Dilemma of Regulation and Implementation of Legal Certainty in the Sale and Purchase Land Rights in Indonesia

M. Yazid Fathoni
Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
myazidfathoni@student.uns.ac.id

Adi Sulistiyono
Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
adisulistiyono@staff.uns.ac.id

Lego Karjoko
Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
legokarjoko@staff.uns.ac.id

***Abstract*— Uncertainty surrounding land purchase and sale agreements in Indonesia is a well-known issue that has resulted in a wide range of legal practices up to this point. This research aims to examine why there isn't more legal certainty in Indonesia due to land sales and purchases. The normative legal technique is the research methodology employed. The study's findings demonstrated that Indonesia's pluralistic legal framework for property sale and purchase agreements dates back to the Dutch colonial period. Law No. 5 of 1960 brought the then-plenty legal sources together. This law's flaw in property sale and purchase agreements is a vague norm or a lack of precise and comprehensive restrictions. Consequently, the absence of established norms has led to the emergence of diverse interpretations and theories about the legal sources found in Government Regulation No. 24 of 1997, BW, and Customary Law. As is typical with other developing nations, Indonesia has a diversity of legal conventions, which adds to the confusion. In addition, there are court rulings with varying legal implications and the Supreme Court Circular Letter's dualistic approach to addressing the problem of land sale and purchase agreements.**

***Keywords*— Land, Sale and Purchase Agreement, Legal Certainty.**

I. INTRODUCTION

The transfer of land rights in Indonesia is a well-known problem that continues to be discussed and analyzed. Government Regulation No. 24 of 1997 concerning Land Registration is the current rule governing land registration in Indonesia; nevertheless, it is essential to note that the regulation's core principles are fundamentally different and do not center on transferring property rights. According to Article 3 of Government Regulation No. 24 of 1997 concerning Land Registration, the primary goal of land registration is to provide administrative legal certainty by presenting recognition proof in the form of a certificate of land rights.[1][2]

Looking back through history, we can see that the issue of land rights transfer started even before Law No. 5 of 1960 concerning the Basic Agrarian Law was passed. It all began when the Dutch colonialists arrived in Indonesia. The principle of concordance—which states that the laws that applied to the colony (the Netherlands) were the same as those that were in place in the country that colonized it—was upheld when the Dutch State established a government representative through the Dutch East Indies Government. This indicates that the archipelago was simultaneously subject to the Dutch civil positive law then. As a result, the Dutch positive direction at the time formally and juridically regulated all spheres and kinds of existence.

However, as time passed, the Dutch East Indies Government understood that native people had their own rules, which were ingrained in the culture of the time. Applying Dutch law to indigenous peoples with their laws is exceptionally challenging. Finally, in addition to Dutch civil law, the Dutch East Indies government enforced customary law based on article 131 IS *(Indische Staatregeling* in 1926. Three population groupings make up the archipelago: the European group, the native or native group, and the foreign eastern group. This division is based on the stipulations of Article 131 IS. Different legal arrangements, controlled by customary or Dutch Civil Law,

A. K. Jaelani et al. (eds.), *Proceedings of the International Conference on Law, Economic & Good Governance (IC-LAW 2023)*, Advances in Social Science, Education and Humanities Research 827,
https://doi.org/10.2991/978-2-38476-218-7_54

apply to each group. Customary law pertains to indigenous peoples, while Dutch civil law applies to European populations, with limited exceptions for immigrant Easterners.[3]

Prior to the establishment of the Indonesian state, the archipelago's pluralistic legal system contributed to the complexity of the region's legal system, particularly in the civil sector. When a legal relationship arises in land law, it is observed from the lawful object (a particular kind of land right) and the legal subject carrying out the legal relationship. Civil law relations in general and civil law contacts in the land sector are distinguished by this feature. Assume that legal matters carry out legal actions independently of the object in normal civil law relations. In that scenario, it is also necessary to consider land-related legal issues and the lawful object's status.

Even if Law No. 5 of 1960 covering Basic Agrarian Regulations brought accomplished legal unification, differences in law still exist. Practically speaking, this is evident in several court rulings. Different theories and interpretations of the legitimacy and legality of the transfer of land ownership from sellers to buyers are common. Several reasons exist for this discrepancy between the Adat Law, Law No. 5 of 1960, and the Civil Code, including comprehension and legal sources. The explanation piques the author's curiosity about why Indonesia has not experienced legal clarity or justice due to the sale and purchase rights regulation.

II. FINDINGS AND DISCUSSION

A. The Concept of Sale and Purchase Land According to the Indonesia Civil Code (Burgerlijk Wetboek)

Dutch civil law is codified in the Burgerlijk Wetboek (BW), adopted in 1983. The Netherlands repealed Burgerlijk Wetboek in 1992 and instituted NBW (Nieuw Burgerlijk Wetboek) to replace and refresh the previous arrangements. BW is still in force and the primary reference source for Indonesian civil law, unlike the Netherlands, where its viewpoint is considered invalid.

Because of the principle of concordance, Burgerlijk Wetboek (BW) was applied throughout the archipelago before establishing the Indonesian state; the laws in effect in the Netherlands were also used for all individuals residing within the Dutch colonial territory. BW continued to be implemented following Indonesia's independence to complete the country's lack of codified legislation. Article I of the Transitional Rules of the 1945 Constitution, which emphasizes that all written regulations that were previously in effect on Indonesian territory stay in effect until new legislation replaces them, serves as the legal foundation for the execution of BW. This clause offers official legal instruction that BW remains Indonesia's primary source of civil laws.[4]

The BW's regulations about land rights transfer are located in multiple books, specifically Book II on the property and Book III on contracts. The rule about the title is found in Book III and is the foundation for the parties' agreement before transferring the right. On the other hand, terms, procedures, and requirements for the parties to share the land are outlined in Book II. Therefore, BW emphasizes that the transfer of property rights must be based on a contract, in contrast to customary law, which views the transfer of land rights as not owing to an agreement. It serves as the cornerstone of a legal agreement that permits the transfer of land rights.[5]

According to BW, a sale and buy agreement is limited to a transaction in which one party commits to transferring an object, and the other party pays a fee (1457). An agreement is defined as an act by which one or more persons tie themselves to one or more other persons (1313). Consequently, the agreement to transfer ownership of the items between the seller and the buyer is what the sale and purchase agreement is. The fundamental component of the sale and buy agreement is this transfer of property rights.

Based on this agreement's interpretation, BW believes the parties' sale and purchase agreement has not yet transferred any property rights. The parties' rights and responsibilities are the sole things that make the deal binding. Apart from the mandatory agreement, further legal acts are necessary to transfer property rights. Levering is the name of this other legal action; it is also sometimes translated as *'penyerahan'*, or delivery, in Indonesian.

It is delivery, not a sale and purchase agreement, that establishes whether ownership of an item changes. The validity of the title on which the levering is based is one of two requirements for this levering's validity. The individual acting freely on the land (without any coercion or *beschickingsbevoegd*) is the one who must perform the levering. "Title" denotes that the sale and purchase agreement or the required action complies with positive law. In addition, the landowner or a representative designated by him has unrestricted authority.

There is a distinction in levering between mobile and immovable items. Transferring ownership of mobile objects is the process of levering them over. On the other hand, formal notary transfers (overachieving) of immovable things, like land in this instance, are done for Cadastral employees (land registrars). This can be seen in Articles 612, 616, and 620. In this case, it is interesting to quote Soebekti's opinion, which revealed the similarity of the transfer of rights between BW and implementing regulations for land registration No. 10 of 1961, or currently with Government Regulation No. 24 of 1997. According to him, in the land registration regulations, the transfer of land rights must be proven by a PPAT (*Pejabat Pembuat Akta Tanah*/ Land Titles Registrar) deed, and the transfer of land rights occurred when the deed was signed.

Next, regarding the land sale and purchase agreement concept according to customary law. An agreement in Adat Law is defined as an act by the parties to agree or approve certain things or actions based on full trust and marked by certain bonds. Traditional agreements place more emphasis on faith. Transactions of land rights in

customary law are divided into unilateral and bilateral agreements and included in bilateral categories such as clearing wilderness land and bilateral party categories such as sale and purchase agreements, grants, and others. Land transactions can also be divided into three types: the handing over of land with payment in cash and the provision that those who transfer land can re-own the land with payment of a sum of money. It is like a pledge. Second, the handover r of land with unconditional cash payments (forever/onwards), called *adol plas*, definitely Bogor, hereditary (Java), *menjual jada* (Kalimantan), *menjual lepas* (Riau and Jambi). Third, the transfer of the land with cash payments accompanied by an agreement that if there is no other legal action later, after one or two years or several harvests, the land will return to the original owner, called an annual sale *(jual tahunan), adol ayodan* (Javanese). Each region has the same pattern but may have a different mention. Each of these transactions gives various land rights according to Adat Law.

According to Soerjono Soekanto, land rights, according to customary law, can be divided into legal personal rights (community, family, clan) and natural private rights on land. Legal unique rights to land are rights owned by indigenous peoples and can be held individually. As in the Civil Code provisions, Adat Law also determines when a person has the authority or ability to carry out legal actions. All people in Adat Law are considered legal subjects (they have rights and obligations). Legal subjects are considered legally competent if they have legal capacity. The criteria for maturity or adulthood in Adat Law are not seen from age but from a biological and psychological point of view. This means that in Adat Law, the man or woman has legal capacity depending on specific characteristics. This characteristic is marked by the person being able to work independently, take care of his property and personal interests, get along in society, and be aware and responsible for all his actions.[6]

According to Djojodigoeno, Adat Law does not recognize a sharp distinction between a person who ultimately has legal capacity and who has no legal ability for legal action. The transition from incompetent to competent in reality gradually occurs according to circumstances. According to Adat Law, a person is declared fully capable of carrying out legal actions if he is already living independently and has his own family. On the other hand, it cannot be said that a person with no legal capacity is undoubtedly incapable of carrying out legal action at all. Every legal subject has the authority to carry out any legal transactions; namely legal issues have the power to transfer their rights to other legal matters. So, every legal subject has the authority to enter into agreements that give rise to separate legal relations and legal consequences, as in the land sale and purchase agreement. Agreements in customary law are more defined as the actions of the parties or legal subjects to agree on something based on complete trust and followed by a sign of a particular bond.

According to Ter Haar, a land purchase agreement may have three contents, namely: 1) Transfer of land rights, based on cash payments so that the transferor of rights still has the right to get the land back after paying the amount of money he has produced. For example, in this case, if it occurs in Pawn Selling *(Jual Gadai)*. 2) Transfer of land rights based on cash payments without the right to buy again. For example, in this case, if it occurs in the *Jual Lepas*. 3) Transfer of land rights based on cash payments with an agreement that the land will return after several years of harvesting and without specific legal action. For example, in this case, if it occurs in the *Jual Tahunan*. A sale and purchase land deal, according to Adrian Sutendi, transfers land rights in cash *(tunai)* and clear *(terang)*. To assign rights, one must do so in the presence of the community leader, who serves as an official with the authority to approve and announce the assignment of rights *(terang)*. Cash *(tunai)* refers to the simultaneous payment of the price and transfer of ownership. Money could mean that all or most of the down payment is made in cash or only a portion is.

According to Urip Santoso, there is just one legal action in a sale and purchase land deal under Adat Law: the buyer transfers the right to the land when the seller receives payment in cash (content). Land sales and purchases are not considered agreements, as defined by Article 1457 BW of the Adat Law. Nevertheless, it is a legitimate procedure meant to transfer land rights from the rightful seller to the purchaser in exchange for a cash payment made in front of the village chief or local customary chief *(terang)*. Like the previous explanation, Maria S.W. Soemardjono concluded that, by Adat Law, three criteria had to be met for a land agreement to be legally valid for the sale or purchase: *tunai, riil*, and *terang*. *Tunai* refers to the transfer of the seller's rights that occurs concurrently with the buyer's payment and that occurs instantaneously. The remaining amount the buyer owes to the seller will be treated as debt, and the price does not need to be paid in full. Thus, the word *"riil"* in this context refers to the requirement that the speech be accompanied by specific deeds, including accepting payment from the vendor and forming a consensus in front of the village chief. To make sure that the act does not break any laws, buying, and selling are done in front of the village chief or *terang*.

B. The Concept of Sale and Purchase Land Agreement in National Land Law

Every rights transfer must be registered with UUPA. According to property registration rules, a PPAT deed must be used as proof of any transfer of land rights, whether through purchase or sale. Although the terms of this government regulation also say that, under certain conditions, a deed not prepared by a PPAT deed may be used to show a sale or purchase, this is considered sufficient, in the opinion of the Head of the Land Office, to register the transfer of rights in question. Land Deed Officials must assist the government or the National Land Agency

with land registration duties. The PPAT's job is to ensure the deed has been produced precisely, with due diligence, by the parties' preferences in the sale and purchase by the law and with legal certainty. Furthermore, the purpose of the PPAT is to guarantee that the sale and purchase agreement does not contravene any Indonesian laws. The legislation under consideration includes written and unwritten elements, particularly community norms.

As a result, PPAT gives the precautionary principle top priority while handling land sale and purchase transactions. If specific requirements are not fulfilled, the PPAT must refuse the creation of a PPAT deed in the context of land registration, for instance, about unregistered land parcels, cannot demonstrate: a statement from the Village Head confirming that the person in question controls the land parcel mentioned in Article 24 paragraph (2), or a letter of evidence by Article 24 paragraph (1); a declaration indicating that the land parcel in question has not been certified by the Land Office, or for land situated in an area remote from the Land Office's headquarters.

The parties carrying out the legal action or the person designated by him with a written power of attorney must be present during the creation of the PPAT deed. According to the regulations, the PPAT deed must be witnessed by at least two witnesses who satisfy the requirements to serve as witnesses in a legal proceeding. These witnesses must attest to the parties' presence or that of their proxies, the existence of the documents used in the deed's creation, and the parties' execution of the legal action. According to Article 101, the PPAT must read the act to the parties and explain the intent behind the deed's creation and the necessary steps for registration.

The parties receive a copy of the two original PPAT deed sheets, one retained at the PPAT Office and the other presented to the Head of the Land Office for land registration. Within seven (seven) working days of the deed's signature, the PPAT is expected to deliver the PPAT deed and any other paperwork needed to register the transfer of the relevant land rights to the Land Office. According to Article 103 of the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1997, this need applies when rights are transferred through the sale or purchase of land that has already received certification.[7]

The causes and challenges of different legal sources that result in confusion while implementing sale and buy land transactions in Indonesia are discussed in detail. In contrast to other nations, Dutch Colonial Law significantly influences Indonesian law, particularly in the Netherlands. In the Netherlands, a notary handles everything. However, in Indonesia, the tasks and responsibilities of a notary and PPAT are distinct. A notary executes all genuine deeds, whether they pertain to land or not (without dividing the job of a notary and a PPAT). Because of the levering system, land and building transfers in the Netherlands are completed by executing a transfer deed. The notary also verifies the legal status of the land and building's owner, including his ability to transfer ownership, the type of ownership, and any debts from the seller about the mortgage. In addition, the notary verifies whether the local government may have a pre-emption right. Pre-emption precisely refers to the right of an individual or organization to purchase property in advance from other buyers, particularly when it comes to public land, where the request is granted because the individual or organization has inhabited the ground for a predetermined amount of time before the sale and purchase being completed. An essential part of the registration procedure is the notary office—the deed the notary made must be archived as soon as feasible.[8]

Interestingly, all payments in the Netherlands must pass via a notary, who keeps a certain amount of cash in their office until the transfer deed is signed and recorded. It has been established by the registration office that no third party has demanded forfeiture during the period between the deed's signing and registration. Buildings and land are transferred quickly and safely. The buyer often has access to the property and building a day or two after signing the transfer document. Therefore, in the Netherlands, the notary verifies the transaction is secure by determining if the object is subject to legal action. Still, it also guarantees that payments made to the seller are secure. To implement this payment security, funds must first be obtained from the buyer and sent to the seller.

To demonstrate the seller's good intentions, 10% of the sale must be sent to the Dutch notary beforehand. In addition to showing the seller's good faith, this 10% payment acts as transaction security. The money placed will belong to the seller in the event of a breach of the agreement. The buyer must finish the remaining 10% and send it to the notary, not the seller before the deed is signed. The notary bears responsibility; upon completion of all transfer procedures, the seller will release the purchase payment. Prudence is required because the Netherlands uses a negative publication system or title registration. In the Netherlands, the function of the notary is essential to reducing the vulnerability of this negative publication system. A notary is an official whose actions are insured while they are being performed.[9]

As a result, there are less risks for both buyers and sellers. If the notary performs as outlined above, the insurance provider will cover the notary's liability for any resulting damages. One of the best insurance-covered professions is notarial work. When a notary is held accountable for mistakes or losses, the insurance company will pay up to 5 million euros, or roughly 800 billion Rupiah, for each instance.

Indonesia has a variety of laws governing the sale and purchase of land, as opposed to the Netherlands, which has a single legislation governing these transactions. It is known that the Dutch government had controlled the region in Indonesia. One of the worries of the Dutch administration when they ruled over Indonesia, was la. The Dutch concept is the concordance principle to uphold its civil law requirements in the Dutch East Indies. The adoption of the Dutch Civil Law was complex and even opposed by certain Dutch people, particularly those who did not hold public office. One of these opponents was Cornelis van Vollenhoven, who claimed that immigrants

should not be subject to Dutch civil law. As a substitute, Cornelis van Vollenhoven created the Adat Law, which was the indigenous people's original legal system at the time.[10]

Jan Michael Otto claims that four factors have traditionally shaped the law in emerging nations: The first layer is made up of community-recognized customary laws; the second is made up of religious laws; the third is made up of legal regulations from the colonial state; the fourth is made up of current, evolving national law; and the fifth is made up of international law. These five positive legal layers frequently differ for emerging nations and depend on the specific location and period.

The inadequacies of the legal system in developing nations stem from both non-legal and legal factors. The legal domain relates primarily to the lack of legal precedents controlling certain instances. Determining which law or rule applies in a given situation might be challenging. Choosing the appropriate laws and how these regulations are interpreted is problematic in developing countries due to the variety of regulatory versions. In addition, variations in this layer of law frequently have implications for what ought to be law, so formal-jurisdictional legal certainty is still a long way off. Consequently, the legal certainty discussed here is the certainty of which source will be cited or utilized as a foundation for law when addressing particular situations. Legal enforcement is implemented consistently to provide a prediction, along with hope and trust, that the rule of law will continue to be applied and interpreted similarly to the following legal subject who performs a similar legal action.[11]

The following conditions must be satisfied to ensure the previously mentioned legal certainty, or at the very least, to be able to fulfill juridical legal certainty: 1) The state has the authority to establish clear, uniform, and easily accessible legal rules; 2) Government agencies adhere to and apply these rules consistently; 3) The majority of citizens generally agree on the content of these rules and adjust their behavior accordingly; 4) Independent and unbiased judges (judges) apply these legal rules consistently when they decide legal disputes that are brought before them;

Therefore, the availability of positive law, which acts as a foundation or guide for the community to carry out particular legal actions, is the primary necessity for legal certainty. The community's *volkgeist* should be the source of this law's text so that it may be easily modified to account for changes in behavior. Following the release of the legal regulations, the executive and judicial branches must act consistently to provide guidance when making decisions or responding to particular, concrete legal acts. History reveals that the issue of land rights transfer started when the Dutch colonialists took control of Indonesia, long before Law No. 5 of 1960, which established the Basic Agrarian Law, was passed. Adat Law applies to indigenous peoples, while Dutch civil law applies to European populations, with limited exceptions for immigrant Easterners.[12]

III. CONCLUSION

According to historical accounts, the Dutch Colonial administration implemented the stipulations of Article 131 IS during the Dutch colonial era, which marked the beginning of pluralism of the legal sources of land sale and purchase agreements in the archipelago. Following Indonesia's independence, Law Number 5 of 1960 addressing Basic Agrarian Law was enacted, unifying this legal heterogeneity. This Act does, however, have certain restrictions. For instance, it does not specifically and comprehensively specify the land sale and purchase agreement terms. The lack of these standards has led to different interpretations and theories about the legal foundation for land purchase and sale agreements. These theories range from *Burgerlijk Wetboek*, Government Regulation No. 24 of 1997, and Customary Law to a combination of these different legal sources. The fact that Indonesia has multiple legal orientations also affects how ambiguous the source of law utilized as a reference is. The general state of affairs in other developing nations is comparable to this. The Supreme Court Circular Letter, which affirms the distinction between legal sources for certified and non-certified land and the variations between Procedures in Government Regulation No. 24 of 1997 and Processes in Adat Law, are further examples of court decisions that vary based on legal considerations.

IV. REFERENCES

[1] D. Ginting, “Legal Status of Land Deed Officers in Land Registration for Preventing Land Disputes in Indonesia,” *J. Leg. Ethical Regul. Issues*, vol. 24, no. 1, pp. 1–9, 2021.

[2] A. Goymour, S. Watterson, and M. D. (Eds), “New Perspectives on Land Registration: Contemporary Problems and Solutions,” *J. Prop. Plan. Environ. Law*, vol. 11, no. 3, pp. 171–175, 2019.

[3] P. Anthias, “Rethinking territory and property in indigenous land claims,” *Geoforum*, vol. 119, pp. 268–278, Jan. 2021, doi: 10.1016/J.GEOFORUM.2019.09.008.

[4] P. O’Brien, A. Lord, and S. Dembski, “How do planners manage risk in alternative land development models? An institutional analysis of land development in the Netherlands,” *Land use policy*, vol. 91, p. 104409, Jan. 2020, doi: 10.1016/j.landusepol.2019.104409.

[5] M. Cai, I. Murtazashvili, and J. Murtazashvili, “The politics of land property rights,” *J. Institutional Econ.*, vol. 16, no. 2, pp. 151–167, Jan. 2020, doi: 10.1017/S1744137419000158.

[6] M. Dodson and D. McCarthy, “Customary land tenure issues in Australia,” *The Genesis of the Papua New*

Guinea Land Reform Program. National Research Institute Monograph, pp. 85–105, 2013.
[7] A. S. Ayuningtyas, R. Candrakirana, and F. Ulfatun, "Perlindungan Hukum Bagi Pemegang Sertifikat," vol. 1, pp. 69–77, 2020.
[8] M. Hanifah, S. Y. Ardiyanto, and H. Tegnan, "Legislation to Reduce Land Conflicts in Indonesian Provinces," *Environ. Policy Law*, vol. 48, no. 6, pp. 412–415, 2018.
[9] M. Faisal, "Makna Itikad Baik sebagai Landasan Hak Kepemilikan Pembeli: Wujud Standar Tindakan dalam Menentukan Kejujuran Pembeli," *J. Mercat.*, vol. 14, no. 1, pp. 9–19, Jan. 2021, doi: 10.31289/mercatoria.v14i1.5079.
[10] R. Myers, D. Intarini, M. T. Sirait, and A. Maryudi, "Claiming the forest: Inclusions and exclusions under Indonesia's 'new' forest policies on customary forests," *Land use policy*, vol. 66, pp. 205–213, Jan. 2017, doi: 10.1016/J.LANDUSEPOL.2017.04.039.
[11] D. P. Rahayu, F. Faisal, R. Sari, and N. Satrio, "Law Enforcement in the Context of Legal Culture in Society," *Law Reform*, vol. 16, no. 2, pp. 276–289, 2020, [Online]. Available: https://ejournal.undip.ac.id/index.php/lawreform/article/view/33780.
[12] T. D. Murbarani, "Status Hukum Tanah Keraton Kasepuhan Cirebon Setelah Berlakunya Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria," vol. 18, no. 2, pp. 117–125, 2019.