



PRINCIPLE OF HORIZONTAL SEPARATION IN REGISTRATION OF THE FORMER WESTERN RIGHTS LAND AS THE OBJECT OF AFWEZIGHEID

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ABSTRACT

The Job Creation Law affects some policy changes in agrarian sector. For instance, the promulgation of Government Regulation No 18 of 2021 (GR 18/2021) regulates that former western rights land are adjusted to state land. However, some former western rights land have not been converted until now. It results in legal uncertainty over the land status, especially land or building juridically belong to the person declared absent (*afwezigheid*) yet owned by legal subjects. This study aims to analyze the land rights registration of former western rights land after the Job Creation Law. Besides, it analyzes the implementation of horizontal separation principle in the land rights registration of former western rights land and buildings, that are the object of *afwezigheid*. This study is legal research applying statute, historical and conceptual approaches. Based on the study, people who possessed former western rights land are the main priority in applying for land rights regarding to GR 18/2021 article 95. Meanwhile, those who only occupy the land and building have to get *afwezigheid* court decision of the former western rights land owner. Afterwards, they follow the object buying process with the principle of horizontal separation through Probate Office and submit land rights application at the land registry office.

Keywords: state land; absence; horizontal separation principle; probate office

INTRODUCTION

Background

Land is human's primary need. However, land availability is not commensurate with the land demand. This condition urges the authority to act and manage regulations regarding the matter. The constitution stipulates the state's role in controlling the land and the water as well as the natural resources in Indonesia, as stated in The 1945 Constitution of The Republic of Indonesia Article 33 section 3 and Law of the Republik Indonesia Number 5 of 1960 on Basic Agrarian Principles (hereafter

referred to as UUPA) Article 2.¹

The concept of state control replaced *Domein* principle (*Domein verklaring*) implemented by Dutch Colonial government in which land is considered the property of the state.² In UUPA, the concept of state control uses Pancasila as its foundation. It is stipulated in General Elucidation Point II Number 2 UUPA:

¹ *Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria* (Indonesia, 1960).

² Boedi Harsono, *Hukum Agraria Indonesia (Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi Dan Pelaksanaannya)* (Jakarta: Djambatan, 2008), 41.

“not necessary and not appropriate for the State of Indonesia to act as landowner. It is more appropriate for the State, in its capacity as the people’s organization of power, to act as Authority Body (Badan Pengusaha).”

The state’s right to control land is based on the rights for Indonesian people to own land. It is essentially an affirmation of the implementation of the state’s authority duties which contains public law elements.³ One of the state’s authorities is to regulate and administer the allocation, the use, the preparation, and the preservation of land. Therefore, the state needs regulations and policies as the instruments to control state land.

The desire to create better legal policies must correspond with the efforts to actualize good regulations according to the circumstances and situations at a time. State policies through the competent institution to establish the desired regulations are expected to be useful to accomodate public interests and aspirations.⁴ The law make a contribution in the form of guaranting the compliance and legal certainty over the results of public agreements. Without the legalization of the law, the implementation of the policy will not be effective.⁵ On the other hand, the low level of public participation will make the state apparatus unable to produce appropriate development policies.⁶

3 Urip Santoso, *Hukum Agraria & Hak-Hak Atas Tanah, Kencana* (Jakarta: Kencana, 2008), 77.

4 Nizar Apriansyah, “Peran Pemerintahan Dalam Pembentukan Kebijakan Hukum,” *Jurnal Ilmiah Kebijakan Hukum* 10, no. 2 (2016): 187–196.

5 Syarif Budiman, “Analisis Hubungan Antara Hukum Dan Kebijakan Publik : Studi Pembentukan Uu No . 14 Tahun 2008” *Jurnal Ilmiah Kebijakan Hukum* 11, No. 14 (2017): 109–119.

6 Taufik H. Simatupang, “Peran Perancang Peraturan Perundang-Undangan Kantor Wilayah Kementerian Hukum Dan HAM Dalam Rangka Harmonisasi Peraturan Daerah,” *Jurnal Ilmiah Kebijakan Hukum* 11, No. 1 (2017): 12–25.

Land utilization policy for the greatest prosperity of the people is a “condition sine qua non”. State intervension is required to sucessfully reach this goal.⁷ The state’s authority is also applied to state land with former western rights land category which were not submitted for confirmation of conversion until September 24, 1980.

According to Rikardo Simarmata, a government administrator does not want the coexistence of state law and customary law in regulating land. It is indicated by evading conversion methods (affirmation, recognition) and replacing it with recognition in the registration of former customary land, and the registration of land with hereditary rights to use as ownership rights. Behind this situation, the state have a great ambition to make land registration as a way to create unified national agrarian law.⁸

It is indisputable that many former western rights land have not been converted until 1980. In accordance with Kepanjen District Court Verdict Number: 774/PdtP/2020/PN.Kpn on 1 April 2021, the court settled that owner of 590 m² land and building area of 112m² in Malang, is declared absent (*Afwezigheid*). The appeal was filed by someone who was asked to occupy the land and the building since 1940. However, when the person wanted to apply for land rights, he cannot find the owner. This former western rights land cannot be converted according to Regulation of Minister of Agrarian Number 2 of 1962 on Basic Agrarian Principal Law Implementation Provisions jo. Regulation of Ministry of Agrarian Number 2 of 1962 on Conversion Confirmation Indonesia Former

7 Ahyar Ari Gayo, “Perlindungan Hukum Hak Atas Tanah Adat (Studi Kasus Di Provinsi Aceh Khususnya Kabupaten Bener Meriah),” *De Jure jurnal penelitian hukum* 18, no. 3 (2018): 15.

8 Rikardo Simarmata, “Orientasi Negara Dalam Pendaftaran Tanah Adat Di Indonesia,” *The Indonesian Journal of Socio-Legal Studies* 1, no. 1 (2021), 31.

Land Rights Registrations, thus the land became State Land

The establishment of Law Number 11 of 2020 on Job Creation aims to increase the investment and business ecosystems, as well as influence land policy. Job Creation Law is constructed through omnibus law method. With omnibus law, the state government will simplify the convoluted and lengthy regulations.⁹ The requirement of the regulation using omnibus law is based on the synchronization of the written and unwritten law. The architecture of the Application of Omnibus Law in its implementation on National Law requires a progressive approach.¹⁰

Examples of land regulations in Job Creation Law are stipulated in Article 142 and Article 185 point b. In relation to land policy, it is promulgated in Government Regulation No 18 of 2021 on Right to Manage, Land Right, Apartment Unit, and Land Registration (PP 18/2021) on 2 February 2021.¹¹ Even though the Decision of Constitutional Court Number 91/PUU-XVIII/2020 on 25 November 2021 open plenary meeting declared Job Creation Law unconstitutional and do not have the legally binding power unless understood as “unrevised in 2 years after the promulgated”, the law *a quo* is still valid until the revision within 2 years.¹²

Government Regulation Number 18 of 2021 (PP 18/2021) regulates policy direction in strengthening rights to manage,

land right, apartment unit, granting of right to underground space, including acceleration on electronic-based land registration. Interestingly, notwithstanding the statement in the Article 95 PP 18/2021 regulates that former proof such as written paper of former western rights land is invalid and the land status is owned by the state. Whereas, it is common to find people who still own former western rights and acknowledge it as proof of legitimate ownership. This regulation is made to organize land tenure but in the other side it can cause agrarian conflicts due to ownership inequality, control, and agrarian resource management, or called agrarian structural inequality. Characteristic of disputes and conflicts in agrarian structural inequality are stated as follows:¹³

- a) Chronic, massive and widespread; legal, social, political and economic dimensions
- b) A structural agrarian conflict, where government policies in land tenure and use and management of natural resources management are the main problems;
- c) The issuance of business permits for land use and management of natural resources does not respect the legal diversity as the basis of the land tenure rights of the community;
- d) Violating Human Rights

The principle of vertical attachment (*verticale accessie beginsel*) is not adopted in National Agrarian Law because various sources lean to the other broadly adopted principles that is the principles of horizontal separation (*horizontale scheidings beginsel*).¹⁴

⁹ Eko Noer Kristiyanto, “Urgensi Omnibus Law Dalam Percepatan Reformasi Regulasi Dalam Perspektif Hukum Progresif” *Jurnal Penelitian Hukum* 20, no. 2 (2020): 233–244.

¹⁰ Ditta Chandra Putri, Ahmad Ulil Aedi, Sakti Lazuardi, “Arsitektur Penerapan Omnibus Law Melalui Transplantasi Hukum Nasional Pembentukan Undang-Undang” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 1–18.

¹¹ *Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 2021 Tentang Hak Pengelolaan, Hak Atas Tanah Satuan Rumah Susun Dan Pendaftaran Tanah*, 2021.

¹² MKRI, *Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020* (Indonesia, 2021).

¹³ Ahyar Ari Gayo dan Nevey Varida Ariani, “Penegakan Hukum Konflik Agraria Yang Terkait Dengan Hak-Hak Masyarakat Adat Pasca Putusan Mk No.35/Puu-X/2012,” *Jurnal Penelitian Hukum De Jure* 16, no. 2 Juni (2016): 157–171.

¹⁴ Sri Harini Dwiyatmi, “Asas Pemisahan Horizontal (Horizontale Scheiding Beginsel) Dan Asas Perlekatan (Verticale Accessie) Dalam Hukum Agraria Nasional,” *Refleksi Hukum: Jurnal Ilmu Hukum* 5, no. 1 (2020): 125–144.

The implementation of the principles of horizontal separation in State Agrarian Law accommodate customary law, and allow different subject of rights for the land and the building.

According to Boedi Harsono, in the principles of horizontal separation, the subject of the right to land can be different from the subject of building ownership. Thus, land and buildings will be subject to different laws. Land will be subject to land law, while the building will be subject to indebtedness law that regulates control of non-land objects.¹⁵ Therefore, land law adheres to the principles of horizontal separation in *mutatis mutandis* which indicates that a building is not in unison with the land. It renounces the attachment principles in Article 500 and 571 of the Civil Code.¹⁶

Previous study by Dyah Devina Maya Ganindra and Faizal Kurniawan, observed that the principles of horizontal separation can be employed as a way to deceive people with no ill intention. It is necessary to determine the basic criteria of horizontal separation of land and/or building ownership. This separation acts as one of the basis to provide legal protection for people with no ill intention, because there are no clear regulations for this in both National Agrarian Law in UUPA and in Civil Law based on Civil Code.¹⁷ In the conclusion of this study, they state several points about the principle of horizontal separation in the court decision:¹⁸

“-that the principle of horizontal separation adopted by Indonesian law states that buildings and plants are not part of the land, resulting in land rights does not include the

ownership of buildings and plants on it;

-that even if a person erects a building on a piece of land and has occupied the building for many years, when the land is put in dispute later and he loses then he must surrender the disputed land as he is an unjustified party because he has erected a building on land that is not his

-that the party with land ownership cannot be pronounced as the rightful owner of the building erected on his own land”

State land controlled by the state means the state can authorize the utilization of the land either by an individual or the state. The land rights can also be requested through a registration mechanism at the Agrarian Office, complying with the provisions of the implementing regulations, which based on a statement letter, one of which describes the land is really one's property and not the property of others. Unconverted land thus became State Land can not be sold.¹⁹ As seen in Nathania Febriani and Endang Pandamdari research, based on Court Decision:

“former western rights land, particularly eigendom land does not have conversion proof. It can not be traded and cannot be filed as lawsuit subject because its status as state land, in which other parties are only given the priority rights to appeal for the land”.

In that research, it is concluded that the legal consequences trade agreement of the former western rights land are null and void for the sake of law, given that the land object

15 Ibid.

16 Ibid.

17 Devina Maya Ganindra and Faizal Kurniawan, “Kriteria Asas Pemisahan Horizontal Terhadap Penguasaan Tanah Dan Bangunan,” *Yuridika* 32, no. 2 (2017): 228.

18 Ibid.

19 a Febriani and Endang Pandamdari, “Akibat Hukum Perjanjian Jual Beli

Tanah Dengan Hak Eigendom Yang Tidak Dikonversi (Studi Putusan Mahkamah Agung Nomor 756 K/PDT/2019),” *Jurnal Hukum Adigama* 3, no. 1 (2020): 205–228, <https://journal.untar.ac.id/index.php/adigama/article/view/8898/5691>.

under the status of state land.

Several previous studies present the principle of horizontal separation scope in National Agrarian Law and the legal consequence of unconverted former western rights land, particularly eigendom that is not converted becomes null and void for the sake of law. This study will discuss the registration of former western rights land which is designed to protect subject of right who holds western rights of unconverted land and principle of horizontal separation implementation in registration of former western rights land with buildings whose landowner is absent (*afwezigheid*), which is occupied by other subjects of right.

It is as an urgency to protect the rights of a person declared absent, even death. This status does not necessarily eliminate their civil rights. In addition, residents can use the land and request for rights of state land without neglecting the rights of a person declared absent on buildings standing on it.

Based upon the previous elaboration, this article will discuss the principle of horizontal separation in the registration of former western rights land which on it erected building whose landowner is declared absent (*afwezigheid*).

Research Questions

The research questions for this study are:

1. How does the land rights registration procedure after the Job Creation Law?
2. How the principle of horizontal separation is implemented in land rights registration of former western rights land which on it erected building whose landowner is declared absent (*afwezigheid*)?

Purposes

This study aims to:

1. Analyze Land Registration for former western rights land after the Job Creation Law.

2. Analyze the implementation of horizontal separation principle in land registration of former western rights land which on it erected building whose landowner is declared absent (*afwezigheid*).

Research Methods

This study is a legal research, the process of identifying and retrieving information necessary to solve legal issues.²⁰ The purpose of legal research is to find the coherence in law, determine whether it is coherent with law norms, correlate with law principal and whether people act in accordance with not only rules but also law norms.²¹

1. Approach

This study applies the statute approach, historical approach, and conceptual approach

2. Method of collecting legal materials

Primary sources such as the law on agrarian, particularly on land rights since independence era until post-independence era and even the Job Creation Law were sought and gathered. The secondary sources were gathered through literature review on legal principles, agrarian law, and civil law textbooks, previous studies, articles, thesis or dissertation, and non-legal sources.

3. Methods of analysing Legal Materials

Legal material analysis was done by elaborating primary and secondary legal materials as well as non-legal materials which then being analysed using conceptual, historical, and statutory approaches. Afterwards, legal facts were identified to be eliminated from irrelevances. The analysis carried out based on legal materials was not only descriptive, but also prescriptive in order

²⁰ Dyah Ochtarina Susanti dan A'an Efendi, *Penelitian Hukum (Legal Research)* (Jakarta: Sinar Grafika, 2014), 1.

²¹ Peter Mahmud Marzuki, *Penelitian Hukum*, XV. (Jakarta: Prenada Media Group, 2021), 68.

to provide justification for the research topic.²²

DISCUSSION

Land Registration of Former Western Rights Land After Job Creation Law

Proclamation of Independence of the Republic of Indonesia has two crucial meanings for the establishment of a national agrarian law. Firstly, Indonesia cut ties with colonial agrarian law. Secondly, at the same time, Indonesia started the formation of a national agrarian law. Composing a national agrarian law was no small feat and indeed taking a lot of time. On the other hand, there were many obstacles that must be resolved immediately and without delay. Therefore, while waiting for the formation of a national agrarian law and to avoid a state of legal vacuum, Transitional Rules of the 1945 Constitution of the Republic of Indonesia Article 2 was enacted. In the meantime, several efforts conducted by Indonesian government to adjust between colonial agrarian law with the situation and needs of Indonesia after independence were the use of new wisdoms and interpretations, abolition of conversion rights, abolition of private land, changes to lease regulations of people's land, additional regulations to oversee the transfer of land titles, regulations and actions regarding plantation land, increased rates of *canon* and *cijn*, prohibitions and settlements of land use without permits, regulations for agricultural land profit sharing, and transfer of agrarian duties and authorities.²³

The promulgation of Law Number 5 of 1960 regarding Basic Regulations on Agrarian Principles (UUPA) was a new history of the national agrarian law enforceability. Colonial

agrarian law which didn't guarantee legal certainty to Indonesian people at that time was declared no longer valid. Provisions in Book II of the Dutch Civil Code (BW) regarding soil, water, and natural resources were revoked, including western rights, namely *eigendom* rights, *erfpacht* rights, *opstal* rights, and *gebruik* rights.²⁴ Since the enactment of UUPA, there have been 3 (three) types of land in Indonesia:²⁵

- a. State Land, land that has not been obligated to any land titles;
- b. Land Rights, land that has been obligated to a particular land title;
- c. Customary Land, land that is owned by a certain community of customary law.

Land of former western rights are converted to support development in general and economic in particular. According to A.P. Parlindungan, this conversion is an adjustment of land rights that become subject to the old legal system (land titles according to BW). In land conversion, the adjustment is also made for land that become subject to customary law in order to be included in land rights system according to UUPA.²⁶ In case of *eigendom* rights, as one of the former western rights system, the enactment of UUPA converts land *with* *eigendom* rights to the ownership rights which can only be owned by Indonesian citizens.²⁷ Meanwhile, the former western rights originating from *eigendom* rights bound with *opstal* rights and *erfpacht* rights, then these rights are converted into rights to build (HGB). The conversion process itself is given a period of 20 years. In the Article

²² Mukti Fajar ND dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Belajar, 2017), 34.

²³ Santoso, *Hukum Agraria & Hak-Hak Atas Tanah, Kencana*, 35-42.

²⁴ *Peraturan Menteri Agraria Nomor 2 Tahun 1960 Tentang Pelaksanaan Ketentuan Undang-Undang Pokok Agraria*, 1960.

²⁵ Urip Santoso, *Pendaftaran Dan Peralihan Hak Atas Tanah* (Jakarta; Kencana, 2010), 29.

²⁶ A.P. Parlindungan, *Hak Pengelolaan Menurut Sistem Undang-Undang Pokok Agraria* (Bandung: Mandar Maju, 1989), 5.

²⁷ *Peraturan Menteri Agraria Nomor 2 Tahun 1960 Tentang Pelaksanaan Ketentuan Undang-Undang Pokok Agraria*.

2 of the Presidential Decree of the Republic of Indonesia Number 32 of 1979 regarding Policy Principles in Context of Granting New Land Rights from Western Rights Conversion (Kepres 32/1979), it is stated that:

“Rights to cultivate, rights to build, and rights to use from the conversions of western rights of which period will expire no later than 24 September 1980, as referred in Law Number 5 of 1960 on the date of expiration, the concerned rights will become land controlled by the state.”

The state’s authority of the rights to control is regulated in Article 2 paragraph (2) of the UUPA. The scope of the state’s rights to control includes all land within the territory of the Republic of Indonesia, both land that is not or has not been or has been entitled with individual rights.²⁸ According to Iman Soetiko, the state’s rights to control is divided into 2 (two), passive and active. Passive state control is the control over land with individual rights. Whereas, the active state control is the right to control over land that is not owned by individuals/ legal entities by any rights and has not been the subject for land clearing.²⁹

The task of managing an entire land cannot be carried out alone by Indonesian nation. Thus, the action is carried out by Indonesian nation as the holder of rights and the bearer of mandate. Meanwhile, on the highest level, the action is delegated to the State of the Republic of Indonesia as an organization of power for the entire people.³⁰ The contents of the state’s authority of land rights control are stated in Article 2 paragraph (2) of UUPA, namely:³¹

1. To regulate and manage the designation, use, supply, and maintenance of land;
2. To determine and regulate legal relations between people and land;
3. To determine and regulate legal relations between people and legal actions concerning land.

Oloan Sitorus explains that the state’s authority in the land sector as stated in Article 2 paragraph (2) of UUPA is the delegation of the nation’s duties to regulate control and lead joint control of land as a national asset. He also explains that the state’s right to control is a delegation of public authority from the nation. Consequently, the authority is only public. The implementation of the state’s right to control land can be authorized or delegated to autonomous regions and customary law communities, as long as it is necessary and does not contradict to any national interests. Delegation management as a part of the state’s authority can also be given to Authority Agencies, state-owned enterprises, and regional-owned enterprises by granting control over certain land with rights to manage (HPL).³²

Former western rights land which had not been converted in 1980 were a transition from passive to active control of the state. That was intended to allow the state to make comprehensive policies in terms of realigning the use, control, and ownership of the land. State Power over land that is not owned with any rights by a person or other party is broader. In General Elucidation II number (2), it is seen that state power is described as if it is not the basis, but side-by-side with individual land rights. Individual rights become more prominent when parallel with State Power. It is a perspective that is parallel to the view of an individualistic natural law.³³

²⁸ Ibid.

²⁹ Iman Soetiko, *Hukum Agraria Indonesia* (Yogyakarta: Gadjah Mada University Press, 1990), 53.

³⁰ *Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria*.

³¹ Santoso, *Pendaftaran Dan Hak Atas Tanah*, 205.

³² Ibid, 79.

³³ Marulak Pardede, “Hak Menguasai Negara Dalam Jaminan Kepastian Hukum Kepemilikan Hak Atas Tanah Dan Peruntukannya” *Jurnal Penelitian Hukum* 19, no. 4 (2019):405-420.

The land acquisition policy is one of the strategic policies regulated in the Job Creation Law. It has implications for the changes to its implementing regulations in the land sector. One of which is Government Regulation Number 18 of 2021. This regulation changes several provisions regarding rights to manage, land rights, apartment units, and land registration. In PP 18/2021, it is emphasized that state land or land directly controlled by the state is the land that is not obligated to any land rights, not waqf land, not customary land, and/or neither an asset property of state nor regional. Another change, a quite substantial one, is regarding evidence of old rights.

In Article 95 paragraph (1) of PP 18/2021, written evidence of former western rights land is declared invalid and its status becomes land that is directly controlled by the state. This means that since the enactment of this Government Regulation on 2 February 2021, all evidence of former western rights, such as *eigendom* rights, *erfpacht* rights, *opstal* rights, and *gebruik* rights are declared invalid. However, registration of former western rights land can still be attained as stipulated in Article 95 paragraph (2) of PP 18/2021, which is based on a statement of claim for de facto possession of land known to 2 (two) witnesses and responsible for the statement to both civil and criminal law. The statement letter outlines the following matters:³⁴

- a. The land belongs to the corresponding person and does not belong to another person and the status is Land Controlled Directly by the State, not a former customary land;
- b. Land in question is physically possessed;
- c. The possession is practiced in good faith and overtly by the corresponding person

³⁴ Indonesia, Peraturan Pemerintah Nomor 18 Tahun 2021 Tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun, Dan Pendaftaran Tanah, 2021.

as the owner of right to land; and

- d. The possession is not questioned by any other party.”

In the elucidation of Article 95 paragraph (2) of PP 18/2021, witnesses who put signatures on the Statement of Claim must have the following criteria: 1) trustworthy, as having roles as elders and/or local residents who have been living in the village in which the referred land is located and 2) are not family-related to corresponding person until the 2nd generation, horizontally and vertically.

Preceding provisions regulating evidence of old rights are written in the Government Regulation of the Republic of Indonesia Number 24 of 1997 regarding Land Registration (PP 24/1997) and still acknowledging evidence of former western rights land.³⁵ In Article 24 of PP 24/1997, it is stated that the existence of a land right resulting from the conversion of an old right shall be proven with evidences. The evidences are in the form of written documents and statements made by the party in question. Then, they are evaluated by the Adjudication Committee in the case of systematic registration. Furthermore, these evidences are evaluated by the Head of the Land Office in the case of sporadic registration as having an adequate content of truth for purposes related to the registration of the right in question, of the right holder, and of other parties' rights which encumber it.

In Government Regulation Number 24 of 1997, conversion of former western rights land is not immediately halted by 1980 which is 20 years after the promulgation of UUPA. Even though the land goes under the state control, the rights to it can still be requested to government institutions, namely the Ministry of Agrarian and Spatial Planning/ National Land Agency (ATR/BPN). This request can be filed on a condition that the owner has

³⁵ Peraturan Pemerintah Republik Indonesia Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah, 1997.

evidence of possession of the land in question or has consecutively possessed the land. In addition, there are no conflicts nor claims from other parties, such as the government, legal entities, or individuals.³⁶

Legal subject can propose for new rights according to Article 2 of Presidential Decree Number 32 of 1979 as long as they are eligible former rights holders and manage or use the land/ building on their own. Regarding land with status of *eigendom* which hasn't been converted, it is still possible to convert it to rights of ownership before Government Regulation Number 24 of 1997 (PP 24/1997). The ownership rights can be obtained as long as the applicant is still the holder of rights based on the evidence or has not been transferred to another name. In addition, survey documents are also required. Only by doing so, bookkeeping can be done simply by stamping on the mentioned evidence and writing converted number and type of the rights.³⁷ After the enactment of PP 24/1997, practices of conversion is carried out by proofing old rights.

In Article 95 paragraph (2) letter a, it is stated the requested land has to be land of the one who files the request possession, not other's. The status also has to be land under state control and not former customary land. The phrase "truly belongs to the corresponding person" emphasizes that this registration is intended for owner that makes it different from the concept of occupancy in *Afwezigheid* regulation.

Former western rights land which has changed to state land is managed under the control of the state. This land can be granted

to legal subjects consisted of individuals and legal entities.³⁸ According to legal provisions, there are priorities that must be considered: *First*, public interests; *Second*, former rights holder's interests; and *Third*, those who occupy or use the land in good faith and don't have legal relations with the former rights holder.³⁹

Furthermore, based on considerations of Presidential Decree Number 32 of 1979 (Keppres 32/1979), priorities to grant new rights are given to: *First*, former rights holders who meet the requirements and use or manage the land or building on their own; *Second*, people who have occupied the land of right to cultivate from the conversion of former western rights with a careful consideration that the land is better designated as settlements or for agricultural purposes; and *Third*, people that have occupied and established a village on referred land.

Article 95 paragraph (2) of PP 18/2021 is a form of grants of priority rights to a first party when there are no other allocations of public interest, in this case, the right is given to the former rights holder. Although it is not strictly regulated in laws and regulations, even more tend to be brief, but in practical, priority rights are acknowledged in court decisions.⁴⁰ Provisions in Article 95 paragraph (2) of PP 18/2021 also provide space for land registration through land offices by the owner of former western rights land by using statement of claim as a basis. In case of no first priority, granting of new rights can be proceeded to second priority which is people who have occupied or used the land in good faith, as stated in Presidential Decree Number 32 of 1979 (Keppres 32/1979).

36 Ranita Eka Setiyarni, "Pemberian Hak Atas Tanah Negara Di Kantor Pertanahan Kota Administrasi Jakarta Timur," *Jurnal Krisna Law* 3, no. 2 (2021):7.

37 Dian Aries Mujiburohman, "Legalisasi Tanah-Tanah Bekas Hak Eigendom: Kajian Putusan Nomor 17/Pdt.G/2014/PN.PKI," *Jurnal Yudisial* 14, no. 1 (2021):130.

38 Dian Aries Mujiburohman, "Problematika Pengaturan Tanah Negara Bekas Hak Yang Telah berakhir," *Jurnal Bhumi* 2, no. 2 (2016): 155.

39 Ibid.

40 Ibid.

Principles of Horizontal Separation in the Registration of Former Western Rights Land Which On It Erected Building Whose Landowner Is Declared Absent (*Afwezigheid*)

The direction of politics of land law and the protection toward community ownership emphasize that there are some efforts to revive the land policies which restore the balance as stated in Basic Agrarian Law (UUPA) by implementing prismatic politics through acknowledging the diversity of laws.⁴¹ Theoretically, the phrase “controlled by the state” means to regulate and/or organize especially to improve and consider the production of natural resource.⁴²

Basically, a person is prohibited to utilize the land without the permission or authority of the owner. This provision is regulated in Article 2 jo. Article 6 of Law Number 51 Prp of 1960, which was later amended by Law no. 1 of 1961 that is imperative to regulate the criminal threats.⁴³ The legal standing of absenteeism (*Afwezigheid*) is a form of good faith from someone who occupies or uses the land, by searching for the former land rights holders or power holders of the land. The basis for physical possession of *afwezigheid* objects is generally based on years of lease, but the existence of the legal subject who gives the rent is unknown.

In PP 18/2021, it is not explained about the position of the party who occupies and physically controls the land other than the former right holder. However, in Article 24

of PP 24/1997, the physical possession of the concerned land for 20 (twenty) years or more in a row can be filed by the registration applicant and the predecessors, in conditions:

1. The tenure is carried out in good faith and in public by the related party as the one who has the right on the land, and it is strengthened by the testimony of a reliable person;
2. The tenure either before or during the announcement as referred to article 26 is not argued by the traditional communal or the concerned village/ urban village or other parties.

PP 18/2021 is an amendment to PP 24/1997 that does not totally remove the validity of PP 24/ 1997. Based on Article 102 of PP 18/2021, PP 24/1997 is still valid as long as it does not conflict with the provisions in PP 18/2021.

Regarding the condition of land rights holder declared absent (*afwezigheid*), then the first priority who has the right to apply for a new right can be taken by the party who owns the next priority by fulfilling the requirements concerning the interests of the former right holder.⁴⁴ The land authority considers that the right holder still owns the attached civil rights. It does not disappear or end to the former right holder, even though the term has expired. For the severance of civil law relation, the former right holders are given compensation and the rights holders have priority over the land.⁴⁵ By giving compensation for the objects built on the state land of former western rights land, anyone can receive rights coming from that state land by providing compensation as well as being able to give up the rights at any time. Particularly, if the rights over the land are

41 Agus Suntoro, “Tinjauan Hak Asasi Manusia Terhadap Regulasi Pengadaan Tanah Bagi Kepentingan Umum,” *Rights Journal* 10, no. 2 (2019): 217.

42 Anna Triningsih and Zaka Firma Aditya, “Pembaharuan Penguasaan Hak Atas Tanah Dalam Perspektif Konstitusi,” *Rechts Vinding Journal : Media Pembinaan Hukum Nasional* 8, no. 3 (2019): 329.

43 Santoso, *Pendaftaran Dan Peralihan Hak Atas Tanah*, 41-42.

44 *Indonesian Presidential Decree Number 32 of 1979 About the Basics Policies In Order to Convert the Western Rights (Indonesia, n.d.).*

45 Mujiburohman, “Problematika Pengaturan Tanah Negara Bekas Hak Yang Telah Berakhir.”:131.

declared expired or asked to be returned by the state by receiving compensation without being able to evade it.⁴⁶ Upon the Court's Decision regarding the absence of the former right holder, after the announcement and examination at the request of the party who physically controls the land, the Judge then in his decree give order to the Property and Heritage Agency (Balai Harta Peninggalan/BPH). It is as the form of the state's presence in terms of representing and managing the property of the absence party. The termination of the civil law relation with the former right holder in this case will be represented by BPH. The situation of a person who is not in his place or is in a state of being out of place so as to be missing does not stop his rightful authority and it does not stop his status as a legal subject.⁴⁷

In general, the provisions related to the absenteeism are regulated in the provisions of Article 463 of Civil Code, which is:

"If a person leaves his place of residence without giving the authority to represent him in his affairs and interests, or to arrange his arrangements or if the authority given by him is no longer valid, while the circumstances urgently require to make the arrangement in a whole or in a part, or to seek representative for him, then at the request of the concerned parties or at the demand of the Attorney Office, the District Court at the residence of the person declared absent must order the Property and Heritage Agency to manage his property and interests in a whole or in a part, defend his rights, and act as his representative.

Principally, the former western rights

land has been directly controlled by the state and has become the state land. However, it should be underlined that a person who physically control the land has an obligation to fulfill the requirements of Article 5 of Presidential Decree Number 32/1979 and the absent person's civil rights are still attached then he must be compensated for the objects on the land. Compensation for the objects on that land is a consequence of the *Horizontale scheiding van beginsel* principle or horizontal separation principle in the national land law. Philosophy of principles is the basis of a rule of law, if it is analyzed deeper, the essence of the basic rule will be found.⁴⁸

The horizontal separation principle emphasizes that buildings and plants upon the land are not part of the land. The land rights do not automatically include the ownership of buildings and plants on it. Legal actions regarding the land do not automatically include buildings and plants on it belong to the landowner.⁴⁹ The horizontal separation principle rights of the land, which is the original rights in customary law, is maintained but adapted to the realities of today's community needs.⁵⁰ The land rights do not include ownership of the buildings on it. Buildings, plants and other objects that exist on the land belong to the party who built or planted them, whether the party is the original rights holder of the land or not, unless if there is an agreement otherwise.⁵¹

Regarding this matter, before submitting

⁴⁶ Ibid.

⁴⁷ Law Consideration of Sragen State Court's Decree Number 143/Pdt.P/2016/PN Sgn on 5 Januari 2017.

⁴⁸ Dwi Handayani, "Kajian Filosofis Prinsip Audi Et Alteram Partem Dalam Perkara Perdata," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 385.

⁴⁹ Urip Santoso, "Pembebanan Hak Sewa Untuk Bangunan Atas Tanah Hak Milik: Perspektif Asas Dan Pembuktian," *Jurnal Yuridika* 33, no. 2 (2018): 339.

⁵⁰ Cicilia Putri Andari dan Djumadi Purwoatmodjo, "Akibat Hukum Asas Pemisahan Horizontal Dalam Peralihan Hak Atas Tanah," *Jurnal Notarius* 12, no. 2 (2019): 707.

⁵¹ Ibid.

an application for the new rights of the land, the applicant/ resident must follow the purchasing granting procedures of that building to the Property and Heritage Agency as the representative of the former rights holder who is declared absent. Based on the Minister of Law and Human Rights Regulation No. M.02-HT.05.10 of 2005 jo. Minister of Law and Human Rights Regulation No. 27 of 2013 concerning Amendment to the Minister of Law and Human Rights Regulation No. M.02-HT.05.10 Year 2005 concerning Permits Application for the Assets Sale of whose Landowner is Declared Absent and Unmanaged Heritage which Under the Management and Supervision of the Heritage Hall (hereinafter referred as Minister of Law and Human Rights Regulation for Selling Permit), residents who wish to purchase/ pay the compensation for the buildings must submit an application to the Minister of Indonesian Ministry of Law and Human Rights through Property and Heritage Agency.

The selling permit itself is based on Article 1 point 4 of Minister of Law and Human Rights Regulation for Selling Permit. In this regulation, the selling permit is stated as the permits granted by the Minister of Law and Human Rights to the Property and Heritage Agency after all the requirements are fulfilled. Those requirements are what stipulated in Article 4 of the Minister of Law and Human Rights Regulation for Selling Permits, as follows:

- a. photocopy of the district court decree legalized by the court;
- b. photocopy of the property registration report legalized by the Property and Heritage Agency;
- c. photocopy of the notification letter to the state attorney legalized by Property and Heritage Agency;
- d. photocopy of the notification letter to the Financial Audit Board legalized by the

Property and Heritage Agency;

- e. photocopy of the absence announcement in the Official Gazette of Indonesian Republic and newspapers legalized by the Property and Heritage Agency;
- f. photocopy of no opposition certificate issued by the district court;
- g. photocopy of proof as a legal resident or residential certificate from the local urban-village for land and/or buildings, legalized by the authorized official;
- h. photocopy of the rental agreement between the Property and Heritage Agency and the legal resident legalized by the Property and Heritage Agency;
- i. photocopy of a valid proof of rental payment which is legalized by the Property and Heritage Agency; and
- j. photocopy of the application letter to purchase from the legal resident legalized by the Property and Heritage Agency .

In addition to all of those requirements, a permit can be issued after the Director General conducts a local inspection to examine the formal and material validity based on the request from Property and Heritage Agency. If the validations are complete, then they become the basis for submitting an application to the District Court to obtain a selling permit.⁵²

The selling price of the building on land whose owner is declared absent is determined by the Appraisal Committee consisting of individuals or legal entities determined by the District Court to assess the selling price of the assets whose owner is declared absent. However, after the changes in the Minister

⁵² "The Minister of Law and Human Rights Regulation No. M.02-HT.05.10 of 2005 Jo. Minister of Law and Human Rights Regulation No. 27 of 2013 concerning the changes of Minister of Law and Human Rights Regulation No. M.02-HT.05.10 of 2005 about the Permits Applications for the Sale of Assets.." (n.d.)."

of Law and Human Rights Regulation for Selling Permits, the task of the Appraisal Committee is replaced by a legal appraiser service company.⁵³ If the Director General considers the price determined is reasonable, the Director General issues a selling permit.⁵⁴

The building sale is carried out in the presence of a notary/ Land Certificate Official between the residents and the Property and Heritage Agency. It is conducted by using deed of building sale and purchase agreement with priority rights. In the agreement itself, the building as the object of this sale must be stated as being built on the state land. The results of the sale are deposited in an account of a bank owned by the government. This account is made under the name of the former rights holder.⁵⁵ It aims to protect the rights of the former rights holder and/or their heirs which is kept for a period of 30 (thirty) years before being handed over to the state treasury.⁵⁶

Then, the parties who are given priority for those new rights are required to apply for the land rights in accordance with the provisions of the State Minister of Agrarian Affairs/Head of the National Land Agency Regulation Number 9 of 1999 concerning Procedures for Granting and Canceling State Land Rights and Management Rights (hereinafter called Agrarian Government Regulation/ Head of National Land Agency Regulation concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights).

Based on Article 1 paragraph (8) of the Agrarian Government Regulation/ Head of the National Land Agency Regulation concerning

the Procedures for Granting and Canceling State Land Rights and Management Rights, granting rights above the land is defined as a government's decree that grants a right to the state land, the extension of the rights term, the rights renewal, the rights changes, including the granting of the rights which is management rights above the land.⁵⁷ The land whose granting authority is given to the National Land Agency are property rights, commercial rights, building use rights, utility rights and management rights. The granting of rights can be given by the rights granting decisions individually or collectively or in general. The granting and cancellation of property rights, commercial rights, building use rights, utility rights, and management rights are carried out by the Head of the National Land Agency of Republic of Indonesia. The authority to grant rights can be delegated to the head of the regional office of the provincial National Land Agency or the head of the regency/ city land office.⁵⁸

The rights granting and the rights cancellation over the state land and the

53 Ibid.

54 Ibid.

55 Ibid.

56 Indonesia, *the Indonesian Republic Minister of Law and Human Rights Regulation Number 20 of 2019 concerning the Administration of the Third Party Money at the Heritage Center* n.d.

57 Santoso, *Pendaftaran Dan Peralihan Hak Atas Tanah*, 218.

58 See the provisions of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Regulation Number 2 of 2013 concerning Delegation of Authority for Granting the Land Rights and Land Registration Activities Jo. Regulation of the Minister of Agrarian Affairs and Spatial Planning/ Head of the National Land Agency of the Republic of Indonesia Number 23 of 2016 concerning the Establishment of a Joint Land Service Office and Delegation of Authority. Legalization of Records on Validated Electronic Land Books and Signing of the Land Rights Certificates in order to Certain Land Registration Activities at the Integrated Joint Land Service Office Jo. Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 18 of 2017 concerning Amendments to Regulation of the Head of the National Land Agency Number 2 of 2013 concerning Delegation of Authority for the Granting Land Rights and Land Registration Activities.

management in terms of commercial rights, building use rights, utility rights and management rights need to pay attention to the transitional rules for the enactment of the Job Creation Law and Government Regulation Number 18 of 2021. Government Regulation Number 40 of 1996 (PP 40/1996) concerning Commerce Rights, Building Use Rights and Utility Rights is declared invalid. However, with regard to the laws and regulations which are the implementing provisions of PP 40/1996, it is declared to remain valid as long as it does not conflict with PP 18/2021. PP 18/2021 regulates the granting of building use rights, commerce rights, utility rights and management rights. On that basis, the party who is given the priority for the rights granting then begin to register the land.

CLOSING

Conclusions

The former western rights land which was not converted in 1980, automatically controlled by the state. The promulgation of PP 18/2021 which is the implementing regulation of the Job Creation Law, explicitly states that the written evidence of former western rights land is declared invalid and its status directly controlled by the state. Based on Presidential Decree Number 32 of 1979, the main priority is given to the former rights holders and the second priority is given to the people who have physically occupied or controlled the land.

The registration of former western rights land which is carried out directly by the former rights holders is based on a statement letter as stipulated in Article 95 paragraph (2) of PP 18/2021. When the holder of former Western rights is declared absent, the person who acts as physical controller over the land can apply for the granting of new land rights after the fulfillment of the requirements. The

requirements are related to the interests of the former holder of the land rights, who still have civil relations to the objects on the land, as a consequence of the horizontal separation principle in the National Land Law.

The absent of the former rights holder makes the Property and Heritage Agency as the manager or representative who will receive the compensation from the sale of the building. Then the given priority party can apply for the land rights in accordance with the provisions of the Minister of Agrarian Affairs Regulation/ Head of the National Land Agency Regulation Number 9 of 1999. In addition to these provisions, regarding the other land rights, PP 18/2021 need to be concerned as it is the latest regulation on land rights. On that basis, new rights can be granted and land registration can be carried out.

Suggestions

The procedure for granting the land rights over the state land of former western rights, especially whose owner is declared absent, is quite long procedure, whether at the District Court, Property and Heritage Agency and National Land Agency. Several stages of the process actually have the same substances or proofing mechanism. Consequently, in order to reform the national laws that provide legal certainty and pay attention more to the effectiveness and efficiency, it is necessary to harmonize laws that leads to institutional integration. In legal and institutional aspects, good governance is manifested in the form of legal and institutional interactions. Since legal and institutional interactions occur in each component of activity and also between the components of activity, the integration should be actualized at every level of legal and institutional interaction.

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