

THE APPLICATION OF MODERN LEGAL POSITIVISM TO THE PRINCIPLE OF LEGAL CERTAINTY IN CERTIFICATE OF PROPRIETARY RIGHTS TO LAND

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Abstract

Certificate of ownership of land is a strong and complete proof for everyone whose names are listed and listed in the certificate of ownership of the land. However, in reality the SHM on the land can be canceled at any time as stipulated in Article 32 of Government Regulation Number 24 of 1997 concerning Land Registration, whereas in Article 20 Paragraph (1) of Law Number 5 of 1960 concerning Agrarian Principles it is stated that property rights, namely as hereditary rights, the strongest and fullest. Thus the legal certainty of SHM on land is not absolute because the SHM on the land can be canceled at any time. It is necessary to renew the principle of negative publications with positive tendencies that do not have a strong rationale for legal certainty, justice and expediency. The problem is, how is the legal certainty of the current Land Ownership Certificate which can then be canceled after a period of five years has passed since the issuance of the certificate of title to the land through a modern legal positivism approach? and what is the solution to the cancellation of land title certificates based on the conditions of *das sein* and *das sollen*?. The research method, in this dissertation research used normative juridical research methods. The conclusion of the study, the land registration system in Indonesia adheres to a negative publication system with a positive tendency. This system basically does not provide legal certainty, let alone good legal protection for certificate holders.

Keywords: Land Title Certificate, Legal Certainty, Proprietary Rights

INTRODUCTION

In a legal regulation, there are legal principles that form the basis for its formation. Satjipto Rahardjo said that legal principles can be interpreted as the "heart" of legal regulations,¹ so to understand a legal regulation it is necessary to have a legal principle. Karl Larenz in his book *Methodenlehre der Rechtswissenschaft* said that legal principles are ethical legal standards that provide direction for the formation of law.² Because the legal principle contains ethical demands, the legal principle can be said to be a bridge between the rule of law and social ideals and the ethical views of society. One of the principles of law is legal certainty.

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that the earth, water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people. Based on this, the Government is obliged to regulate all natural resources in Indonesia, including land for the benefit of the community. For this reason, it is necessary to have a national land law that is able to realize the embodiment of the spiritual principles of the State and the ideals of the nation, namely Belief in One Supreme God, Humanity, Nationality, Democracy, and Social Justice.³

In this regard, the Government of Indonesia on September 24, 1960 promulgated and began to enact Law Number 5 of 1960 concerning Basic Agrarian Regulations, better known as the Basic Agrarian Law (UUPA). With the birth of this LoGA, a uniformity has been achieved regarding land law, so that there are no longer rights to land according to Western law in addition to land rights according to customary law⁴ or it can also be said that there has been a legal pluralism in the land sector.⁵

Article 6 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles states "All land rights have a social function." On the basis of its authority, the state grants land rights to individuals, legal entities or government agencies. After obtaining land rights, the land owner already has proof of rights, so that he can use the land parcels without disturbing the rights or interests of others.

In order to realize legal certainty on the subject of land rights, Article 19 paragraph (1) of the UUPA states that "to guarantee legal certainty, the government is holding land registration throughout the territory of the Republic of Indonesia, according to the provisions regulated by government regulations." Furthermore, in paragraph (2) it is stated that the land registration⁶ in paragraph (1) includes: "a. Land measurement, mapping and bookkeeping, b. Registration of land rights and the transfer of these rights, c. Provision of valid proof of rights documents as strong evidence. The implementation of land registration as mentioned above was initially regulated in Government Regulation Number 10 of 1961 concerning Land Registration which later in accordance with existing developments has been refined into Government Regulation Number 24 of 1997 concerning Land Registration (LN. 1997-42 TLN. 3696) (hereinafter referred to as PP Number 24 of 1997).

Land registration is an important means to realize legal certainty regarding land rights, which in modern society is a State task carried out by the Government for the benefit of the people, in order to provide legal certainty in the land sector. The land registration system in Indonesia, which is categorized as adhering to a mixed system of the two, is a negative system with a positive tendency, i.e. the State does not absolutely guarantee the truth of the data presented in the certificate, but as long as no one else files a lawsuit to the court who feels more entitled, the data will be in the certificate is a

¹ Satjipto Rahardjo, *Legal Studies*, Bandung: Citra Aditya Bakti, 2012, p. 45

² Dewa Gede Atmaja, "Legal Principles in the Legal System", *Journal of Kertha Wicaksana*, Volume 12, Number 2, 2018, p. 146

³ Yudhi Setiawan, *Mixed Legal Instruments in Land Consolidation*, Jakarta: PT. Raja Grafindo Persada, 2009, p. 5.

⁴ CST Kansil, *Civil Law Module*, Jakarta: PT Pradnya Paramita, 1995, p. 178.

⁵ Maria Sumardjono, *Tanah*, Jakarta: Kompas, 2009, p. 56.

⁶ AP Parlindungan, *Land Registration in Indonesia*, Issue I, (Bandung: Mandar Maju, 1999), p. 18. The term land registration is derived from the word "Cadastre" in Dutch, which is a technical term for something that refers to the area, value and ownership (or other basis of rights) of a plot of land. While the word "Cadastre" comes from the Latin "Capitastrum" which means a register or capita or unit made for Roman land taxes (*Capotatio Terrens*).

strong proof of rights.⁷

Article 32 paragraph (1) of PP Number 24 of 1997 implies that the certificate is a strong means of proof and as long as it cannot be proven otherwise, the physical data and juridical data listed in the certificate must be accepted as correct data, while paragraph (2) emphasizes more more guarantees of legal certainty and protection for land certificate holders.

Land registration with a negative publication system cannot provide legal certainty and maximum legal protection to people who are registered as rights holders, because the State does not guarantee the truth of the data presented to other parties who can provide stronger evidence. Holders of land rights who have evidence of land certificates can lose their rights at any time due to a lawsuit, as a result the certificate will be canceled.

The researcher uses a modern legal positivism approach. This flow is allegedly derived from the influence of the wave of positivism philosophy.⁸ Legal positivism is identical with the actions of officials who are ignorant, rigid, or old-fashioned in applying the law only to the extent of the material articles in the law. Legal positivism according to Prof. Soetantyo, it must be linked the use of the natural sciences to science, including law.

Research on land title certificates has been carried out by Saim Aksinudin with the research title "Legal Certainty of Ownership of Certified Land Ownership Against Customary Law in the Land Law System in Indonesia". Dissertation from Pasundan University, Bandung.⁹

In this study, researchers examine several Court Decisions within the scope of the State Administrative Court. Some examples of State Administrative Court decisions, namely researchers reviewing Decision Number: 206/G/2016/PTUN-JKT. The Jakarta State Administrative Court which examines, decides and resolves State Administrative disputes at the First Level with the Ordinary Procedure, has rendered a decision with the following considerations, in the dispute between:

Next is Decision Number 13/G/2012/PTUN-JKT jo Decision Number 232/K/TUN/2013 in conjunction with Decision Number 118 PK/TUN/2014, then Decision Number 31/G/2016/PTUN-SRG in conjunction with Decision Number 55/B/2017/PT.TUN.JKT in conjunction with Decision Number 390 K /TUN/2017 in conjunction with Decision Number 111 PK/TUN/2018. As well as several other comparative decisions.

The focus of the research in this dissertation is to examine and examine the legal certainty for each person holding a certificate of ownership of land based on Article 32 PP no. 24 of 1994 concerning Land Registration does not have legal certainty, because at any time, a certificate of ownership of land, even after a period of 5 years has passed since the issuance of the certificate, can be canceled.

The type of research used is normative legal research, namely by examining materials from various laws and regulations and other materials from various literatures related to the problem.

Based on the description of the background of the problem above, the problem that will be discussed in this research is how the legal certainty of the current certificate of ownership of land can be canceled after a period of five years has passed since the issuance of the certificate of ownership of the land through a legal positivism approach. modern? What is the solution to the cancellation of the certificate of ownership of land based on the conditions of *das sein* and *das sollen*?

RESEARCH METHOD

Research is basically a search effort and not just observing carefully an object that is easy to hold in hand. The type of research used is normative legal research,

⁷M. Yamin Lubis and Abdul Rahim Lubis, *Land Registration Law*, (Bandung: Mandar Maju, 2008), p. 75.

⁸ HP Panggabean, *Application of Legal Theory in the Indonesian Judicial System*, (Bandung: Alumni, 2014), p. 152.

⁹ Saim Aksinudin, *Legal Certainty of Ownership of Certified Land Ownership Against Customary Law in the Land Law System in Indonesia*, *Dissertation*, (Bandung: Pasundan University, 2016).

namely by examining materials from various laws and regulations and other materials from various literatures related to the problem.¹⁰

The sources of legal materials in this study were obtained through normative juridical legal research consisting of primary legal materials, secondary legal materials and tertiary legal materials by conducting research on legal materials sourced from secondary data, namely legal materials obtained from research through the library (*Library Research*).¹¹

RESULTS AND DISCUSSION

1. Legal certainty of current land

title certificates, which can then be canceled after a period of five years through a modern legal positivism approach. are Law Number 5 of 1960 concerning Basic Agrarian Regulations and Government Regulation Number 24 of 1997 concerning Land Registration. The concept used as an analytical knife is the legal theory of modern positivism by using the thoughts of HLA Hart from the Neo-Positive group.

The provisions governing how to obtain Hak Milik on land can be found in the following formulations of the article in the Basic Agrarian Law below:¹²

Article 21

- (3) Foreigners who after the enactment of this law obtain Property Rights due to inheritance without a will or mixing of assets due to marriage Likewise, Indonesian citizens who have property rights and after the enactment of this law loses their citizenship are obligated to relinquish that right within one year of the acquisition of said right or loss of citizenship. If after this period of time the ownership rights are not relinquished, then the rights are nullified by law and the land belongs to the state, provided that the rights of other parties that burden it continue to exist.
- (4) As long as a person in addition to his Indonesian citizenship has foreign citizenship, he cannot own land with property rights and for him the provisions in paragraph (3) of this article apply.

Article 22

- (1) The occurrence of Property Rights according to customary law is regulated by a Government Regulation.
- (2) In addition to the method as referred to in paragraph (1) of this article, property rights occur because of:
 - a. a government determination, according to the methods and conditions stipulated by a Government Regulation;
 - b. statutory provisions.

Article 26

- (1) Buying and selling, exchanging, granting, granting in a will, giving according to custom and other acts intended to transfer property rights and their control shall be regulated by a Government Regulation.

From the two provisions in Article 22 and Article 26 paragraph (1) of the Basic Agrarian Law, it can be seen that there are three things that can constitute or become the basis for the birth of Hak Milik on land:¹³

1. according to customary law, which is regulated in a Government Regulation. In connection with this provision, it is necessary to note that until now, the said Government Regulation has never been issued at all.

¹⁰Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Overview*, (Jakarta: PT. Raja Grafindo Persada, 2007), p. 13.

¹¹Ronny Hanitijo Soemitro, *Legal Research Methodology*, (Jakarta: Ghalia Indonesia, 2000), p. 24.

¹²Kartini Muljadi and Gunawan Widjaja, *Land Rights*, Jakarta: Kencana, 2004, p. 33.

¹³*Ibid.*, p. 34.

2. due to statutory provisions. With regard to this provision, up to now there has never been a law on Property Rights as mandated in Article 50 paragraph (1) of the Basic Agrarian Law.

a. Provisions for Conversion of Basic Agrarian Laws

In line with the revocation of the provisions concerning land rights as regulated in:¹⁴

1. Agrarische Wet (S. 1870-55) as contained in Article 51 “*wet op de Staatsinrichting van Nederlands Indie*” (S. 1925-447) and the provisions of other paragraphs and that article;
2. as follows:
 - a. “Domeinverkiaring” as stated in Article 1 “Agrarisch Besluit”(S. 1870-118);
 - b. “Algemene Domeinverkiaring” in S. 1875-119a;
 - c. “Domeinverkiaring for Sumatra” referred to in Articles 1 and S. 1874-94f;
 - d. “Domeinverkiaring for the residency of Menado” is stated in Articles 1 and S. 1877-55;
 - e. “Domeinverkiaring for Residentie Zuider en Oosterafdeling van Borneo” referred to in Articles 1 and S. 1888-58;
3. Koninklijk Besluit dated April 16, 1872 No. 29 (S. 1872-117) and its implementing regulations;
4. Book II of the Indonesian Civil Code, as long as it concerns the earth, water and natural resources contained therein, except for the provisions concerning mortgages which are still valid at the time this law comes into force and the conception of land rights is enforced according to the provisions The Basic Agrarian Law, then in the Second Part Establishing the Basic Agrarian Law, Conversion Provisions are given.

b. Decree of the Minister of State for Agrarian Affairs/Head of the National Land Agency No. 6/1998 concerning the Granting of Land Ownership Rights for Residential Houses

according to the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 6/1998 concerning the Granting of Land Ownership Rights for Residential Houses, Building Use Rights or Land Use Rights for residential houses owned by individual Indonesian citizens with an area of 600 m² or less, at the request of the person concerned, shall be removed and given back to the former right holder. with Property Rights. Thus, it means that Land with Building Use Rights or Land Use Rights on land for residential houses belonging to individual Indonesian citizens with an area of 600 m² or less that has expired and is still owned by the former holder of the said rights, upon the request in question, the Ownership Rights are granted to the former the right holder.¹⁵

Furthermore, in the formulation of Article 2, Article 3, Article 4 and Article 5 of the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 6/1998 concerning the Granting of Ownership Rights to Land for Residential Houses, it is further stated:¹⁶

Article 2

1. The application for registration of Property Rights as referred to in Article 1 is submitted to the Head of the local Regency/Municipal Land Office with a letter in the form as in the sample in Attachment I to this Decree accompanied by :
 - a. certificate of the land concerned;
 - b. Evidence of land use for residential houses in the form of:
 - 1) Photocopy of Building Permit which states that the building is used for residential houses, or

¹⁴ *Ibid.*, p. 37-39.

¹⁵ *Ibid.*, p. 42.

¹⁶ *Ibid.*, p. 43-45.

- 2) a certificate from the local Village/Sub-district Head that the building is used for residential houses if the Building Construction Permit has not been issued by the authorized agency,
 - 3) Photocopy of the latest SPPT PBB (especially for land with an area of 200 m² or more),
 - 4) Proof of identity of the applicant;
 - 5) A statement from the applicant that with the acquisition of the Ownership Rights for which registration is requested, the person concerned will have Ownership Rights on land for residential houses of not more than 5 (five) parcels covering an area of not more than 5,000 (five thousand) m², using the sample as appendix II to this decision.
2. Upon the application for registration of Property Rights as referred to in paragraph (1), the Head of the Land Office issues an order for the deposit of levies as referred to in Article 1 paragraph (2) which is made according to the sample as attached in Attachment III to this Decree.
 3. After the levy as referred to in paragraph (2) is paid in full, the Head of the Regency/Municipal Land Office:
 - a. registers the abolition of the relevant Building Use Rights or Use Rights in the land book and certificates as well as other general registers,
 - b. then registers Ownership Rights on the former Land Use Rights or Building Use Rights. The Right of Use is made by making the land book by stating this decision as the basis for the existence of the Hak Milik and issuing the certificate, with a measuring document made based on the physical data used in the registration of the Right to Build or the Right to Use.

Article 3

1. Applications for changes in Building Use Rights or Use Rights into Land Ownership Rights for residential houses owned by individual Indonesian citizens with an area of 600 m² or less which at the time this decision takes effect are being processed at the National Land Agency, Provincial National Land Agency Regional Offices and Regency/Municipal Land Office and the income has not been paid back to the Regency/Municipality Land Office and processed according to this decision.
2. Applications for an extension of the period or renewal of Building Use Rights or Land Use Rights for residential houses owned by individual Indonesian citizens with an area of 600 m² or less which at the time this decision takes effect are being processed at the National Land Agency, Regional Offices of the Provincial National Land Agency and the Land Offices. Regency/Municipality and the income has not been paid for on the application in question, it is returned to the Regency/Municipality Land Office and processed according to this decision.

Article 4

1. Application for land ownership rights for residential houses that do not meet the requirements to be processed according to the Decree of the State Minister of Agrarian Affairs / Head of the National Land Agency Number 9 of 1997 jo. Number 15 of 1997 and Number 1 of 1998 concerning the Granting of Land Ownership Rights for Very Simple Houses (RSS) and Simple Houses (RS), Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 2 of 1998 concerning Granting of Land Ownership Rights for Houses The residence that has been purchased by a civil servant from the government and this decree is processed in accordance with the provisions in the Regulation of the Minister of Home Affairs Number 6 of 1972 jo. Number 5 of 1973.

2. Application for Ownership as referred to in paragraph (1) is limited to land with a maximum area of 2000 (two thousand) m².
3. In the management of the application for Ownership as referred to in paragraph (1), a statement from the applicant must also be attached that with the acquisition of the Property Rights requested, the person concerned will have Ownership Rights on land for residential houses of not more than 5 (five) parcels covering an area of not more than 5 (five) parcels. more and 5,000 (five thousand) m² by using the example as in Attachment II to this Decree.

From the four articles it can be seen that this provision is special (*lex specialist*) to the general provisions regarding the granting of Ownership rights to land parcels as regulated in the Regulation of the Minister of Home Affairs Number 6 of 1972 jo. Number 5 of 1973 as *lex generalis*. In its development, the provisions of the Regulation of the Minister of Home Affairs Number 5 of 1973 concerning Provisions Regarding Procedures for the Granting of Land Rights have been declared invalid with the enactment of the Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency no. 9/1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights.¹⁷

From the formula given in the formulation of Article 1 letter a, and Article 2 paragraph (3) Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 6/1998, it can be seen that the granting of Hak Milik status was preceded by the abolition of the Right to Build or the Right to Use in the Land Book and Certificates as well as other general lists of the parcels of land to which the Hak Milik status would be granted. Furthermore, upon granting the status of Ownership Rights, a Land Book is made and a Certificate of Ownership is issued based on the physical data listed in the registration of Building Use Rights or Use of Use Rights whose land rights are abolished.¹⁸

c. **Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency No. 5/1998 concerning Changes in Building Use Rights or Land Use Rights for Residential Houses that are encumbered with Mortgage Rights into Ownership Rights**

. 6/1998 concerning the Granting of Land Ownership Rights for Residential Houses mentioned above, it can be seen that the granting of Hak Milik status is always preceded by the abolition of Building Use Rights or Land Use Rights in the Land Book and Certificates as well as other general lists of parcels of land to be granted the status of Rights. Belongs to it. This means, in the event that the Building Use Rights and Use Rights that will be changed to Property Rights have been encumbered with Mortgage Rights, then with the abolition of Building Use Rights or Use of Use Rights that are encumbered with the Mortgage Rights, the Mortgage Rights charged above will also be removed. land parcels with the status of Building Use Rights or Use Rights. In order for the creditor holding the Mortgage to be guaranteed the right (of property), it is necessary to place a new Mortgage on the same plot of land, but with the status of Hak Milik. In order to further explain the status of the abolition of the Mortgage that was imposed on the plot of land with the status of the abolished Building Use Right or Use of Land Rights, and further the obligation to put the Mortgage back on the same parcel of land with the status of the Property Rights, a provision was made that regulated in the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 5/1998 concerning Changes in Building Use Rights or Land Use Rights for Residential Houses Encumbered with Mortgage Rights into Ownership Rights.¹⁹

¹⁷ *Ibid.*, p. 46.

¹⁸ *Ibid.*, p. 47.

¹⁹ *Ibid.*

d. **Decree of the Minister of State for Agrarian Affairs/Head of the National Land Agency No. 9/L997jis No. 15/1997 and No. 1/1998 concerning the Granting of Ownership Rights to Land for Very Simple Houses (RSS) and Simple Houses (RS)**

. 9/1997 chs. No. 15/1997 and No. 1/1998 concerning the Granting of Land Ownership Rights for Very Simple Houses (RSS) and Simple Houses (RS) is a special provision relating to the granting of Ownership Rights to land, which are included in the criteria for Very Simple Houses (RSS) and Simple Houses (RS). In the formulation of Article 1 letter d of the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 9/1997 chs. No. 15/1997 and No. 1/1998 concerning the Granting of Ownership to Land for Very Simple Houses (RSS) and Simple Houses (RS) it is stated that:²⁰

Article 1

- d. Land for RSS and RS is a parcel of land that meets the following criteria:
- 1) the acquisition price of land and houses is not more than Rp. 30,000,000 (thirty million rupiahs) and
 - 2) above have been built houses in the context of the construction of mass housing or housing complexes.

So, for plots of land whose acquisition cost of land and houses is not more than Rp. 30,000,000,- (thirty million rupiah) and on which a house has been built for the purpose of mass development or a housing complex may be granted the status of Ownership of the said parcel of land.

e. **Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency No. 9/1999 concerning Procedures for Granting and Canceling State Land Rights and Management Rights**

Regulations of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 9/1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights are general provisions that apply to the acquisition of Property Rights, as also stated in the provisions of Article 4 of the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 6/1998 concerning the Granting of Land Ownership Rights for Residential Houses, which states as follows:²¹

Article 4

1. Applications for Land Ownership Rights for residential houses that do not meet the requirements to be processed according to the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1997 jo. Number 15 of 1997 and Number 1 of 1998 concerning the Granting of Land Ownership Rights for Very Simple Houses (RSS) and Simple Houses (RS), Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 2 of 1998 concerning Granting of Land Ownership Rights for Houses The residences that have been purchased by civil servants and the government and this decree shall be processed in accordance with the provisions of the Regulation of the Minister of Home Affairs Number 6 of 1972jo. Number 5 of 1973.
2. Application for Ownership as referred to in paragraph (1) is limited to land with a maximum area of 2000 (two thousand) m².
3. In the management of the application for Ownership as referred to in paragraph (1), a statement and the applicant must also be attached that with the acquisition and the Property Rights requested, the person concerned will have Ownership Rights on the land for residential purposes of not more than 5 (five) parcels covering the total area of not more than 5,000 (five thousand) m²^{by} using the sample as in Attachment II to this Decree.

²⁰ *Ibid.*, p. 52-55.

²¹ *Ibid.*

By declaring that the Regulation of the Minister of Home Affairs Number 5 of 1973 concerning Provisions Regarding Procedures for Granting Land Rights is no longer valid by the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 9/1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights, the practical procedures for granting land rights, including the granting of Ownership Rights to land are regulated in the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency no. 9/1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights.²²

f. Regarding Authorized Agencies to Grant Property Rights on Land

Provisions regarding agencies authorized to grant Property Rights on Land can be found in the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1999 concerning Delegation of Authority for Granting and Cancellation of Decisions on the Granting of State Land Rights. The authority for granting ownership rights to state land can be found in the formulation of Article 3, Article 7 and Article 13 of the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1999 concerning Delegation of Authority for Granting and Canceling Decisions on the Granting of State Land Rights, which states:²³

Article 3

The Head of the Regency/Municipal Land Office shall make a decision regarding:

1. granting of Ownership Rights to agricultural land which is not more than 2 ha (hectare);
2. granting Ownership Rights to non-agricultural lands with an area of no more than 2000 m²(two thousand square meters), except for lands that were ex-Hak Guna Usaha;
3. granting ownership rights to land in the context of implementing the following programs:
 - a. transmigration;
 - b. land redistribution;
 - c. land consolidation;
 - d. mass land registration, both in the context of implementing systematic and sporadic land registration.

Article 7

The Head of the Regional Office of the Provincial National Land Agency shall give a decision regarding:

1. granting of Ownership Rights on agricultural land which is more than 2 ha (hectare);
2. granting Ownership Rights to non-agricultural land with an area of no more than 5000 m²(five thousand square meters), except for those whose authority has been delegated to the Head of the Regency/Municipal Land Office as referred to in Article 3.

Article 13

State Minister of Agrarian Affairs/Head of Agency National Land stipulates the granting of land rights that are given in general.

From the formulation of the three articles, namely Article 3, Article 7 and Article 13 of the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1999 concerning Delegation of Authority for Granting and Canceling Decisions on the Granting of State Land Rights, it can be seen that there is a gap in the granting of Property Rights to the State. Soil.

²² *Ibid.*, p. 58.

²³ *Ibid.*, p. 75.

g. Civil Events Aiming to Transfer Property Rights to Land

From the explanation that civil events aimed at transferring Property Rights to Land can occur due to the mere occurrence of a certain legal event in a person, for example due to marriage or death; or because of a legal event that is jointly desired by the party who intends to transfer the Land Ownership Rights with the party who intends to receive the transfer of the Land Ownership Rights, for example due to buying and selling, grants, or exchanges.²⁴

In the Criminal Code there are only a few material rules that are categorized as land crimes with elements of forgery of letters, land grabbing in the sense stated in the Criminal Code is too narrow to be applied. The reform of criminal law by prioritizing the form of conceptual formulation, to be able to include land crimes in the element of "occupying" land as an act against rights. Occupying this is not only the perpetrators but those who participate, both those who recommend and those who order. Occupying land that he already knows is not his right.²⁵

In discussing the notion of crimes against land, it is necessary to first know what the meaning of "crime" is which is often interpreted as a criminal act or an act prohibited by a rule of law, and there are sanctions for those who violate the prohibition. Crime is a form of "deviant behavior", always attached to every form of society that is never devoid of crime. Deviant behavior is a real threat, as well as a threat from social norms, which underlie social life or order, can cause social tension, and is a real or potential threat to the sustainability of social order.

A crime or criminal act is an act that is prohibited by a rule of law, and is accompanied by threats (sanctions) in the form of certain crimes for anyone who violates the prohibition. It can also be said that a crime is an act which is prohibited by law or is punishable by a crime, as long as we need to remember that the prohibition is shown to an act (a condition or event caused by a person's actions), while the threat of punishment is aimed at the person who caused the crime.

Although experts state that the legal field that is the scope of Law no. 5 of 1960 concerning Basic Agrarian Regulations (UUPA) includes; Civil Law and State Administrative Law only, but if we look back at the chronology of disputes, conflicts and land cases, it is possible that when discussing the UUPA it is also related to the discussion of Criminal Law. In the Criminal Code there are articles that regulate land matters in book II on crimes, and book III on violations.²⁶

In the Pekanbaru High Court Decision Number 69/PID.B/2014/ PTR with the defendant Daeng Manunggeng Bin Alm. Daeng Magasing. The chronology is that PT. Teguh Cipta Pratama, the developer of the Montigo Resort development, requires land/land to be rented which will be used to put stones that have been completed on the absorber (drill), then witness Erwin as Assistant Project Manager of PT. Teguh Cipta Pratama, the developer of the Montigo Resort development, summoned witness M. Nurdin and ordered witness M. Nurdin to look for the location of the land/land to be rented, then witness M. Nurdin looked for land/land to rent and then met the defendant who claimed to be the owner of the land/land covering a total area of approximately 6 (six) hectares located on Jalan Hang Lekiu Nongsa Batu Besar right next to Montigo Resort Batam City by showing a letter/document of land/land ownership in the form of a land statement in the name of the defendant dated March 7, 2004 known and signed by Lurah Nongsa witness H. Ramlan HS, after seeing the land statement, witness M. Nurdin and the defendant made an agreement that if they were to use the land, the monthly rental price was Rp. 2,500,000,- (two million five hundred thousand rupiah), and the plan is that witness M. Nurdin will rent the land/land belonging to the defendant for 10 (ten) months for

²⁴ *Ibid.*, p. 77-78.

²⁵ Hairan, Policy on Formulation of Criminal Law Against Land Crimes in Indonesia, *Gorontalo Law Review*, Volume 3 - NO. 1 – April 2020, p. 19.

²⁶ Rudi Mulyana, Overview of Land Crimes, at <https://www.ninestar.co.id/sekilas-mengenai-tindak-pidana-pertanahan/>. Retrieved 26 November 2020.

Rp. 25,000,000,- (twenty five million rupiah), then the payment was agreed on Monday, February 20, 2012.

That witness Lim Tion Tek Alias Batik, attorney from PT. Wahana Cipta Prima Sejahtera based on power of attorney Number: 001/Whn-cps/SK/III/12 dated March 5, 2012 is in charge of maintaining and resolving problems as well as clearing all forms of buildings that exist on land owned by PT. Wahana Cipta Prima Sejahtera, on the day Saturday, March 10, 2012 saw a large pile of stones on the land of PT. Wahana Cipta Prima Sejahtera beside Montigo Resort, then witness Lim Tion Tek reported the incident to PT. Wahana Cipta Prima Sejahtera, then PT. Wahana Cipta Prima Sejahtera as the owner of the land/land located on Jalan Hang Lekiu Nongsa, Batam City based on the proof of HGB Number 05.07.05.02.3.00931 and letter measuring Number 00560/2004 covering an area of 34,663 M2 (thirty four thousand six hundred sixty three square meters), through its director, witness Leeris Harni asked witness Lim Tion Tek to report the defendant's actions to the Riau Islands Police.

2. Solutions to the Cancellation of Land Title Certificates Based on *Das Sein* and *Das Sollen*

The flow of legal positivism gives philosophical nuances of thinking about law. There are at least four main meanings in the term legal positivism, namely:

- a. Legal positivism is used to refer to the legal concept that defines law as a command, a thought as introduced by the British legal philosopher John Austin.
- b. The term legal positivism is also used to denote an important development in the concept of law which is characterized by two main characteristics: (1) law is strictly separated from morals and politics. The law must be morally and politically neutral. As long as it is well understood, this so-called pure legal theory was developed by Hans Kelsen; (2) law does not deal with ideal law, but with actual law, existing law. This separation is of course important because of considerations of legal certainty. However, this separation for positivism is also seen as important to release the law from unscientific moral statements. Scientific law must be free from morals.
- c. Legal positivism is also understood as a way of thinking in a judicial process where judges base their decisions entirely on existing legal regulations. Here the judicial decision is solely the result of the deduction of the rule of law. This is an academic way of thinking that relies on the ability to think logically. Thus, positivism in a judicial context refers to the judicial process in which the judge's decision is taken, according to Ronald Dworkin's terms, mechanistically. Hart referred to this judicial concept as *Automatic* or *Slot-Machine*. This kind of process practically makes the litigation process redundant.
- d. Legal positivism is also a way of thinking that argues that moral judgments if deemed necessary must be carried out by showing factual evidence or rational arguments. This impression is strong enough to emerge, especially in the view of Joseph Raz through his idea of '*the myth of common morality*'. This view assumes that the unity of society is created because of the morality that is accepted by all members of society. This last view is known as sociological positivism, which also places great emphasis on the scientific nature of law.
- e. The term positivism is also used to refer to the view that demands that existing laws, even if they are not fair, must be obeyed. In other words, for positivism the validity of the law does not depend on moral validity. The law is only invalid or *invalid* if there is a contradiction in the law itself.²⁷

Legal positivism did not just appear in the development and evolution of medieval thought. A number of conditions at that time became important points to be stated at the beginning to absorb the spirit of the positivism spirit as a whole. Several facts will be disclosed related to the social, political and cultural conditions of the community that have inspired the desire to "positivize" the law.

²⁷Andre Ata Ujan, *Op.Cit.*, p. 66-68.

Thinking about the concept of the state at that time also had a tremendous effect on people's desire for legal justice. Previously, sovereignty was in the hands of the king with all his orders which were laws that made the people saturated and at least distanced themselves from the essence of law for the welfare of the people.

Beginning with the treaty of Westphalia (*Treaty of Westphalia*) signed in 1648 which is a milestone in the birth of the modern state. Sovereignty changes from being individuals or citizens of the nation (), to sovereignty by all nations (*nations*). Since then the state has become a fully sovereign power organization in a region.²⁸ Technological developments in the 18th century The state made a transformation into a modern form of modern law. According to E.Sumarsono, legal positivism wants to make the law fully autonomous and compose (himself - the author) as a complete legal science based on all normative systems that apply in society in general.²⁹

This condition gives the state (ruler) the authority to form laws that can be imposed on all citizens. This is a breath of fresh air for the capitalists in the industrialized world because the state provides a centralized structure and is supported by modern law.³⁰ Thus, Roberto M. Unger states that law is increasingly shifting from an interactional legal form to a positive and public phase of law or also known as bureaucratic law types (*bureaucratic laws*).³¹

Likewise, the irrational law from God becomes an advanced legal order with a secular character in which it separates these irrational things, the law has reached the stage of complexity, abstraction, and systematization because it is a scientific object carried out by specialists who are specially educated to that.³² That then the law becomes sacred and cannot be entered by lay minds who are not capable of law.

Legal positivism is not a single construction about the character of the law itself, but stems from the effects of positivism in science. The positivism view itself was influenced by the *cultural* at that time when in the 18th century the era of the industrial revolution in England caused a wave of optimism for the progress of mankind with the success of its industrial technology. Basically positivism is a philosophy that believes that the only true knowledge is that which is based on actual-physical experience. Positivism rests philosophy from its speculative work in search of the ontological and metaphysical natures that it has undertaken for thousands of years.³³ Such knowledge can only be generated through the establishment of theories through a rigorous scientific method, for which metaphysical speculation is avoided.³⁴ The aim is to displace much of philosophy and religion as meaningless by establishing verification criteria, and to reaffirm and resolve remaining issues using strict formal language.³⁵ The characteristics of positivism include the following:³⁶

- a. Objective/³⁷ value-free; only through observable and measurable facts, our knowledge is structured and becomes a mirror of reality (correspondence);
- b. Phenomenalism,³⁸ science only talks about reality in the form of impressions;
- c. Nominalism,³⁹ only concepts that represent particular realities are real. For example, when a metal is heated expands, the concept of metal in this statement overcomes all the particular forms of metal such as; iron, brass, tin, and others;

²⁸ Anton F. Susanto, *Op .*, p. 75.

²⁹ *Ibid.*, p. 77.

³⁰ *Ibid.*, p. 76.

³¹ *Ibid.*, p. 75.

³² John Glissen, *Op Cit.*, p. 66.

³³ Anton F. Susanto, *Op. Cit.*, p. 63.

³⁴ <http://robbani.wordpress.com/2009/02/07/auguste-comte-dan-positivism/>, downloaded on November 14, 2017.

³⁵ Anton F. Susanto, *Op.Cit.*, p. xiii.

³⁶ *Ibid.*, p. 66.

³⁷ Regarding the actual situation without being influenced by personal opinions or views.

³⁸ The theory which states that all knowledge is a phenomenon and all that exists is phenomenal

³⁹ . A philosophy that teaches that general understanding does not reflect general aspects and aspects that have in common about the existence of an object.

- d. Reductionism,⁴⁰ reality is reduced to observable facts;
- e. Naturalism,⁴¹ thesis on the regularity of events in the universe that explains the supernatural;
- f. Mechanisms,⁴² phenomena that can be explained with principles that can be used to describe machines (mechanical systems). The universe is described as a giant clock (*a giant clock work*).

Meanwhile, the flow of positivism in law (legal positivism) emerged based on the views of a French philosopher Auguste Comte whose full name is Isidore Marie Auguste Francois Xavier Comte, born in Montpellier, Southern France on January 17, 1798. After completing his education at the Lycee Joffre and the University of Montpellier, Comte continued his education at the Ecole Polytechnique in Paris. He spent two years at the cole Polytechnique, between 1814-16. This period of two years had a profound effect on Comte's later thought. In this educational institution, Comte began to believe in the ability and usefulness of the natural sciences.

Comte claimed that from the study of human intellectual development throughout history we can find the laws that underlie it. This law, which became known as the *Law of Three Stages*, which every human conception and knowledge must pass through. The three stages of the law are:⁴³

- a. The theological stage,⁴⁴ where humans believe in divine forces behind natural phenomena;
- b. The metaphysical stage⁴⁵ begins with a critique of all thoughts, including theological thought. Theological ideas are replaced by abstract ideas from metaphysics;
- c. The positive stage,⁴⁶ where the symptoms are no longer explained by an abstract idea of nature. There one phenomenon is explained through other phenomena by finding the laws between them. The laws are nothing but a constant relation of phenomena.

So the philosophical view of positivism in the course of human thought in seeking a truth is transformed from what was previously divine, orthodox accepting all miracles from the creator into logical constructions (positive). Logic will be seen as determining the legitimacy of knowledge, thus providing the necessary certainty, because one must be able to reach a solid base, and a firm foundation, to justify everything.⁴⁷ Therefore, what is said to be law by the positivism view is what the norms (rules) can be captured by the five senses (not metaphysical/visible) because they are written clearly. This indicates that the law must go through a very strict bureaucratic process by the competent authority on an order from the ruler. The legal position is in formal provisions (formalized) because its validity (legitimacy) can be accounted for and can be used as a general benchmark. So it is not wrong why adherents of legal positivism are also referred to as formalistic schools.

⁴⁰ Theories or procedures simplify complex phenomena, data, and so on so that they become less complex.

⁴¹ 1. the attempt to apply a scientific view of the natural world to philosophy and art; 2. a flow in art that depicts things as they really are; 3. works of art that have the nature of physical truth from nature; 4. teachings that do not recognize the existence of forces other than nature; 5. techniques or ways of presenting an objective view of human beings carefully and honestly (good or bad).

⁴² 1 *Tech* use of the machine; machine tools; machine working; 2 ways of working an organization (association and so on): -- *work*; 3 things work together like a machine (if one moves, the other moves too).

⁴³ *Ibid.*, p. 83.

⁴⁴ Knowledge of God (regarding the nature of God, the basis of belief in God and religion, especially based on the holy book).

⁴⁵ Science that deals with things that are non-physical or invisible.

⁴⁶ 1 *a* sure; assertive; of course: *he knew it by --; he gave an answer that --; he has evidence -- of that person's involvement*; 2 *a* sure: *he is very -- of the truth of his opinion*; 3 *a* is real and constructive: *the situation shows developments that --; the result is very --*; 4 *a* indicates the presence of a disease, certain conditions, etc. (about the results of the examination): *the test results state that she is -- pregnant*; 5 *a* *Fis* is greater than zero: *number --*; 6 *n* ready-made portraits (not cliches or movies); 7 *a* *Fis* is electrically charged higher than the rest (about the poles), which is a source of electric current; 8 *a* not deny (rebut, etc.); confirm (about sentences, statements, utterances, etc.): *sentences --*, sentences that do not contain disclaimers (such as *no*, *not*);

⁴⁷ Anton F. Susanto, *Law; From Consilience Towards a Constructive-Transgressive Legal Paradigm*, Bandung: Refika Aditama, 2007, p. 88.

CONCLUSION

Based on the results of the discussion, it can be concluded: 1) The implementation of land registration for the first time based on PP no. 24 of 1997 does not use a pure negative publication system, but a negative publication system with positive tendencies. However, it does not change the meaning that land registration is based on PP. No. 24 of 1997 is a negative publication system, meaning that the State does not guarantee the truth of the data recorded in certificates, land books, and certificates of measurement; 2) Land title certificate issued based on PP No. 24 of 1997 is a letter of proof of rights that is strong but not absolute. That the holder of the certificate of land rights is guaranteed legal certainty for the owner or is "strong", as long as: 1) it is issued in the name of the rightful person, 2) the land rights are obtained in good faith, 3) physically controlled, and 4) there is no evidence to the contrary. While the meaning of "not absolute", that the certificate of land rights can still be canceled by a court decision that has obtained a permanent legal determination, or because of administrative defects. In essence, land registration has a purpose, *first*, land registration is to provide legal certainty and legal protection to holders of land rights. *Second*, certificates of land rights are proof of rights which are the embodiment of the land registration process that can provide legal certainty and legal protection for the holder. *Third*, the land registration system in Indonesia adheres to a negative publication system with a positive tendency. This system basically does not provide legal certainty, let alone legal protection for both certificate holders and third parties who obtain land rights. In order to provide more legal certainty, the LoGA should adopt a positive publication system with positive tendencies. *Fourth*, what is protected by the holding of land registration is the holder of the certificate of land rights, because the registration of land means that legal certainty, certainty of rights and orderly land administration will be created so that all parties are well protected, both certificate holders, land rights holders, third parties. who obtain land rights and the government as state administrators.

By issuing certificates in registration activities, it is intended that rights holders can easily prove their rights. Therefore, the certificate is a strong evidence as referred to in Article 19 of the LoGA. The certificate is issued for the purpose of proving the right holder concerned in accordance with the physical data and juridical data that have been registered in the land book. With physical data and juridical data listed in the certificate, it must be in accordance with the data listed in the land book and the relevant letter of measurement. With the issuance of a certificate of land rights, the owner is given legal certainty and legal protection to prevent legal lawsuit disputes that occur in the future as a result of parties who feel aggrieved due to the issuance of a land certificate. The certificate of ownership of land has been regulated in Article 16 of the Basic Agrarian Law which was followed up by Government Regulation Number 24 of 1997 concerning Land Registration. Both of these laws and regulations adhere to the positivism legal theory. In the development of positivism, modern positivism is known. The inherent characteristics or characteristics of positivistic law have been described from the previous explanations, but have not yet described the true identity of legal positivism. Several experts collect their views regarding the characteristics of positivism as a whole, as described by Hart who describes the characteristics of positivism in legal science today are:

- a. Law is a command of human being (*command of human being*);
- b. There is no absolute/important relationship between law and morals.

The legal system is a closed system that is logical, permanent, and closed in nature in which the right or proper legal decisions can usually be obtained by means of logic without regard to social goals, politics and moral standards. Moral judgments cannot be made or defended as statements of fact to be proved by rational arguments, proof or experiment. The law in the characteristics built by Hart must indeed be cleaned of moral elements, because moral considerations cannot be studied scientifically. The scientific process according to *Descartes* will make a correct assessment and have a solid and definite basis for a phenomenon. If moral considerations are included in the scientific process, the results to be achieved will certainly not be objectively rational, but merely subjective emotional which is not desired by the positivism view in making the law a universal general norm and can be used as a reference for everyone. However, true modern positivism whose implementation is the formation of laws and regulations, then

the substance of the law must be influenced by ethical and moral elements. Why? Because of modern positivism, the preparation of the articles in the law must be imbued with legal morality. Therefore, the regulation of land ownership certificates must be based on morals so that the purpose of the certificate is to have legal certainty. Legal certainty itself is singular, meaning that the law is essentially something unique.

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