 1960 on BAL that becomes constitutional and philosophical basis of national agrarian law, the regulation of implementation of BAL is regulated in Government Regulation Number 24 of 1997 on Land Registration and Regulation of Ministry /Regulation for Agrarian Affairs/ Head of National Agency for Land Number 3 Year 1997 on the Provision of Implementation of Government Regulation Number 24 of 1997. In addition, using Jurisprudence of Supreme Court that is related to the decision of legality of sale and purchase of ownership of land according to customary law. Secondary legal materials include textbooks, journals of law, legal dictionary, the results of previous studies, legal documents that are related to the sale and purchase of rights of land and archives at the Land Office that are relevant to the topic of this research.

C. Results and Discussion

1. Meaning of Customary Law in BAL

Legal vision in arrangement of BAL is meant to be the basis of system development of national agrarian law which is single based on Pancasila and the Constitution of Republic of Indonesia of 1945 which provides justice and legal certainty for Indonesian people based on principles of customary law². In term of arrangement of national agrarian law as written law, the principles and norms of customary law become a legal source that complete and improve national agrarian law as stipulated in Article 56 and Article 58 of BAL. Article 5 of BAL is in harmony with vision and spirit and purpose of the arrangement of BAL, which then become the basis of unification of national agrarian law.

Result of Seminar on Customary Law and Development of National Law, which was referred by Boedi Harsono that customary law in BAL that become basis of the arrangement of national agrarian law is the original law of indigenous group which are laws that live in the unwritten form and contains national elements which are original, namely the nature of community and kinship that is based on balance and covered by religious atmosphere.³ According to Soepomo, customary law is a law which live because he incarnates a real law feeling of people. Customary law is alive, used to grow and developed in people's lives (living law).⁴

Meanwhile, Satjipto Rahardjo said that in the development of modern law, since its inception has marginalized the old law, which does not come from law of state.⁵ However, customary law will remain existed as the completeness of national law. The mentioning of customary law as an unwritten law will not diminish its role in the public interest which is not stated in written law. Because customary law that is applied in Indonesia has many varieties, the customary law as the basis of the national agrarian law is customary law that eliminate localism and should be more national. According to Boedi Harsono, it is customary law that its deformity has been eliminated or it has been completed and added so that it can be implemented commonly for all regions of Indonesia.⁶

¹ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenadamedia Group, 2014), hlm 133.

² Lihat Boedi Harsono, *Hukum Agraria Indonesia, Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya*, (Jakarta: Djambatan, 2005) hlm 219.

³ Ibid, Boedi Harsono, hlm 179.

⁴ Soepomo, *Bab-Bab Tentang Hukum Adat*, (Jakarta: Pradnya Paramita, 2000), hlm 3.

⁵ Satjipto Rahardjo, *Hukum Progresif*, (Yogyakarta: Genta Publishing, 2009), hlm 12.

⁶ Lihat Boedi Harsono, *Hukum Agraria Indonesia, Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya*, (Jakarta: Djambatan, 2005), hlm 213.

Recommendation of Seminar of Customary Law and National Law Development on 15-17th of January 1975 in Yogyakarta by National Law Development Agency in collaboration with the University of Gajah Mada (UGM),¹ in the arrangement of national agrarian law, taking materials from customary law by:

- 1) Using concepts and principles of law of customary law to be formulated in legal norms that meet community needs;
- 2) Using institutions of customary law which are modernized and in line with need of period.
- 3) Including concept and principles of customary law to new legal institutions.

Referring to explanation above, the researcher claims that legal vision contained in Article 5 of BAL means that a legal act of sale and purchase of ownership of land according to customary law becomes a basis for regulating sale and purchase of ownership of land according to national agrarian law. Therefore, customary law becomes main source and complement, from the provisions of sale and purchase of ownership of land that the rule is not available yet, in order to avoid *vacuum norm*, in the formation of the law according to the science of law. In this case, the researcher agrees with Boedi Harsono's thought², although since Government Regulation of 10 of 1961 on Land Registration has decided the institution that strengthen evidence of legal act of transfer of rights of land is PPAT, but that provision does not negate the institution of sale and purchase of ownership of land that is done by custom.

2. Legality of sale and purchase of Ownership of Land According to Customary Law, Law and Regulation Legislation and According to Jurisprudence

a. Legality of sale and purchase of Ownership of Land According to Customary Law

Regarding concept of jual beli of ownership of land according to customary law, Boedi H Arsono argues as follows³.

“Sale and purchase according to custom is a legal act of transfer of rights in which the owner as the seller hands over the land in perpetuity to the buyer, which at that time the buyer pays the price to the seller. At that time the land moved from the seller to the buyer who became the new owner. Thus, sale and purchase is a legal act which is cash that is the purpose of both parties has been fulfilled when sale and purchase is done, where the buyer gets ownership of his land and the seller gets the money. Sale and purchase is completed when that transaction is done”.

Legal act of sale and purchase of ownership of land must meet the clear and cash principles that become principle of sale and purchase of rights of land in customary law. According to Soerjono Soekanto⁴ sale and purchase of ownership of land is the act of transferring rights that is clear and cash. Clear means the act is done in front of chief of the tribal council that the role is as officials that bear the regularity and legality of the rule of transferring rights so that the action is known by public. If it is not done, according to Ter Haar, that act is not a part of the legal order, it is not applied for third parties and the the buyer is not admitted as the holder of rights of land⁵. Cash is referred to the act of transferring rights and payment of the price is done simultaneously.

By conducting in front of chief of the tribal council or village chief so that sale and purchase becomes clear. Buyer will get admission from the community involved and will get legal protection as a party who do legal act with good intention if in the future there is a lawsuit that claim that sale and purchase is unauthorized. Imam Soetiknyo explained that definition of "clear", the transfer of rights of land according to custom, should be supported (*medewerking*) by chief of the tribal council or village chief in order the clarity and the legality (*rechtsgeldigheid*) of that act are borne by chief of the tribal council or village chief. Chief of the tribal council

¹ Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia*. Edisi Revisi, (Bandung: Mandar Maju, 2014), hlm 31. Lihat juga Badan Pembinaan Hukum Nasional. *Simposium Sejarah Hukum*.(Bandung: Rindang Mukti Cikapundung, 1976), hlm 250.

² Ibid, Boedi Harsono, hlm 207.

³ Boedi Harsono, *Cinerama Hukum: in Memoriam Prof Djokosoetono SH*, (Jakarta: 1971), hlm 238-239.

⁴ Soerjono Soekanto, *Hukum Adat Indonesia*, (Jakarta: RajaGrafindo Persada, 2011), hlm 189.

⁵ Ter Haar, *Asas-Asas dan Susunan Hukum Adat*. Terjemahan K. Ng.Soebakti Pesponoto (Jakarta: Balai Pustaka, 2013), hlm 85.

also guarantee the rights of heirs, the neighbors (*buren recht*) and rights of same ethnic groups are not violated if that land will be sold off¹.

From the explanation above it can be argued that the sale and purchase of ownership of land according to customary law is legal, if a legal act of transfer of rights is done clearly and in cash where the land owner as the seller hands over the land in perpetuity to the buyer, and at that moment he also pays the price to the seller, and done in front of chief of the tribal council or village chief. In this case the position of chief of the tribal council or village chief besides as a witness also guarantee that sale and purchase is legal and does not violate any applicable laws. Thus, it gets the admission of the people involved and the legal protection as a party that performs legal acts with good intention.

b. Legality of sale and purchase of ownership of Land According to Law and Regulation

Since BAL is applied there has been a fundamental change in agrarian law in Indonesia, due to change of the structure of the legal instrument. BAL creates a single-structured law based on customary law on land as the original law of the majority of Indonesian people. It is appeared at regulating basis and provisions on ownership regulated in Articles 20-27 of BAL. Other provisions are regulated in Articles 50, 56 and 58 of BAL, which is in provision of ownership of land customary law is applied.

Regarding basis to ensure legal certainty, related to sale and purchase of ownership of land, it establishes Article 19 paragraph (1) and paragraph (2) letter b and c, and Article 23 paragraph (1) of BAL, as follows:

Article 19

(1) In order to ensure legal certainty by the Government land registration is held throughout the territory of the Republic of Indonesia in accordance with the provisions stipulated in Government Regulation

(2) That registration in paragraph (1) of this article includes:

b. registration of rights of land and transfers of those rights;

c. distribution of letters of proof of rights, which is applied as a tool of strong evidence.

Article 23

(1) Ownership and each transfer, abolishment and assignment with other rights must be registered according to the provisions which are referred to Article 19

(2) The registration referred to in subsection (1) is a tool strong evidence regarding the abolition of property rights as well as the validity of the transitional and the imposition of such rights

Provision of Article 23 is important in terms of evidence. In Article 23 of BAL, the transfer of ownership should be registered and that registration is a strong evidence regarding the legality of transfer of rights. Boedi Harsono explains that the provisions of Article 23 should be interpreted as the transfer of ownership to new buyer that happens at the time of registration by Head of Office. However, that provision it may not be interpreted that way. It is explained that in the Draft of Soenarjo, Article 19 paragraph (2) gives provision to obtain and for all transfer of ownership, that registration is an absolute requirement. This draft is withdrawn and replaced by the Sadjarwo's draft which completes it and changed into the current Article 23 of BAL. Land registration according to the present formula is not an absolute requirement to obtain ownership and legality of transfer, but it is a strong evidence that there has been a legal transfer of rights. The transition of its own right has taken place before registration². That Boedi Harsono's explanation, it has no legal force until now, because it has not been established in law and regulation.

The formulation of Article 23 is inconsistent with Article 5 of BAL that the conception and principle are customary law, which sale and purchase has been "legal" if it is done clearly and in cash. Especially if it is related to the provisions of Article 37 of Government Regulation Number 24 of 1997, registration of transfer and imposition of rights can only be made if proven by the deed made by PPAT. Agrarian Policy itself is vertically out of sync in developing the conception of customary law as the basis of national agrarian law that result in obscurity of regulating norms and sale and purchase of ownership of land based on the concept of customary law. It can be observed in the regulation of implementation of Article 19 and Article 23 of BAL which is

¹ Iman Soetiknjo, *Politik Agraria Nasional*, (Yogyakarta: Gadjah Mada University Press, 1987), hlm 71.

² Boedi Harsono, *Cinerama Hukum: in Memoriam Prof Djokosoetono SH*, (Jakarta: 1971), hlm 243-244.

regulated in Article 37 and Article 45 of Government Regulation Number 24 of 1997 on Land Registration as follows.

Article 37

(1) The transfer of rights of land and ownership of apartment units through sale and purchase, exchange, donation, income in the company and the legal act of other transfer of rights except transfer of rights through auction can only be registered if it is proven by deed made by authoritative PPAT according to the prevailing laws and regulations.

(2) In certain condition as decided by the Minister, the Head of Land Office may register the transfer of rights of land area of ownership, which is done among individuals among Indonesian citizens that is proven by a deed which is not made by PPAT, but according to the Head of Land Office of the degree of truth is considered sufficient to register the transfer of the rights concerned¹.

Article 45

(1) letter b: Head of the Land Office refuses to register the transfer of or imposition of rights, if the legal act referred to Article 37 paragraph (1) is not proven by deed of PPAT, except in certain condition as described in Article 37 paragraph (2)

According to Boedi Harsono, deed of PPAT is functioned as evidence that it is right to do sale and purchase of rights of land, but that sale and purchase can still be proven by other evidence. People who do sale and purchase without being proven by the deed of PPAT will not be able to get a certificate, even if sale and purchase is legal.² Then Boedi Harsono said that the registration is a note that is added to book of land and certificates of rights is a prevailing evidence to third parties. This is in line with A.P. Parlindungan (1992) duty of PPAT to do recording the legal acts of transfer and imposition of rights of land (*recording of deeds of conveyance*) as regulated in Article 2 paragraph (2) of the Regulation of the Agrarian and Spatial Planning Ministry/ Head of National Agency for Land Number 1 of 1996.³

Although BAL has not set out clearly concepts and institutions of the sale and purchase of ownership of land, but in Article 5 of the BAL it is explicitly stated that national agrarian law is customary law. Several articles which are related to regulation of ownership of land are Article 20, 21, 22, Article 26, Article 50, Article 56 and Article 58 of BAL:

Article 20.

(1) The right of ownership is hereditary right and be strongest and fullest right one can have on land that may be possessed by citizen, considering the provision laid down in Article 6.

(2) The right of ownership may go over to and transferred to another party.

Article 21.

(1) Only an Indonesia citizen may have rights of ownership.

Article 22.

(1) Origin of the right of ownership according to the Adat-law shall be regulated by Government Regulation.

Article 26

(1) Sales, and purchases, exchanges, gift and bequest by will, bequest according to customary law and other act which are meant to transfer the right of ownership and its control shall be regulated by Government Regulation.

Article 50.

(1) Further provisions concerning the right of ownership shall be regulated by Act.

¹ Dalam penjelasan Pasal 37 ayat (2) keadaan tertentu yaitu untuk daerah-daerah yang terpencil dan belum ditunjuk PPAT Sementara untuk memudahkan rakyat melaksanakan perbuatan hukum mengenai tanah. Ketentuan Pasal 37 ayat (2) belum ditindaklanjuti dalam suatu Peraturan Menteri, sehingga sepanjang UUPA berlaku sampai sekarang, jual beli hak milik atas tanah menurut adat yang aktanya dibuat Kepala Desa atau Kepala Adat tidak dapat didaftar

² Lihat Boedi Harsono, Op cit, *Hukum Agraria Indonesia*, hlm 515.

³ A.P. Parlindungan, *Pendaftaran Tanah di Indonesia*, (Bandung: Mandar Maju, 1999), hlm 181.

Article 56.

As long as the Act regarding the right of ownership meant in Article 50, paragraph (1) has not yet been established, so the prevailing provisions are the local customary law and other regulation regarding right on land which give rights corresponding or similar to those meant in Article 20, as long as they are not in conflict with the spirit and the provisions of this law.

Article 58.

As long as the regulations for the execution of this law has not yet been established the written as well as unwritten provision concerning the earth and the water and the natural resources contained therein and the right of land, existing at the time of the coming into force of this law, shall remain in force as long as they are not in conflict with the spirit of the provisions in this law, mid are interpreted accordingly.

Establishment of Act of ownership as Article 50 paragraph (1) and Government Regulation of sale and purchase of ownership in Article 26 of BAL is very strategic. But until now it has not been formed. This is a legal vacuum, whereas the agency of sale and purchase is an activity that many people do. Therefore, in accordance with Article 56 of the BAL, the prevailing regulation is the provision of local customary law. Similarly, rules, both written and unwritten that exist when BAL is applied, in accordance with Article 58 of BAL the prevailing regulation is customary law, so that it can be concluded that the sale and purchase of ownership of land according to customary law is legal as intended by BAL.

c. According to Jurisprudence

In the jurisprudence of the Supreme Court regarding the legality of the sale and purchase of ownership of land there are different opinions, some judges argue that the Sale and Purchase of ownership of land is legal if it is done clearly and in cash in front of chief of the tribal council or village chief. However, some argue that the sale and purchase of ownership of land is only legal if it is done in front of PPAT as meant in Article 37 paragraph (1) of Government Regulation 24 of 1997 as the rule of implementation of the provision of Article 23 paragraph (1) of BAL. In Supreme Court's Decision Number 123/ K/Sip /1970, the land registration is only an administrative act, it means that the registration is not a requirement of legality or determining when the transfer of land in sale and purchase.¹ Legal system of Indonesia is Civil Law which is different from the Anglo Saxon or Common Law, so the decision of jurisprudence is not obligatory to be obeyed. Therefore, in the case of jurisprudence there is no similar opinion regarding the Sale and Purchase of Ownership of Land after BAL is applied.

From the description of Legality of sale and purchase of ownership of Land according to Customary Law, Law and Regulation and Jurisprudence can be stated.

First, the existence of similarities about the concept of sale and purchase according to customary law and national agrarian law is a legal act in which the seller gives ownership of his land to buyers who at that time also paid the price to the seller.

Second, there is a similar opinion of the Experts with jurisprudence through the Supreme Court's decision which stipulates the sale and purchase conducted in front of the head of custom or village chief clearly and in cash is legal. The registration of sale and purchase is only an administrative act.

Third, there is a different arrangement of land registration. Although sale and purchase carried out under customary law or under national agrarian law, both of them are legal, but sale and purchase under national agrarian law can only be registered in the Land Office if it is done with Deed and by PPAT. This means that the sale and purchase of ownership of land by the customary law can not be registered at the land office to obtain legal certainty and legal protection based on the provision of Government Regulation 24/1997. In order to be able to be registered at the Land Office it must be repeated by making deed of PPAT, this provision becomes unfair. It does not provide legal certainty and legal protection for all people who carry out the sale and purchase of ownership of land according to customary law.

The researcher argues that legality of sale and purchase of Ownership of Land, do not interpret it as a tool to register the transfer of ownership of land at the Land Office, but it is a legal evidence of legal act of transfer of ownership of land as well as the concepts and principles of sale and purchase of ownership of land according to customary law. The sale and purchase of Ownership of Land that has not been regulated according to provision of Article 50 of BAL has resulted in inconsistency in the development of concepts and principles

¹ Putusan Mahkamah Agung RI No 123/K/Sip/1970.

and institutions according to Customary Law and it does not achieve legal certainty and legal protection of rights of land in accordance with the objectives of BAL.

d. Causes of the Sale and Purchase of Ownership of Land According to Customary Law cannot be Registered in the Land Office

There are some factors that makes the sale and purchase of ownership of land under customary law cannot be registered according to the land registration system, which are stated as follows.

1) Reduction of concept of customary law in BAL

Since BAL is applied and then regulation of implementation is arranged, according to the researcher, the government embraces policy of agrarian law that is ambivalence. Preamble of BAL and the provisions of Article 5 of the BAL explicitly states that "agrarian law that is applied for earth, water, and space is the customary law", but the provisions of Article 5 of the BAL, customary law that is admitted is that which has been given the requirements with the word "as long as", namely: (1) that is not contrary to the national interest and the State; (2) that is based on national unity and socialism of Indonesia; (3) which is not contrary to the BAL and another law and regulation; and (4) that respect the elements that rely on the law of religion. Defining customary law as referred to BAL is not customary law such customary law that exist in the society, but the customary law according to the interpretation of BAL's arranger and its regulation of implementation, so that the sale and purchase of ownership of land which is conducted according to customary law is not object of registration of land in the system of national agrarian law.

Regarding "the agrarian policy that is ambiguous" above, according to the researcher, even though there is requirement "as long as" which is a restriction or limitation for prevailing customary law in the legal system of the national agrarian, basically it does not eliminate meaning of customary law as the basis and the main source of the development of the national agrarian law, because the constitution of state which is stipulated in the amendment of IV of Article 18B paragraph (2) of Constitution of 1945¹ explicitly gives admission and respect for the units of society of customary law and their traditional rights. Therefore, the admission of customary law in the national agrarian law should be interpreted as a form of protection of state to the society of customary law, so that Article 5 of the BAL becomes the juridical basis to arrange regulation of implementation of BAL especially land registration in system of national agrarian law.

With requirement "as long as it is not contrary to the soul and provisions of the BAL", it is no longer relevant because the provisions of Article 58 BAL explicitly state that "if the regulation of implementation of the BAL has not formed, then it applies the old regulation and as long as that regulation is not contrary to the soul of the provisions of the BAL, so that old rule must be interpreted in accordance with the soul and provisions of the BAL. "Therefore, regulation of the sale and purchase of ownership of land and registration can still refer to the concepts, principles and institutions of sale and purchase of ownership of land under customary law and can be registered to obtain a guarantee of legal certainty in accordance with the purpose of land registration. This is in line with opinion of Sudikno Mertokusumo that states, the community continues to grow following the rule of law which is dynamic, while the rule of law will change to follow the development of society that is affected by time and place. That legal system itself completes the emptiness, the weakness and the obscurity of the law. Therefore, Law should be in accordance with the development of society, the law should be sought or found².

Reduction of provisions of Article 5 of the BAL which contain requirements of customary law needs to be tested with the national law and regulation such as the assumption that the position of customary law is lower than the BAL as a form of national agrarian law. Such fact that is meant by John Griffiths as the ideology of legal centralism in the implementation of national agrarian law by ignoring the fact of legal pluralism in the life of plural society.³

¹ Lihat Pasal 18B ayat (2) UUD Negara Republik Indonesia Tahun 1945

² Lihat Sudikno Mertokusumo, *Penemuan Hukum*, (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2010), hlm 12 dan 33.

³ John Griffiths, "What Is Legal Pluralism", (dalam *Journal of Legal Pluralism and Unofficial Law* No. 24/1986). Baca pula I Nyoman Nurjaya, *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum*, (Jakarta: Prestasi Pustaka Publisher, 2008), hlm 181.

2. Asynchronization of Customary Law in National Land Law

If it is seen from vertically synchronization aspect, it is related to the norm rules mentioned in Article 37 and 45 Government regulations No. 24 Year 1997, in which the implementation of Article 23 BAL - Limitation of PPAT as the authorized chief who do sale and purchase the land and the valid utterance of transferring and loading right is not synchronized and inconsistent by way of Article 5 BAL which gives direction of sale and purchase according to valid customary law if it is fair and cash. It is also mentioned in Article 45 section 1 that the chief of land affairs declines the sale and purchase registration for the ownership of the owner of the land if it is not provided by the PPAT certificate.

Because the asynchronization of Article 23 BAL with Article 5 BAL, the certainty of Article 37 and 45 Government regulation No. 24 year 1997 is not synchronized as well and or inconsistent by the way of Article 5 BAL. Although, there is a certainty of Article 37 section 2 Government regulation No. 24 year 1997 about the exception of doing registration for the land by using certificate made by PPAT, in which in the practice, it is rarely used since the Ministry regulation has not been published.

In regard to the asynchronization, the writer states that there are inappropriate rules mentioned as follows:

- 1) The command from BAL is not realized to manage the further connection of law of ownership of the land owner and the law attitude about sale and purchase of the land ownership is mentioned in Article 2 section 2 part C, Article 20 section 2, Article 22 section 1, Article 26 section 1, Article 50 section 1, by forming the constitution about the right of land ownership and the implementation.
- 2) To decline the norm command of Article 56 and 58 BAL which mention that during the constitution regulation about right of land ownership and the transfer have not been formed, then the customary law can be used.
- 3) There is inconsistency and multi translation in managing the transfer of sale and purchase of right of land ownership in Article 23 section 2 BAL, the registration is a strong proof and valid of transferring the right. Whereas, Article 5 BAL gives the direction that the law attitude about sale and purchase of the right of law ownership as stated in customary law is valid if it is legal
- 4) There is a certainty of the chief of land affairs to decline the registration of transferring or loading from the right of the land if it is not proved by the PPAT certificate. This statement is explicitly mentioned in Article 45 section 1 part B the Government Regulation No. 24 Year 1997.
- 5) There is an ambiguity in implementing the determination the chief of sub district and/or village as PPAT. Meanwhile, it is necessary to fulfil the needs of PPAT, slowly reduced by determining notary public/PPAT who works in the city or regency. This can be seen from the determination of Article 7 section 2, Article 37 section 2 Government regulations No. 24 Year 1997 and Article 5 section 3 Government regulations No. 37 Year 1998.

Sudikno Mertokusumo says that, if there is inconsistency in managing the norm, conflict of norm between the rule for the higher and lower authority according to the order of constitution, which is valid for preferential principle as popular as *lex superiori derogat legi inferiori principle*, which means that the higher rule puts aside the lower rule.¹ This means that when the regulation of Article 23 Government regulation No. 24 year 1997 is not in line with Article 5 BAL, then, according to law principle, Article 5 BAL must be used as the higher rule in the hierarchy of constitution mentioned in the constitution No. 12 year 2011 about forming the constitution regulation.² Based on this principle, the valid sale and purchase of right of land ownership can be registered in the land affairs office.

¹ Soedikno Mertokusumo, *Teori Hukum*, (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2011), hlm 55.

3. Synchronization of Sale and Purchase management of the right of land ownership and its registration in harmonic land registration system with the national land Law

The law effort to build the unification of sale and purchase of the right of land ownership and its registration has not been realized in normative pattern and its implementation. The juridical constraint has occurred since 1948 until 1960 in forming the process of BAL. At that time, the committee of BAL, The Preparation of Program Arrangement, occurred in many times in forming the concept, law principles and customary law in national agrarian law, covered by politic situation and the force of importance.

Customary law in BAL means the customary law which has been reconstructed, or according to Boedi Harsono, it has been perfected, designed, renewed. On the contrary, Moch. Koesno says that the customary law in BAL has lost its material because it is affected by the institution and western characteristics, or has been modified by socialism in Indonesia so that the rest is only its formula or cover.¹ The existence of customary law in BAL recently is truly affected by law politic believed by the states of legal centralism which points a law as a state law that is valid for all the citizens who live under the state sovereignty. Therefore, the customary law position does not get the real place in national law, notably in national land affairs.

On the contrary, there is a legal pluralism. The legal pluralism places the law system at the same level of other laws. Satjipto Rahardjo says since there is a modern law in the centre of the state (legal centralism), then it is the beginning of disappearing of customary law and other customs. If the types of those laws are still valid here, then it is by the grace of state law.²

Law pluralism in Indonesia tends to belong to weak legal pluralism as stated by John Griffiths, in which the dominant law is state law which give an implicit or explicit space for the validity of other types of law, such as customary or religious law. However, Esmi Wirasih strongly states that the implementation of law system which does not come from the society is a problem, notably, in states that are not fit with the value from its country and others.³ That condition is an obstacle to synchronize customary law and national land affairs.

The effort to establish the national legal land affairs in Indonesia society which has a compound characteristics and agrarian country meets the various constraints because of some things, such as:

- 1) Law norm of sale and purchase of the right of land ownership as mentioned in customary law is not written and modified. Meanwhile, a modern law needs the written proof of sale and purchase of the right of ownership. Imam Soetiknyo points out that the land ownership as the custom is however its meaning without its proof and not registered somewhere but it is known and admitted its validity by the society. Even if based on Article II section 1, the certainties and rights have been converted as the right of ownership as mentioned in Article 20 section 1 BAL but this reality has not been done by the stakeholders in some regions.
- 2) The sale and purchase of the right of land ownership according to customary law shows that there is a legal pluralism in a variety of regions in Indonesia in which the customary law is still strongly believed by the society, so that there are multiple diverse of law attitude done by the community in regions as managed by more than one regulation system.
- 3) There is dualism on the certainty of sale and purchase of the right of land ownership according to regional customary law as a law attitude of transferring the valid right cannot be registered. On the other hand, modern law (state law) is also done which manages the sale and purchase of the right of land ownership acknowledged by PPAT, in purpose of being valid by showing the proof from PPAT certificate and can be registered at the office of land affairs.
- 4) The certainty of sale and purchase of the right of land ownership in national land law as a positive legal instrument, in fact, it has not been implemented in society who mostly lives in the village or remote area in which their prosperity is low but they still believe the tradition and traditional living

¹ Moch. Koesnoe dalam Iman Sudiyat, *Asas-Asas Hukum Adat. Bekal Pengantar*, (Yogyakarta: Liberty, 2000), hlm 107.

² Satjipto Rahardjo, *Sisi-Sisi Lain dari Hukum di Indonesia*, (Jakarta: Kompas, 2003), hlm 23.

³ Esmi Warassih Pujirahayu, *Pemberdayaan Masyarakat Dalam Mewujudkan Tujuan Hukum (Proses Penegakan Hukum dan Persoalan Keadilan)" Pidato Pengukuhan Guru Besar* (Semarang: Fakultas Hukum Undip., 14 April 2001).

way, including available customary law which develops as the living law in the society as meant by Eugen Ehrlich¹.

- 5) A customary law as the real legal for Indonesia society is flexible and dynamic, meaning that it dynamically changes soon following the development in the society. In this side, the customary law adjusts to social change in the society but on the other side, the concept, principles and customary law institution, especially in sale and purchase of the right of land ownership according to customary law is not counted and not be priority in establishing the national land law.

As stated by the explanation above, the aim of unification of land registration in national land affairs law which based on the customary law has not been consistently built as meant by BAL. The certainty of regulation of BAL implementation in Government Regulation No. 24 Year 1997 on land registration, especially Article 37 section 1 and Article 45 section 1 part C is further regulation from Article 19 and 23 BAL, precisely, it creates the unfair attitude for the society who does sale and purchase of the right of land ownership according to customary law. It cannot be registered to the land office to get the guarantee of law certainty and protection. On the other hand, when the transfer of the right of land ownership is not registered, the goal of BAL to go forward to correct land affairs administration through land registration does not become reality.

4. Reconstruction of Fair and Certain Land Registration Management

In this study, the meaning of reconstruction is rearranging the management of land registration so that the sale and purchase of the right of land ownership can be done bright and cash acknowledged by the chief of village according of the available customary law that also can be registered at the office of land affairs so that it shows the fairness and certainty of law.

The articles which need to be reconstructed are Article 37 and 45 Government regulation Year 1997 which give dilemma source. If the sale and purchase is done according to the customary law, although the resale and repurchase is done acknowledging by PPAT so that it can be registered, the society is objected by the double fee that they should pay, the long duration, the location of PPAT which is too far from their house and the difficulty to re-invite the seller maybe who has moved to the other places or passed away.

Thus, if the sale and purchase of the right of land ownership of customary law cannot be registered, then the goal of national agrarian law can be seen from the certainty of Article 19 BAL and Article 3 Government regulation Year 1997 cannot be established because the purpose of land registration as stated in national land law is giving the protection and certainty of law for the right of land ownership holder in reaching the correct national land affairs administration.

The regulation managed in Article 37 section 2 Government Regulation No. 24 Year 1997 about the exception of registering land by putting certificate that is not made by PPAT open the opportunity to go further and build the value and spirit of Article 5 BAL. To declare that the sale and purchase of the right of the land ownership is done according to customary law. It can be registered to get the proved certificate to guarantee the law certainty for the land owner. To support the statements of the writer, here are the arguments about law.

First, Philosophical reason, Article 18B section 2 the basic Constitution of Indonesia 1945 declares that state admits and respects the unity of the customary law society along with their traditional right within their life and is appropriate with the development in the society. Indonesia principles are managed in the constitution. Meanwhile, in the explanation of BAL, it strongly mentions that the goal of BAL in part B is to put the basic things to empower the unity and simplicity in land law. The philosophy of BAL in land affairs has not been formed.

Second, Juridical reason, it is the certainty of Article 37 and 45 Government regulation Year 1997 that determines the requirement to register if it is proved by the PPAT certificate. This is not synchronized with the certainty of the sale and purchase of the right of valid land ownership according to the customary law based on Article 5, 56 and 58 BAL. In relation with this, Sodiki points out that if the meaning of Article 5 BAL is accurately understood, the certainty of provisional people's consultative assembly (MPR RI) No. IX/MPR/2001 about agrarian modernity and natural source management does not need to put the acknowledgement towards the existence of customary law because BAL is already being a customary law. BAL as the national agrarian law needs to admit the existence of customary law around the society along with some requirements. The problem in

¹ Lihat Lili Rasjidi dan Ira Thania Rasjidi, *Dasar-Dasar Filsafat dan Teori Hukum*, (Bandung: PT Citra Aditya Bhakti, 2007), hlm 66-67.

this area is the one who should handle the material test according to customary law because this is not mentioned further.¹

Third, Sociology reason, the compound society of Indonesia with their own customary law does not need to conflict with the land law unification. The customary law is flexible and dynamic in line with the era development.

Beside those three reasons, the politic reason can also be added to this topic because its cover from the Indonesia Government in which 90% of Indonesia society is the village government. Economical reason is most of Indonesia society living in a village, where their prosperity cannot be said well-enough to reach the reasonable living so that it needs a simple law facility which the people can involve inside.

The effort to reconstruct the regulation of land registration in national agrarian law is to build the fairness for the society in rural area, guarantee the law certainty and establish the correct administration of land affairs in whole area in Indonesia. Thus, each the sale and buy activity of the right of land ownership done by the society according to the customary law can be registered at land office and get the proof of the right guaranteed by the law certainty of land ownership. The certainty of Articles in Government Regulation No. 24 Year 1997 needed to reconstructed according to the writer is as seen in Table 1.

Table 1: Norm Reconstruction of the Sale and Purchase of the Right of Land Ownership based on the Customary Law in Land Registration Management

Current Setting	Real Setting
Article 37 Section 1 and 2 Government regulation No. 24 year 1997	
PPAT certificate as the requirement of land registration: <ol style="list-style-type: none"> 1. The transfer of right of land ownership and law attitude the transfer of other right can only be registered if it is proved by the certificate made by authorized PPAT based on the constitution 2. In some cases, the head of land office is able to register the transfer of property right done by Indonesian and proved by certificate made by PPAT but according to the head of land office the degree of truth is assumed well-enough to register the transfer of right. 	PPAT certificate and valid deed of sale and purchase based on customary law as the requirement of land registration: <ol style="list-style-type: none"> 1. The transfer of land ownership and law attitude in transferring other tight can only be registers if it is proved by certificate from PPAT or the authorized village head or customary head based on the constitution. 2. The head of land office registers the right of property right done by Indonesian as individual and proved by the certificate from PPAT or village head or customary head.
Article 45 section 1 part A and B and Section 2 and 3	
The rejection of registration by the head of land office. <ol style="list-style-type: none"> 1. The head of land office rejects to register the transfer if one of the requirements is not fulfilled: <ol style="list-style-type: none"> a. The certificate about the right of land ownership is not appropriate with the list in land office. b. The law attitude is not meant to be proved by the deed of PPAT except, in some conditions, it is meant in Article 37 section 2. 2. The rejection from the head of land office is done in writing by mentioning the reasons of rejection. 3. The letter of rejection is delivered to the concerned person accompanied by returning the document of appeal and its copy to PPAT. 	The rejection of registration by the head of land office. <ol style="list-style-type: none"> 1. The head of land office rejects to register the transfer if one of the requirements is not fulfilled: <ol style="list-style-type: none"> a. The certificate about the right of land ownership is not appropriate with the list in land office. b. The law attitude is not proved by the deed from PPAT or village or customary head as stated in Article 37 section 2. 2. The rejection of the head of land office is done in writing by mentioning the reasons of the rejection. 3. The letter of rejection is delivered to the concerned person accompanied by returning the documents of appeal and its copy to PPAT or village head or customary head.

Note: Bold fonts are the plan of reconstruction of Article 37 and 45 Government regulation No. 24 year 1997

¹ Achmad Sodiki, *Politik Hukum Agraria*, (Jakarta: Konstitusi Press, 2013), hlm 15-17.

4. Towards the Sale and Purchase of the Right of Land Ownership

The sale and purchase management of the right of land ownership and registration is really strategic in social life in rural areas which has patterned agrarian and strongly holds the customary law so that it needs to make a perception the concept of customary law principle including the customary law into national land law. The writer recommends the effort to update national agrarian law in the connection with the sale and purchase setting of the right of land ownership and the registration through these options:

- 1) Do the change of norm in BAL. This is meant by adding the philosophy of sale and purchase of the right of land ownership based on value norm in customary law in Indonesia society which reflects law values and justice in line with the Indonesia culture. This is aligned with some conditions:
 - a. Article 18B section 2 Indonesia constitutions Year 1945, the point is “State admits and respect the unities of customary law and their traditions.”
 - b. Article 28 section 3, the point is “The cultural identity and society right are respected in line with the era development and civilization.”
 - c. Article 4 part D and F, the provision of People’s Consultative Assembly (MPR RI) No. IX/MPR/2001 about agrarian reform and natural resource management, the point is “Agrarian reform and natural resource management must be done in line with the principles to respect the supremacy of the law by accommodating the diversity in law unification” and part J: “State admits, respect and protect the customary law society and the cultural diversity on the agrarian/natural resource.
 - d. Article 6 the constitution No. 39 year 1999 on the human right, the point is:
 - (1) In order to build the human right, the differences and needs in customary law society should be considered and protected by the law, society and government.
 - (2) Cultural identity of customary law society, including the right of land ownership should be protected and in line with the development of civilization.
- 2) By adding the norm regulation in the constitution plan of land affairs that is in the process of legalization by the Commission II of House Representative of Indonesia (DPR RI), norm regulation accommodates each law attitude of the right of land ownership which implements legally in the eyes of the customary law that can be registered to get the certificate as the proof of property ownership, so that it reflects justice, protection and legal certainty for those who live in the village.
- 3) The Government along with legislative institution form the constitution about the right of land ownership to establish the mandate of Article 50 BAL; forming the regulation of government about the transfer of the right of land ownership as the embodiment of the command of 22 BAL; and revising the regulation about the land registration in the government regulation No. 24 year 1997 about land registration.

D. Conclusions and Suggestions

1. Conclusions

- a. The dream of forming BAL is to build simple national agrarian law to give certainty, protection of law and justice for Indonesia society. Thus, unification politic of agrarian law based on the living law in the society in Indonesia should be meant as the basis of concept management, principles and sale and purchase of the right of land ownership based on the customary law into BAL and its implementation.
- b. The validity of sale and purchase of the right of land ownership by concerning the customary law bright and cash done in front of the village or customary head can be registered at land office in line with the condition on Article 19 Government Regulation No. 24 year 1997 about land registration has not been done. This problem is because the regulation on Article 37 section 1 and Article 45 section 1 Government regulation No. 24 Year 1997 which determines that the transfer of right of land ownership is valid if it is proved by the deed from PPAT and it becomes the requirement to make a registration at land office in order to get the certificate as the strong proof as the land ownership. Jurisprudence of Supreme Court disagrees with this. Thus, since the validity of BAL until now, the unification of sale and purchase registration of the right of land ownership has not been done as the dream of BAL based on the customary law.

- c. Land registration system in national agrarian law should be in line with BAL so that the unification of the national land law can be made based on the customary law in all areas in Indonesia. Hence, Article 37 and 45 needs to be reconstructed to accommodate the transfer registration of right of land ownership legally based on the customary law in the present and future.

2. Suggestions

- a. Land registration system in national land law needs to concern the customary law in society who most of them live in the village or rural area, so that it is consistent with the spirit of BAL based on customary law. Thus, the sale and purchase setting of the right of land ownership based on the customary law needs to be accommodated in simple land registration management which gives the certainty of the right of land ownership.
- b. To reach justice, the law certainty and protection for those who do sale and purchase of land right bright and cash based on the customary law, then the land registration managed in Article 37 section 2 Government regulation No. 24 year 1997 needs to be reconstructed its law norm by mentioning the transfer as stated in customary law;

“The head of land office can register the sale and purchase of the right of land ownership done by Indonesia citizen and proved by the legal deed from the village or customary head”

- c. In line with the condition in Article 18B section 2 and Article 28I section 3 the Indonesia constitution Year 1945, it declares that “State protects and respects the unities of customary law society and its traditional right”, then the reconstruction of Government regulation No. 24 Year 1997 about the land registration should be followed by the reformulation of conditions on Article 23 section 1 BAL so that it will be consistent with the spirit of BAL based on the customary law and the formation of the constitution of right of ownership and the implementation management to manage sale and purchase of the right of the land ownership.

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