

# THE TURBULENCES OF STRATA TITLE IN THE LEGAL SYSTEM OF INDONESIA AS A RESULT OF MALCADASTRAL

*By Martin Roestamy*

## THE TURBULENCES OF STRATA TITLE IN THE LEGAL SYSTEM OF INDONESIA AS A RESULT OF MALCADASTRAL

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### Abstract

*The theories that underlie this paper are basic law that is Pancasila in Indonesia as the source of all law sources, discussing basic rights of people that announced in the 1945 constitution to defend people's rights by building legal construction through harmonizing laws based on construction theory, discusses the theory of the benefits of the use of law and the theory of justice. In the practice of ownership of strata title, it is recognized that there are housing units that are separate objects both vertically and horizontally with the land, but de facto ownership cannot be separated from the land, due to one-time registration at the same time which impacts on weakening of property rights and tends to cause confusion law and has the potential to become a turbulence in property law in Indonesia.*

*Keywords: property rights; property law; housing; turbulence*

### I. INTRODUCTION

There are several factors that lead to the occurrence of turbulence in the ownership of the property that is now the case that, many claim to the developer through the district court on the status of land rights to build the expired them to land over management rights are not extended, because the owner of the management rights in terms the Jakarta provincial government or local-owned enterprises do changes in land use with a new project that is not housing for example. There are cases that are not known by consumers due promotions are not transparent from the developer at the start of the sale, that the apartments (flats residential or non-residential to office and Regions commercial) built on land rights which the period is limited to 20 to 30 years only. Then the building rights granted over management rights owned by local governments or government-owned areas that charge the price of land to the value of the Taxable Sale Value (NJOP) multiplied by the area of land that must be paid by the consumer, either pro rata or by the building owner to ownership of non-residential building or a commercial from the beginning also charged money for the country's revenue application for renewal of building rights. In this case, the case of payment twice for the land object; first to the state for the money income countries (UPN), and then a second payment to the owner of the management rights in this case the consumer to pay twice for the same ground objects, and are regarded by consumers as unfair terms. Must keep in mind that many consumers who bought units or building flats non-residential (commercial) is a multinational company that has investments in Indonesia, a good investment on the object properties and investments of manufacturing, agriculture, or other businesses that need office space to work or head office in Jakarta and other city areas. Among them, too, need housing units for officers stationed in Indonesia.

Related multinational companies, as investors build a business through a company that is subject to the laws of Indonesia (Indonesian incorporation), then the problem of legal uncertainty of flats both residential and no-residential, as mentioned above, will bring influence to investment in Indonesia.

Because according to a survey, complaints about land law and property law of some foreign investors, especially from Japan and the Region of Central Asia, considers the Indonesian law has been in force is not balanced, one facet expect investment in Indonesia advanced, but the law of the land and property law are not addressed so that it becomes something competitiveness. Ignorance about the time period shorter building rights for the investment period is very long. In some countries, such as Singapore, for example, granting property rights to both local residents and foreign nationals competitively is to lease-hold (75 years) or free-hold (95 to 125 years). Similarly, in Malaysia, the practice of lease-hold and freehold apply for locals and foreigners. As in Japan, there are no restrictions on the term of right, not restricted to foreign nationals to have rights. For foreign nationals who have the ability to buy property freely and obtain proper legal protection, because it has the status of land property rights. Turbulence state property law has entered a critical area, and requires awareness of property agents, stakeholders, especially the government to look in all its aspects.

In other cases, for those properties whether simple or commercial, there is a concealment of data from the developers of the burden of mortgage (mortgage) of the loan granted by the bank to build a property to make the land of building rights (land of origin) as the right base unit apartment unit construction both residential and non-residential. In banking practice, building rights were pledged as collateral for the financing of the project, known as *Kredit Yasa Griya* (construction loan), in this case the developers as holders of rights to build offers a certificate as collateral for construction loans and to note that the building rights is the right of the origin of the emergence of property rights apartment unit in which includes communal rights, namely the collective land rights, objects together, and parts together; and personal rights, namely the right upper unit apartment units as specified in the certificate of ownership apartment unit (SHM SARUSUN).

The building rights will be bonded as a bank guarantee until the issuance of the certificate unit apartment units, and will remain bound before the omission of liability which is called *roya*, for the parent certificate or units that will do partial omission of liability after the hand-over. The question is if the developer did omission of liability on certified aircraft, whether after the debt is paid off from the sale or gradually by partial omission of liability. The problem would arise, if in the middle of the sales process, developers did not get the result in the potential market for bad loans, whereas some of units have been handed-over to the end-users. Then, how end-users who have paid off the purchase price either directly or bank credit? System of registration of rights to flats and removal of encumbrance in Indonesia does not give legal certainty to consumers, although consumers have paid off the unit price of the apartment units (residential and non-residential), there is no guarantee either by the authority land registration (national land agency) or from developers, consumers secure their rights, because there are cases in Taman Rasuna Epicenter, where the consumer has paid the price of the house to the bank, and ask being partially omitted of liability to the unit has, but it cannot be granted by the land office, given CA. (building rights) are still burdened with debt. Therefore, the unit owners have to wait for the developer to repay their debts and the omission of liability parent certificate, then later partial omission of liability to the top of the unit can be serviced. This is the result of the system of registration of one and the same time between coinciding rights to a piece of land which is derived from the comparison value proportional (NPP) of each unit with communal lands are ground together in one hand with the land of origin (HGB Parent) are still held by the top the name of the developer. For foreign investors, it is not only confusing, but rather a land registration system and the system of registration of property rights carried apartment units together as practice is considered dangerous and is a threat to the survival of the rights owned by each party.

Since the enactment of Law No. 18 of 1985 concerning strata title, at a relatively young age, 11 cases could be heard that reached the Supreme Court regarding disputes over land rights and strata title, and with the enactment of the change of the UURS to No. 20 of 2011, no significant improvements have been seen, particularly regarding the registration of a certificate of ownership one time at a time, which includes collective ownership, namely: shared parts, shared objects, and shared land; and individual ownership, namely the unit and an inseparable piece of land due to the Proportional Comparison Value. As a result of the registration, many disputes are experienced between the developer and the Association strata title owners, (Easthope, Hazel, and Bill Randolph) between the developer and the unit owner, or between the unit owner and building management who tend to lead to the chaos of property law, legal uncertainty and injustice, which tends to experience legal turbulence future property.

In the legal system in Indonesia, flats or apartments are strata title buildings built in an environment that is divided into functionally structured sections, both horizontally and vertically and are units which can each be owned and used separately, (Palmer, S., Rusniah, A., Fauziah, N., & Nursadi, H.) especially for dwellings supplemented by shared parts, shared objects, and shared land, therein is an element of ownership in the strata title unit in the form of an individual title certificate, including rights attached to shared land as an element of strata title ownership, land which is an inseparable part of joint ownership is calculated based on proportional comparison value. Other elements of ownership of strata title is communal rights, namely:

1. Shared part is part of the strata title that is not separately owned for joint use in a unitary function with housing units. The joint part is a building structure that is not separate from the strata title building. The shared part cannot be shared or used individually by the owner of the housing unit, but it is a shared right which is an inseparable part of the housing unit. Examples of shared parts are foundations, columns, beams, walls, floors, roofs, gutters, stairs, elevators, corridors, channels, pipes, electricity, gas, and telecommunications networks.
2. Shared objects are objects that are not part of a strata title but are partly owned jointly for shared use. Common objects are shared property, but their properties are separate from the structure of strata title building. Common examples are meeting rooms, plants, garden buildings, social facilities buildings, places of worship, playgrounds and parking lots that are separate or integrated with the structure of strata title building. And shared objects become part of the joint if built as part of the strata title building.
3. Shared land is a plot of land rights or leased land for a building that is used on the basis of a shared right not separately on which the Highrise Building stands and the limits specified in the building permit requirements. Shared land is not only the property of strata title owners who are on the ground floor but the common property of all strata title owners in the building.

These three elements, the rights of which are published after one registration and at the same time, are formed by the strata title unit which is carried out by the local government land office simultaneously in one certificate of proof of rights, land rights and rights to the strata title unit which was declared born and the law is recognized as a new right which covers the above elements and is de facto subject to the land law regime. In addition, when a certificate of ownership of a unit rises, practically the ownership of rights to objects that are separated from each other, namely units, shared objects, shared parts and shared land, and land which are rights calculated based on proportional comparison value of shared land compared to the area of the unit in accordance with a legal act known as the deed formation of a statement to be able to find out the wide separate parts of the objects which are united in one certificate. (Van Der Molen)



From this description, it can be understood that nothing happened with the registration of ownership rights of the strata title with the one-time registration, even though there are legal acts with five different objects, namely land, objects, shared parts, housing units and building right has been registered in advance, using the term "separate but attached". (HARRIS, Paul B.; BROWN, Barbara B.; WERNER, Carol M.) In the writer's opinion, the term contains contradictions, because there have been many legal cases in the matter of this registration which result in different treatment of land as an independent right and building which in this case is a strata title as a new object in the legal system of objects. (Kalantari, M., Rajabifard, A., Wallace, J., & Williamson, I) In fact, the unit as an object is increasingly weakening its rights following the process of weakening the building right due to the Proportional Value Comparison of shared land that is separate but attached to the unit.

Many people are not aware of it, even accept it happily, even though on the other side a big problem is waiting according to time. The problem starts with the status of joint land ownership, namely land originating from the Right to Build as the capital of the developer to build a strata title building, then it will be shared land owned by each unit owner proportionally, then what will happen to the original building rights as a right Is there a confusion in the shared land basis in the transfer of rights from the developer to the association of residents and owners of strata title units?

The problem is more complicated when the unit owner who has a certificate of ownership rights to the strata title unit wants to use his rights if he wants to guarantee or want to transfer; i.e. sells, donates, or makes stock deposits. The obstacles lead to the national land office for a variety of reasons, including the right to use of buildings whose validity period has expired, the period of which must be extended. On the other hand, the strata title development process can take up to 5 years or more. That is, if the issuance of building rights together with the commencement of a development project, it is very risky to obtain land acquisition until the issuance of a building rights certificate quickly, even though everything depends on the issue of the origin of the land. Likewise, the process of applying for building rights by the developer to the national land office depends on the basis of rights and the relationship with the previous acquisition of land rights. The 5-year time limit may be from the submission process of the building rights which will cut the validity period of the building rights certificate which is 30 years. Even though there are also tenure rights for buildings that are only 20 or 25 years, which is certainly a time bomb for the next unit owner.

The method used is normative approach (Kanbur, R., & Shaffer, P.) by looking deeper into legal norms governing associated with postulates of the law on property rights of strata title unit registration, that is called as cadastral that is an integral part of the joint part, shared objects, and shared land, nor a land proportional integral part of the pieces on the shared land.

## II. DISCUSSION

Turbulence (Allen, C. R., Fontaine, J. J., Pope, K. L., & Garmestani, A. S.) is one of the weather phenomena and irregular air movements from vortices and vertical currents that disrupt aircraft travel and can cause structural damage. Turbulence referred to in the perspective of property law in this paper is chaos, upheaval, chaos, and uncertain and uncontrolled situations and will harm the structure of social stability to the people, in this case, the owner of the housing unit.

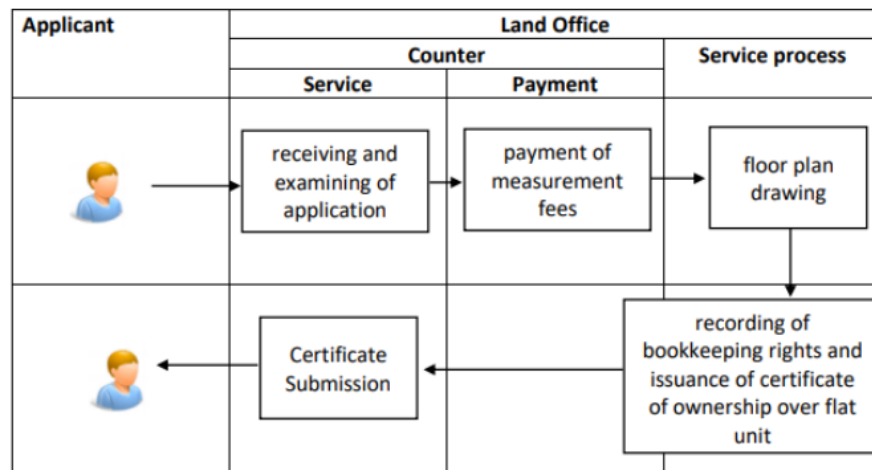
Meanwhile, Land Registration (Wallace, J., & Williamson, I), which is a series of activities carried out by the government on an ongoing, sustainable and regular basis (Article 1 number 1 PP Number 24 of 1997). Each building construction can be given a building ownership status in addition to the ownership status of the land (article 8 paragraph (1) and (2) UUBG No. 29 of 2002), even mandated by building

registration and issuance of building certificates is an obligation that is the duty of local governments (paragraph (4)). The building cadastral which is carried out in conjunction with the cadastral land which is integrated into the unit of ownership of the housing unit technically facilitates the registration process, but legally it raises legal issues which up to now have been a dispute between the extension process, the process of transferring rights to the building to the association of owners and occupants' strata title buildings, the process of registering shared land can be said to be far from expectations or not by the initial promises at the time of marketing.

Mal- is the wrong way, and cadastral is derived from a map or survey, which shows the extent of value, and land ownership, especially for taxation. Also called cadastre, which is a comprehensive recording of land from real estate or real property and the boundaries of a country (Koroso, N. H., Van der Molen, P., Tuladhar, A. M., & Zevenbergen, J. A.). So, malcadastral in the field of property law can be translated as registration carried out by an improper institution, the Land Agency, which registers once at a time between land registration and registration of housing units in one certificate. How does the Land agency can register the building?

Housing registration is combined with land registration, as a result, if the building rights expire then the building will also weaken and the ownership will end. The application of the principle of sticking comes from the inheritance of Dutch Law by ignoring Customary Law (Suartika). This has happened until now, wherein there is no transfer of shared land rights from the developer to the association of owners and occupants of the strata title building that are entitled to land ownership, namely community ownership. The National Land Agency, as a government authority, seems less concerned with these conditions, so that it only highlights the sectoral ego which is very bureaucratic. as a result, there is a conflict of interest among government agencies, developers, and the community of strata title owners (Tang, Y., Mason, R. J., & Sun, P.).

**Chart 1.** The Registering Process of Property Rights of The Unit



Source: from BPN-RI 1.5

The process of registration of rights that has been running is as stipulated in the basic agrarian law which is the principle of the cadastral system since the colonial era with the term *Agraris Wet* (Van der Krabben, E., & Jacobs, H. M.). Land registration becomes dominant over building registration because

the office for registration of building rights to issue building certificates has not yet been realized. That is because there are doubts that the bureaucracy has not yet received coordination and synchronization from the central government. In the end, the registration of land and buildings became one-time registration under the authorization of the National Land Office. Therefore, it found legal uncertainty due to one-time registration between building right and strata title issues caused by the *assesie* principles has resulted in turbulence in property law, instead of the principle of horizontal separation.

There are many data of Backlog, Bad debt loan, Developers' bankruptcy, business treat, buying and selling cannot be done on the track of property development in Indonesia (table 1).

Table 1. Cases

No.	Disputing Parties	Type of Case	Judgement Code
1.	Between developer (PT. Duta Pertiwi) and the owners of Flats Place: ITC Mangga Dua Jakarta	Case: building rights cannot be extended  HGB that has ended cannot be extended even though 90% of property rights of flat units' owners have agreed and paid the building right renewal fee, this happens because it turns out that the building rights turns out to be management rights. Happened in 2008	Decision of the Supreme Court Number 364 PK/Pdt./2016
2.	Between Developer (PT. Duta Pertiwi) and Association of flats unit owners (P3SRS)  Place: ITC Cempaka Mas Jakarta	Case: building rights cannot be extended  It has been 18 years since the Association of owners of flats has been established, but the right to use the main building has never been reversed. In addition, PT. Duta Pertiwi takes advantage of the residents from the results of the management of Water, Parking, Canteen, which should be the income of the flat owner association. Occurred since 1997.	Decision of the Supreme Court Number: 41 PK/TUN/ 2017
3.	Management Conflict  Place: Slipi Apartment	Case: building rights cannot be extended  The dispute in 2008 during the election of the management of the association of owners and occupants of flats during the period 2008-2011 occurred a dispute on both sides and reported to the court. building rights expired in 2012.	Decision of Administrative Court Number: 182/G/2012/PTUN-JKT

These all are because of the building right period ends and National Land Office is not willing to serve. Furthermore, become the problem of Land transfer from the first buyer to the new one. Besides, it found also several problems are occurred as the consequences of malcadastral registration, namely:

1. Bank rejection for the mortgage and credit application; cannot do grant, exchange, inheritance, and such.
2. Barriers to any transition and imposition of land rights such as mortgage rights.
3. The expiration of the right to the building coincidentally weakening building ownership.
4. The unit status becoming worthless time to time and disadvantageous situation for the owners.
5. All the government agencies and stakeholders exchanged responsibilities, especially the National Land Agency as the appointed institution for land arrangement had been not aware of the issue.

Finally, this situation will continue throughout and potentially become a turbulence.



### III. RECONSTRUCTION

Legal Reconstruction is an activity of analysing after observing, selecting and sorting about how the legal construction built by the legislators and how the legal strength of material rights absolutely must be possessed by objects, then with a process and institutional approach, it can be known weaknesses in legal construction and how to carry out the reconstruction of the principles and conventions with the theoretical reconstruction approach to law (Alhajri). Legal reconstruction approach as the stages proposed by John Henry Merryman becomes a reference (Merryman), namely; first, tinkering harmonization is the harmonization of law through the optimization of the application of existing law with several adjustments, based on efficiency considerations. Second, following harmonization, refers to the harmonization of laws in certain fields aimed at adjusting existing law to social changes. And third, Leading harmonization, refers to the application or use of law to make social changes. So, in the context of harmonizing law, in the scope of the law of objects, agrarian law (land law), building law, and property law, these stages will be used as a step to rebuild the concept (reconceptualization) of building law development in an effort to build self-reliance on building rights, which in turn became the domain of property law in Indonesia. Reconceptualization stage can be done through the building law phrase as a novelty which is the responsibility of the author in this paper in accordance with the stages to completion.

In the regime of land and non-land (i.e. buildings) registration in Indonesia, there is a dualism of different registration regimes. First, the land registration regime based on PP 24/1997 concerning Land Registration and Second, the building registration regime PP 36/2005 concerning Implementing Regulations for the Building Law. At first glance, the presence of these two different regimes seemed to have separated the land from buildings on the ground. However, problems arise when PP 24/1997 states in Article 9 that one of the objects of land registration is the Right to strata title, while based on the characteristics of the strata title is an object located on the ground and qualified in terms of building. Therefore, this confuses the practice of registering land and non-land objects (buildings).

In the above review, it has been stated that based on the principle of horizontal separation in customary law which is also adhered to by the Agrarian Law and Building Law causes the division of objects into two categories, namely land and non-land objects. The definition of non-land objects is any object related to the land's underneath. In this sense, the material objects are generally planting that stands on the ground and buildings that stand on the ground. In the context of this study, the definition of non-land objects is narrowed down in the form of houses or buildings.

In the construction of legal thinking, then something that is publicly binding must also be known by the public so that the new material rights are perfect when the terms and conditions of the principle of publicity is fulfilled (Van Der Molen), where such rights have been announced. The common mechanism in announcing a object right owned by a person is by interfering with the authority of state in carrying out the announcement process, in the context of Indonesia, for example in the ratification of a limited liability company, the publication that is common to a person's material rights is the ratification process carried out by Notaries as public officials are then registered with the Ministry of Law and Human Rights to be published in the state news. Through this series of processes, then the principle of publicity is fulfilled. The role of the state in the process of announcing material rights is not merely an administrative process. The state's representation in the process is intended to provide legal guarantees that the information announced is true as long as it is proven otherwise. Such legal guarantees ultimately create legal certainty and right holders can definitely enjoy the object rights they have.

The aforementioned construction thinking can also be applied in analysing the certification of a building or house-building rights in the creation of legal certainty. The role of the state in the process of



establishing certificates of building or house rights equivalent to the concept of the state put its will in the process of the announcement (the principle of publicity) and the issuance of certificates (Ekpodessi, Serge Gérard N., and Hitoshi Nakamura.). Any waiver of any action that disturbs the enjoyment of the building or house rights holders will get a reaction from the state in the form of sanctions. Sanctions for pleasure disorders can take the form of criminal sanctions (property offenses), civil and administrative sanctions. So that the formation of Certification of building and house building rights, becomes an effective instrument to achieve legal certainty related to ownership of building and house building rights. (Kelly, Scott, Doug Crawford-Brown, and Michael G. Pollitt.)

Substantially, the idea of certifying ownership of a building or house is intended to provide legal certainty and legal protection. To create this, it needs to create a system of registration regimes that are accurate and reliable. There are several criteria for creating such a registration system. First, it is to provide clarity about the institutional rights that are the objects of registration; second, the suitability and accuracy of the physical data of objects and their juridical data; third, the appropriate institution assigned to carry out the registration process; and fourth, strict administrative requirements to guarantee the accuracy and initial information data about the material object.

This then brings the understanding, that the institutional rights to buildings are as complex as the institutional rights to land which cannot be reduced to one particular type of institutional rights, in building law only stated Building Ownership. Such an arrangement cannot meet developments in industrial building or home sector (property) industry practices, so it requires institutional nomenclature of building or housing building rights that are in accordance with practical needs and in accordance with the characteristics of the property sector business. (Koroso, N. H., Van der Molen, P., Tuladhar, A. M., & Zevenbergen, J. A.)

The development of building law is carried out with the pattern of applying the principle of horizontal separation, carried out in harmony with efforts to harmonize building law and land law with due regard to legal certainty. The application of the principle of horizontal separation is considered to be the best way not only to impede the provision of property for strata title ownership, but also a way out of land disputes that are unrelenting in the land law.

#### IV. CONCLUSION

The development of building legal regulations is carried out through, First, changes to building regulations will provide legal certainty for property businesses in Indonesia. This is related to a more orderly arrangement and also results in clarity of buildings or building units to be sold to consumers. Second, with a clear and separate ownership status of the building and ownership of land rights, the development of the market for buildings to strata title is wider open.

Furthermore, the development of building law will provide legal protection for the people of Indonesia because the ownership of strata title for buildings will be regulated in such a way so as not to interfere with the right of Indonesians to own buildings, especially to meet decent residential needs. Also, the development of building law is oriented to methods, principles, institutions, and processes or substances especially regulatory models, legal structure and culture, in addition to placing them in the Legal Sciences tree.

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